AN INHERENT RIGHT TO HEALTH: REVIVING ARTICLE II(C) OF THE GENOCIDE CONVENTION

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INTRODUCTION

> The United Nations was founded at the end of a war during which genocide had been committed on a horrific scale. Its prime objective was to prevent such a conflict from ever happening again. Three years later, the General Assembly adopted a Convention under which States accepted an obligation to prevent and punish this most heinous of crimes.
>
> In 1994, the whole international community—the United Nations and its Members States—failed to honour that obligation. Approximately 800,000 Rwandans were slaughtered by their fellow country men and women, for no other reason than that they belonged to a particular ethnic group. That is genocide in its purest and most evil form. All of us must bitterly regret that we did not do more to prevent it.
>
> —United Nations Secretary-General Kofi Annan, December 16th 1999[1]

Scholars and practitioners have grappled with a question that has endured since the finalization of the Genocide Convention in 1948: how should the international community interpret and implement the treaty to best realize its goals and stop mass atrocities? Notably, only one of the five enumerated provisions in Article II of the Convention, which defines the acts that constitute genocide, addresses mass killings.[2] The other four provisions in Article II cover a broad set of conduct and physical preconditions that lead to mass deaths, effectively prohibiting such genocidal methods.[3]

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1. Press Release, United Nations Secretary-General Kofi Annan, Kofi Annan Emphasizes Commitment to Enabling UN Never Again to Fail in Protecting Civilian Population from Genocide or Mass Slaughter, U.N. Press Release SG/SM/7263 (Dec. 16, 1999), https://www.un.org/press/en/1999/19991216.sgsm7263.doc.html [https://perma.cc/39W9-YC2S].

2. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. II(a), 102 Stat. 3045, 3035, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

3. Articles II(b)–(e) of the Genocide Convention define genocide as any conduct that causes serious bodily or mental harm, that inflicts destructive conditions of life on a target group, that imposes measures to prevent births, and/or that results in the forcible transfer of children. *See* Genocide Convention, *supra* note 2, arts. II(b)–(e).

The Convention's obligations prohibiting genocide are not limited to direct lethal activity, but include indirectly lethal conduct as well.[4]

However, modern discourse often considers the term genocide to apply only in cases of mass murder—the genocides in Rwanda and Bosnia as the contemporary paradigms—characterized by overt targeting and persecution of a protected group.[5] Such a narrow focus has seen numerous other atrocities transpiring without a legal genocide inquiry throughout the past fifty years, leaving these crises to be addressed only after significant harm and death. Ultimately, these situations proceed without the immediate condemnation and punishment consistent with the full legal weight of the Genocide Convention.[6] This Note focuses on one particular provision that has received a paucity of attention, Article II(c), which prohibits the deliberate infliction of "conditions of life calculated to bring about . . . physical destruction in whole or in part."[7] Despite its place as a co-equal provision with those regarding mass killing [8] and forced sterilization,[9] Article II(c) has been glossed over, ultimately falling out of the modern dialogue of genocide. Specifically, this Note will further suggest that the recent and ongoing events in Western China are the very type of conflict that could be confronted by the revival of this provision.

Since 2017, the Chinese government has arbitrarily detained millions of Uyghur Muslims from the Xinjiang province in Northwest China. In organized detention camps, these prisoners are subjected to harsh conditions of rape, torture, human experimentation, and death,

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4. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 517 (ICTY Trial Chamber July 31, 2003). A preventative scope of the Convention is further reflected in both Article II, which defines genocide, and Article III, which specifies the offences prohibited by the Convention. *See* Genocide Convention, *supra* note 2, art. III, 78 (stating that genocide, conspiracy, incitement, attempt, and complicity are punishable acts).

5. *See* Winston P. Nagan & Aitza M. Haddad, *The Holocaust and Mass Atrocity: The Continuing Challenge for Decision*, 21 MICH. ST. INT'L L. REV. 337, 340–41 (2013) (describing that the Genocide Convention defines genocidal conduct through the harmful acts or omissions committed, and giving both Rwanda and Bosnia as prototypical examples, among other instances); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES ix–xiv (2d ed. 2009) (same).

6. See *infra* Section II.C for an example of the failure to prevent and punish genocide in East Timor as a case study.

7. Genocide Convention, *supra* note 2, art. II(c).

8. *Id.* art. II(a).

9. *Id.* art. II(d).

simply for practicing their religious faith.[10] The targeted persecution of a minority religious group has reignited the debate about what conduct constitutes genocide. Human rights organizations, U.N. officials, and some foreign governments have urged China to stop the oppression, but to no avail.[11] Chinese officials have maintained that they have not infringed upon any human rights, describing the camps as "re-education" facilities or vocational schools created in response to terrorism and extremism.[12] However, emerging reports and leaked documents such as the 2019 Xinjiang Papers (also known as the China Cables),[13] as well as emerging eyewitness testimony, all

10. Testimony of Deputy Assistant Sec'y Scott Busby: Hearing on Human Rights in China Before the Subcomm. on East Asia, The Pacific, and International Cybersecurity Policy of the S. Comm. on Foreign Relations, 115th Cong. (2018) (statement of Deputy Assistant Secretary Scott Busby, Bureau of Democracy, Human Rights and Labor at United States Department of State), https://www.foreign.senate.gov/imo/media/doc/120418_Busby_Testimony.pdf [https://perma.cc/G49P-UN8P].

11. *See* Lindsay Maizland, *China's Repression of Uighurs in Xinjiang,* COUNCIL ON FOREIGN RELS. (June 30, 2020), https://www.cfr.org/backgrounder/chinas-repression-uighurs-xinjiang [https://perma.cc/J8GZ-SDQU] (summarizing background on the Uyghur Muslim crisis and highlighting the global response from human rights organizations, U.N. officials, and some foreign governments); *see also UN: Unprecedented Joint Call for China to End Xinjiang Abuses*, HUM. RTS. WATCH (July 10, 2019), https://www.hrw.org/news/2019/07/10/un-unprecedented-joint-call-china-end-xinjiang-abuses [https://perma.cc/J7UG-EXBN] (reporting that the 22 countries of the Human Rights Council, in 2019, had called on China to put an end to the Xinjiang abuses).

12. In October 2018, Xinjiang's governor, Shohrat Zaki, acknowledged the existence of some type of holding facility, but said that it was aimed at providing "vocational and educational training" and de-radicalizing those suspected of terrorist or extremist leanings. Chris Buckley, *China Breaks Silence on Muslim Detention Camps, Calling Them 'Humane,'* N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/world/asia/china-muslim-camps-xinjiang-uighurs.html (on file with the *Columbia Human Rights Law Review*). In an official white paper, published in August 2019, the Chinese government claimed these re-education centers as a success, citing that there have been no terror attacks for three years as a result of the program. Mimi Lau, *China Claims 'Success at this Stage' of Xinjian Internment Camps amid Global Outcry*, SOUTH CHINA MORNING POST (Aug. 16, 2019), https://www.scmp.com/news/china/politics/article/3023195/china-hails-success-stage-xinjiang-internment-camps-countering [https://perma.cc/NQK2-4BJV].

13. *See* Austin Ramzy & Chris Buckley, *'Absolutely No Mercy': Leaked Files Expose How China Organized Mass Detentions of Muslims,* N.Y. TIMES (Nov. 16, 2019), https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html (on file with the *Columbia Human Rights Law Review*).

provide evidence indicating that the world must grapple with a potential ongoing genocide in Western China.[14]

Although States have obligations to protect vulnerable populations from genocide under the Genocide Convention, human rights law, and the position taken by the international community at the 2005 United Nations World Summit [15] —mechanisms that

14. On November 28, 2018, Mihrigul Tursun testified in front of the United States Congressional-Executive Commission on China, describing her experience as a former prisoner in the Chinese detention camps. *Hearing on the Communist Party's Crackdown on Religion in China Before the Cong.-Exec Comm'n. on China*, 115th Cong. (2018), https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/REVISED_Mihrigul%20Tursun%20Testimony%20for%20CECC%20Hearing%2011-28-18_0.pdf [https://perma.cc/8Y4R-SKXG] [hereinafter Mihrigul Tursun Congressional Testimony]. In June 2020, Dr. Adrian Zenz published additional information in a special Jamestown Foundation report highlighting measures directed by the Chinese Communist Party to forcibly suppress birthrates among ethnic Uyghur communities. The policies include mass application of mandatory birth control and sterilizations. Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang,* JAMESTOWN FOUND. (June 2020), https://jamestown.org/wp-content/uploads/2020/06/Zenz-Internment-Sterilizations-and-IUDs-UPDATED-July-21-Rev2.pdf?x34979 [https://perma.cc/CQ9T-UN76]. This evidence finally indicated a clear nexus to the well-understood provisions of the Genocide Convention, as Article 2(d) states that the intentional imposition of "measures intended to prevent births" within a protected group constitutes genocide. Genocide Convention, *supra* note 2, art. II(c). Indeed, soon after publication the language of a Genocide Convention violation was invoked in relation to the Uyghur crisis. *See, e.g.*, Editorial Board, *What's Happening in Xinjiang is Genocide*, WASH. POST (July 6, 2020), https://www.washingtonpost.com/opinions/global-opinions/whats-happening-in-xinjiang-is-genocide/2020/07/06/cde3f9da-bfaa-11ea-9fdd-b7ac6b051dc8_story.html (on file with the *Columbia Human Rights Law Review*) (acknowledging that most of the persecution in Xinjiang has focused on cultural genocide but the new evidence reported by Dr. Adrian Zenz suggests a form of "demographic genocide"). Dr. Zenz's research highlighting the breadth of human rights abuses is of critical importance, especially as it provides additional substantive evidence to claims of a Genocide Convention violation. However, this Note's focus is on Article 2(c) and argues that the evidence published from the onset of the internment practices, as early as 2017 and certainly upon the 2018 testimony of Mihrigul Tursun, constitutes an ongoing Article 2(c) violation as well. *See* Adrian Zenz & James Leibold, *Chen Quanguo: The Strongman Behind Beijing's Securitization Strategy in Tibet and Xinjiang,* JAMESTOWN FOUND. (Sept. 21, 2017), https://jamestown.org/program/chen-quanguo-the-strongman-behind-beijings-securitization-strategy-in-tibet-and-xinjiang/ [https://perma.cc/YEM6-Y9K6] (bringing to light the Chinese government's campaign of repressing and mass internment directed against ethnic Uyghur's in Xinjiang).

15. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005).

together ought to be sufficient to avert these irreversible tragedies by covering the precursors or ancillaries of genocide and genocidal action itself—the application of these doctrines in their current form has been disparate and largely incapable of preventing such mass atrocities.

To address the proper scope and application of the Convention with a focus on Article II(c), this Note will analyze the intent and origin behind the provision by examining the negotiating history of the Convention, the first petitions submitted to enforce the Convention's obligations, and subsequent genocide case law. This Note argues that the Article II(c) provision, from its inception, has encompassed a robust right to health protection that has gone unrecognized in our current application of the treaty. Human rights law, particularly the development within the right to health, can then inform the proper scope and application of Article II(c) of the Genocide Convention today.

First, Part I of this Note uses legal history to identify the context and original right to health protections embedded in Article II(c). Part II identifies how the legal regime of Article II(c) in its current application has moved away from its original conception, resulting in a narrowed application of the Genocide Convention and "conditions of life" falling out of the modern dialogue. Part II further illustrates the challenges to preventing genocide that arise from the narrowing of the Convention by analyzing the Indonesian Occupation of East Timor in the late twentieth century as a case study. Then, Part III proposes a framework to revive the original intent and understanding of Article II(c) in order to clarify the definition of genocide and prevention obligations of State Parties to the treaty. Finally, Part III demonstrates how returning to the original protectionist scope can assist practitioners in identifying and preventing future atrocities by applying the framework to the Uyghur Muslim Crisis.

I. THE ORIGIN OF ARTICLE II(C): A BROADER CONCEPTION TO THE DEFINITION OF GENOCIDE

Current scholarship on the history of the Genocide Convention has focused primarily on provisions of mass killings and the protected classes covered by the treaty, all to the detriment of an

expansive historical analysis of Article II(c).[16] Part I explores the legal history and negotiating records of Article II(c), which emerged parallel to the newly constructed United Nations system that sought to protect individuals from abuses by their governments, such as the harms that occurred during World War II.[17] At the same time the governments met to conclude the Genocide convention, universalized human rights norms were being finalized, all in direct response to the atrocities committed by Nazi Germany during the Holocaust through extermination campaigns, forced labor, and concentration camps.[18] When the Genocide Convention was adopted unanimously on December 9, 1948 by the U.N. General Assembly, it marked one of the first developments in international law under the new United Nations system.[19]

Part I begins by examining the interpretations of Article II(c) as initially conceptualized by the drafters of the treaty, with a focus on the incorporation of health rights. Section I.A analyzes the events leading to the Convention in order to uncover the original meaning and intent. Section I.B continues by analyzing the historical context

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16. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 19 (1991); *see also* William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT'L L. 35, 35 (2007) (describing, anecdotally, how displeasure with the Nuremberg Court's not going "far enough in dealing with genocidal actions" helped garner support for the Genocide Convention); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1, 10–11 (1985) (detailing that, in drafting the Genocide Convention, the Secretariat "took the position that genocide is the deliberate destruction of a human group and that this strict definition must be rigidly adhered to," thereby limiting an expansive view of genocide (internal quotations omitted). The initial drafts of the Genocide Convention banned mass killings and the tools employed for carrying out genocidal acts for a wide range of protected groups, including political and cultural groups. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 82–90 (1944). However, the final version of the treaty limited the definition to national, ethnic, racial, and religious groups alone. Genocide Convention, *supra* note 2, art. II**.** Scholarship has focused primarily on the narrowing of the definition for protected groups.

17. Sunil Amrith & Glenda Sluga, *New Histories of the United Nations*, 19 J. WORLD HIST. 251, 253 (2008) (noting that common accounts of the history of the United Nations describe its creation as a "spontaneous response" to World War II).

18. ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY 99–101 (2012). Furthermore, scholars note that one of the driving forces for the Genocide Convention was a response to the genocidal acts conducted by the Nazi Regime. LEBLANC, *supra* note 16, at 23.

19. G.A. Res. A/810, at 174 (Dec. 12, 1948).

of Article II(c), examining the writings of the treaty's primary author, Raphael Lemkin, and then the committee notes and negotiation history prior to the treaty's entry into force. Then, Section I.C turns to the interpretation and legal strategies used in the *We Charge Genocide* petition, one of the first invocations of the Convention, notable for how its arguments are systematically advanced in line with the treaty text with a robust Article II(c) argument.[20] Lastly, Section I.D examines the development of the right to health within human rights law, which emerged in tandem with the law of genocide, but has progressed independently over the course of the twentieth century.

A. Drafting a Treaty to Prevent Genocide

The Genocide Convention emerged in the aftermath of the Second World War, when the United Nations and similar regional compacts sought to limit State action in order to prevent future international atrocities. The slaughter of millions of racial and ethnic minorities by the Nazi Regime was fresh in the minds of the international community as they sought to establish a new order of global governance that would fight impunity and create a system that would counteract the outbreak of another world war.[21]

Concurrent with the emergence of the United Nations systems, the Allied victors established the Nuremberg Tribunals and convicted high-ranking Nazi leaders for their murder, extermination, enslavement, deportation, and persecution of civilian populations.[22] The first formal reference to a new international crime occurred on October 8, 1945 at the Tribunals, where a set of defendants were

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20. C.R. CONG., WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 125–32 (William L. Patterson ed., International Publishers 3d ed. 1952) (1951) [hereinafter We Charge Genocide]. The Civil Rights Congress presented their charge within the confines of Articles II and III of the Genocide Convention, organizing their evidence to support an argument under Article II(a), then an argument under Article II(b), then an argument under Article II(c), and so forth. *Id.* at 125–32.

21. LEBLANC, *supra* note 16, at 23; *see also* JUSSI M. HANHIMÄKI, THE UNITED NATIONS: A VERY SHORT INTRODUCTION 8–17 (2008) (describing the formation of the United Nations)

22. Christian J. Tams et al., *Introduction* to CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY 1, 4–5 (Christian J. Tams et al. eds., 2014).

charged with conducting a "deliberate and systematic genocide."[23] The French Prosecutor, Champetier de Ribes, highlighted the heinous nature of the crime during the trials, describing the conduct as "so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term 'genocide' has had to be coined to define it." [24] However, the trials themselves provided limited precedential value in establishing the widespread recognition of a crime of genocide, because the jurisdictional scope was limited to examining only conduct that had occurred during World War II.[25] An international treaty prohibiting genocide had to be established to fight impunity and prevent future genocides.[26]

Understanding the context behind the origins and intentions in creating the Genocide Convention provides a valuable lens with which to interpret the scope of Article II(c). Under the Vienna Convention on the Law of Treaties, treaty interpretation should be made in "light of [the treaty's] object and purpose."[27] Read together with Article 32 of the Vienna Convention, which permits recourse to a treaty's preparatory materials during treaty interpretation, [28] the

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23. 1 Secretariat of the Int'l Mil. Tribunal Nuremburg, Trial of the Major War Criminals Before the International Military Tribunal 43–44 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [https://perma.cc/G3AN-3RMJ]. In his closing argument, Sir Hartley Shawcross, the British Prosecutor, said that the defendants had a "policy of national murder" through starvation and "used various biological devices, . . . to achieve genocide." 19 Secretariat of the Int'l Mil. Tribunal Nuremburg, Trial of the Major War Criminals Before the International Military Tribunal 497–98 (1948), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf [https://perma.cc/G3AN-3RMJ [hereinafter Nuremburg Trial XIX].

24. Nuremburg Trial XIX, *supra* note 23, at 531.

25. 22 Secretariat of the Int'l Mil. Tribunal Nuremburg, Trial of the Major War Criminals Before the International Military Tribunal 498 (1948), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf [https://perma.cc/7KUF-U64K].

26. LEMKIN, *supra* note 16, at 82–90.

27. Principles of treaty interpretation under international law first examine the "ordinary meaning" of the treaty text in light of the treaty's object and purpose. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) [hereinafter VCLT]. The Vienna Convention on the Law of Treaties is considered a codification of customary international law rules for treaty interpretation. Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, 2002 I.C.J. Rep. 625, ¶ 37 (Dec. 17).

28. *See* VCLT, *supra* note 27, arts. 31–32. Courts and tribunals routinely rely on Articles 31 and 32 of the Vienna Convention in interpreting the Genocide Convention. Accordingly, a treaty should first be interpreted based on its "ordinary meaning" in its context and in light of its object and purpose as stated

object and purpose of a treaty is understood as what the drafters of the treaty hoped to achieve when concluding the new instrument.[29]

1. The Author of the Genocide Convention

The Genocide Convention stands out from other treaties and international instruments in that its origin can be traced to the work of one individual, Raphael Lemkin.[30] The Polish-Jewish lawyer, who fled to the United States in the wake of the Nazi invasion, is widely credited as both the individual who coined the term genocide and as the main author of the convention itself.[31] Lemkin was deeply concerned about the destruction of national groups and pluralism, having studied the massacre of Armenians in Turkey during the First World War, and had argued for the inclusion of genocide as a crime under international law long before the Nuremberg Tribunals.[32]

Foundationally, Lemkin dedicated his life to the study of State-endorsed collective massacres, particularly those perpetrated against minority groups.[33] Lemkin's career led him to believe that only international legal enactments could avert such tragedies.[34] His concept of genocide articulated a crime broader than mere murder, instead encompassing the destruction of the essential foundations of life of a minority group, by a wide array of means, including but not

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in Article 31. To confirm the resulting meaning or to address any ambiguity or obscurity, or if the resulting interpretation would lead to a "manifestly absurd or unreasonable result," one can utilize supplementary means of interpretation. These would include preparatory work of the treaty (or the travaux préparatoires), circumstances of its conclusion, and subsequent state practice as well. *Id*.

29. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 204–06 (2007).

30. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 17–85 (2002).

31. LEMKIN, *supra* note 16, at 79.

32. *Id.* at 91 (arguing that the "destruction and oppression of populations" be included as crimes under international law).

33. Steven Leonard Jacobs, *Lemkin on Genocide: An Introduction*, *in* LEMKIN ON GENOCIDE vii, viii–x (Steven Leonard Jacobs ed., 2012). *See generally* RAPHAEL LEMKIN & MICHAEL J BAZYLER, RAPHAEL LEMKIN'S DOSSIER ON THE ARMENIAN GENOCIDE (2008) (detailing the horrors endured by the Armenian people at the turn of the twentieth century).

34. Raphael Lemkin, *Totally Unofficial Man, in* PIONEERS OF GENOCIDE STUDIES 365, 368–72 (Steven L. Jacobs & Samuel Totten eds., 2002).

limited to the outright killing of the group's members.[35] Lemkin believed that the crime ought not to be restricted to only mass killings, but should encompass any "techniques of genocide," such as political, social, cultural, economic, biological, physical, religious, and moral destruction.[36]

In light of the limited jurisdiction and precedential value of the Nuremberg trials, Lemkin urged the newly-formed United Nations to declare genocide an international crime and worked with diplomats to create an international treaty prohibiting genocide in 1946. Although the International Military Tribunals at Nuremberg signified an important development in codifying a crime of genocide, the precedential value of their decisions were limited by the Tribunals' operative jurisdiction.[37] Therefore, in partnership with the United Nations, Lemkin sought to create an international treaty prohibiting genocide,[38] the central aim of which would be to protect minority groups from oppression and mass harm motivated by ethnic, racial, or religious animus.[39]

Lemkin's lobbying at the United Nations was ultimately successful; representatives from Cuba, India, and Panama introduced a resolution to the U.N. Secretary-General on November 2, 1946 requesting that the U.N. General Assembly officially consider the prevention and punishment of the crime of genocide.[40] The General Assembly unanimously adopted the proposal on December 11, 1946 and officially began the path to negotiating a new treaty.[41]

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35. LEMKIN, *supra* note 16, at 79. Lemkin describes these essential foundations of life as including physical conditions such as food and health as well as social, economic, political, and religious freedoms. *Id*. at 70–78, 82–90.

36. *Id.* at 82–90.

37. John Q. Barret, *Raphael Lemkin and 'Genocide' at Nuremberg, 1945-1946, in* THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION 35**,** 51–53 (Christoph Safferling & Eckart Conze eds., 2010).

38. *Id*.

39. LEO KUPER, GENOCIDE: ITS POLITICAL USES IN THE TWENTIETH CENTURY 22 (1982); Lemkin, *supra* note 34, at 372 (articulating the central aim of the proposed treaty).

40. U.N. GAOR, 1st Sess., at 2, U.N. Doc. A/BUR/50 (Nov. 2, 1946).

41. While the origins of the Convention lie in the atrocities that were committed in World War II, the resolution itself refers to many instances of genocide, affirming the timeless nature of the crime. Article I of the present Convention reflects this rationale and goal as it reiterates the rationale driving Resolution 96(I), the UNGA resolution that instructed the drafting of a new treaty. The Genocide Convention stated that genocide is a crime "whether committed in time of peace or in time of war." Genocide Convention, *supra* note 2, art. I; *see also* G.A. Res. 96 (I), U.N. GAOR, 1st Sess., 55th plen. mtg. at 1134–35,

B. Negotiating the Genocide Convention

The negotiating history of the Convention reveals that the ideology and purpose behind Article II(c) remained largely consistent between the first and final draft of the treaty. The Convention drafters not only sought to establish prohibitions on State power, such that individuals would remain free from genocidal acts, but also considered baseline standards of human rights, including health.

1. Debating Article II(c): An Emphasis on the Denial of Health

The final version of Article II(c) in the Genocide Convention was the result of deliberate efforts to avoid defining genocide too narrowly, fearing the inadvertent exclusion of a form or method of genocide.[42] The final text of Article II(c) reads, in relevant part:

> In the Present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> . . .
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[43]

With respect to the actions understood to be captured by the "conditions of life" provision, the debate began from the understanding that genocide can be accomplished by "wiping out all

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U.N.Doc. A/1/PV.55 (Dec. 11, 1946) (articulating the purpose of the treaty in the U.N. Resolution as well). Resolution 96(I) adopted much of Lemkin's initial drafts, drawing from his personal writings as well as submissions to the United Nations and the Nuremburg Tribunal prosecutors in the 1940s elaborating on the envisioned scope of a crime of genocide. Schabas, *supra* note 16, at 35–36; KUPER, *supra* note 39, at 22 (discussing the context of the Convention); Lemkin, *supra* note 34, at 372 (articulating the central aim of the proposed treaty).

42. Notably, it "[did] not include a list of proscribed genocidal acts but rather seems to include any act that denies the 'right of existence' to a human group." Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention*, *Article 2(e)*, 50 HARV. INT'L L.J. 61, 74 (2009) (citing G.A. Res. 96 (I), at 188–89 (Jan. 31, 1947)).

43. Genocide Convention, *supra* note 2, art. II(c).

basis of personal security, liberty, *health* and dignity."[44] The attack on individual members of a group threatens any one or all of the "life, liberty, *health*, [and] economic experience[s]" of the targeted group and should be outlawed.[45]

The denial of healthcare was considered to be one of the methods of genocide. In fact, the first draft of the Convention did specify deprivation of medical care as one type of conduct that would constitute genocide under the "conditions of life" text:

> Such acts consist of:
> 1. Causing the death of members of a group or injuring their health or physical integrity by
> . . .
>
> b. subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene, *medical care*, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals.[46]

The inclusion of the "conditions of life" text remained largely uncontroversial during treaty negotiations, as most of the debate focused on enforcement, how to impose liability, and how to facilitate dispute resolution without infringing on State sovereignty. [47] Following initial debate,[48] the General Assembly advanced the first draft of the Genocide Convention to the Economic and Social

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44. Raphael Lemkin, *Genocide—A Modern Crime*, 4 FREE WORLD 39, 39 (1945) (emphasis added).

45. *Id.* at 43 (emphasis added).

46. 4 ESCOR at 20, U.N. Doc. E/447 (1947); *see also* SEDA GASPARYAN ET AL., RAPHAEL LEMKIN'S DRAFT CONVENTION ON GENOCIDE AND THE 1948 UN CONVENTION: A COMPARATIVE DISCOURSE STUDY 84 (2016) (emphasis added). Commentators note that the long list of situational elements purposefully responded to the recent conduct by Nazi Germany and includes Lemkin's own research from other historical atrocities such as the Turkish campaign against Armenians in the early 1900s. *Id.*

47. Lippman, *supra* note 16, at 11–16.

48. *Id.* at 17–19. For example, the United States advocated for submission of the draft Convention and comments from Member States directly to the General Assembly. ESCOR Comm. on Soc. Affairs, 5th Sess., 15th plen. mtg. at 3, U.N. Doc. E/AC.7/Sr.15 (1947) (Mr. Stinebower, United States). Other countries, such as Chile, feared that the General Assembly would just defer consideration of the Convention. *Id.* at 2–3 (Mr. Cruz, Chile).

Council [49] and a newly established Ad Hoc Committee for finalization.[50] The Committee members—composed of representatives from China, France, Lebanon, Poland, the United States, the Soviet Union, and Venezuela—closely reviewed and synthesized drafts and comments regarding a new convention on genocide.[51]

While the Committee members unanimously agreed that an act whose purpose or result was the destruction of a group, even partially, would constitute genocide, various delegates sought to adjust the "conditions of life" provision to align with the goals of their respective States.[52] For example, the Chinese representative proposed reviving the draft text to "[s]ubjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group," for simplicity. [53] However, disagreement arose, as delegates feared that the Chinese proposal lacked the requisite directness[54] and that the terminology "of such group" protected only the group and not any individual members.[55] In opposition, the Polish delegate remarked that certain measures, like prolonged segregation of the sexes, could contribute to a group's destruction without causing the death of any of its existing members.[56]

To resolve the debates, the final version combined three propositions that arose during discussions: it 1) emphasized a directness of acts of genocide, 2) that groups can be destroyed by a targeting of its members, and 3) that the group can be destroyed without the death of its members.[57] The version of the "conditions of life" language that was adopted passed Committee vote with twenty-

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49. G.A. Res. 180 (II), Draft Convention on Genocide, at 129–30 (Nov. 21, 1947). The first formal draft was compiled by a group of appointed experts, including Raphael Lemkin himself. Lippman, *supra* note 16, at 9.

50. Economic and Social Council Res. 117 (VI), at 19–20 (Mar. 3, 1948).

51. *Id.*; Lippman, *supra* note 16, at 27–28 (detailing the Committee member composition and review).

52. Lars Berster, *Article II*, *in* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY, *supra* note 22, at 90–91.

53. ESCOR, Ad Hoc Comm. on Genocide, Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China, U.N. Doc. E/AC.25/9, art. I, ¶ 2 (Apr. 16, 1948); Berster, *supra* note 52, at 90–91 (providing the context to the Chinese representatives amendment).

54. ESCOR, Ad Hoc Comm. on Genocide, Summary Record of the Thirteenth Meeting, U.N. Doc. E/AC.25/SR.13, at 9–12 (Apr. 20, 1948).

55. *Id.* at 11–13.

56. *Id.* at 13.

57. Berster, *supra* note 52, at 90–91.

three votes in favor to seven against, with seven separate abstentions.[58]

Over the course of treaty negotiations, State representatives reflected on the circumstances that contextualized their debates about the scope of protection afforded by varying definitions of genocide. The delegates concluded the convention against the historical context of the Nazi Holocaust and the Armenian massacre of the 1910s, seeking to ensure that the likes of these atrocities would not occur again.[59] For instance, during one dialogue, Mr. Alexander P. Morozov, a delegate representing the Soviet Union and serving as vice-chairman of the Ad Hoc Committee, recalled and emphasized the ghettos "where the Jews were confined in conditions which, either by starvation or by illness accompanied by the *absence of medical care*, led to their extinction" as an example that "must certainly be regarded as an instrument of genocide."[60]

The desire to include the "conditions of life" provision went largely uncontested, and a concern about healthcare remained a constant priority throughout later stages of debate as well.[61] The final negotiations turned primarily on the scope of genocidal intent and the precise language and grammatical placement that would articulate the causal link between actions imposed and any potential destruction of the group in part or in whole.[62] However, across the debate, the delegates consistently were wary that they might define genocide too narrowly. The ultimate decision to omit specific factors that constitute "conditions of life" was meant to ensure that an expansive array of conduct that would result in destruction of a

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58. ESCOR, Continuation of the Consideration of the Draft Convention on Genocide: Report of the Economic and Social Council, 82nd mtg. at 183, U.N. Doc. A/C.6/SR.82 (Oct. 23, 1948). The record of the Commitee notes that the USSR amendment introduced the revised wording on the "conditions of life" text. There were no other amendemnts to that section of the draft, apart from the USSR amendment. *Id.* The Commitee adopted the full text of Article II at the next meeting, with 28 votes in favor to 6 against, with 5 separate abstentions. 83rd mtg. at 192, U.N. Doc. A/C.6/SR.83 (Oct. 25, 1948).

59. Philip B. Perlman, *The Genocide Convention*, 30 NEB. L. REV. 1, 5 (1950).

60. ESCOR, Ad Hoc Comm. on Genocide, 4th mtg. at 14, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948) (emphasis added).

61. *See, e.g.*, *id.* (reflecting that multiple delegates raised that genocide ought to include biological, as well as physical and cultural, destruction).

62. Lars Berster, *supra* note 52, at 90–91.

protected group would be captured as a violation of international law.[63]

The final draft prepared by the Ad Hoc Committee was introduced at the 142nd plenary meeting of the General Assembly in 1948, and ultimately voted upon on December 9 that same year.[64] The Convention was adopted unanimously and without abstentions,[65] and entered into force on January 12, 1951.[66] While the as-adopted Convention did not explicitly mention a right to health, the nexus between health deprivation and genocide was nevertheless assumed, consistently affirmed, and understood throughout the drafting process by the delegates at the United Nations.

C. Early Applications of the Convention: The *We Charge Genocide* Petition

The first petitions invoking the Genocide Convention also evince that the treaty encompassed inherent health protections. Shortly after the Convention was finalized, the American Civil Rights Congress ("CRC"), led by William Patterson, published a petition to the United Nations in 1951, charging that the United States had violated the Genocide Convention for the policies taken against Black American communities.[67] Notably, the petitioners document over eight hundred individual human rights violations against Black people within an evidentiary portfolio to argue that the United States

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63. *Id*.

64. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 25–27 (1960).

65. 2 HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 2085 (2008) (citing to the record of the Hundred and Seventy-Ninth Plenary Meeting of the U.N. GAOR to continue the discussion on the draft convention on genocide, U.N. Doc. A/PV.179 (Dec. 9, 1958)).

66. Genocide Convention, *supra* note 2, 78 U.N.T.S at 278.

67. Notably, the petition was one of the first invocations of the newly constructed Genocide Convention submitted to the United Nations. In his autobiography, Patterson describes the process of tactfully selecting the United Nations and the Genocide Convention as a "timely" instrument to advance the Civil Rights cause within the United States. WILLIAM L. PATTERSON, THE MAN WHO CRIED GENOCIDE: AN AUTOBIOGRAPHY 171, 174–75 (1971). In the post-World War II era, the United States was actively involved with promoting internationalized human rights. The petition sought to take advantage of the opportunity opening up with the United States' central role in advocating for universal human rights, as well as to ensure that the United Nations Charter, and the provisions of the newly established conventions, would be available for Black people in the United States to challenge their oppressions. *Id*.

failed to uphold its duty to protect.[68] Understanding how lawyers interpreted and advanced genocide arguments adds clarity to the scope of Article II(c) as originally understood.

1. Using a Right to Health to Prove Genocide

The legal claims in the petition are organized parallel to the language of the Convention text: 1) that Black Americans, as a racial group, constitute one of the four enumerated protected groups, and 2) that the destruction *in part* of such a group consists of genocide. The petition ultimately concluded that the oppressed Black American "citizens of the United States, segregated, discriminated against and long the target of violence, suffer[ed] from genocide as a result of the consistent, conscious, unified policies of every branch of government."[69]

The petition advanced an Article II(c) violation as one of its primary arguments, presenting evidence that nonwhite communities were far more likely to succumb to a fatal disease, experience diminished life expectancy rates, and suffer from disproportionate health outcomes when compared to white populations.[70] First, the petition argued that discriminatory employment practices exposed Black populations to dangerous working conditions at a far higher rate than white populations. These working environments, referred to as "jimcrow conditions" by the petitioners, led to higher rates of tuberculosis, followed by pneumonia and influenza.[71] To substantiate their claims, the petitioners referenced U.S. Office of Vital Statistics data which demonstrated that the death rates for twenty-five broad categories of diseases were significantly higher for nonwhite populations than for white populations.[72] In fact, one category alone—"all other" diseases—reported twice as high of an incidence rate for nonwhite groups.[73]

The effects of these higher incidences of workplace disease were compounded, according to the petition, by unequal access to

68. *See* We Charge Genocide, *supra* note 20, at 55–193 (presenting all the evidence for the various acts of genocide, chronologically arranged under the specific articles and provisions of the Genocide Convention to which the acts pertain).
69. *Id.* at xi.
70. *Id.* at 125–32.
71. *Id.*
72. *Id.* at 128.
73. *Id*.

healthcare and insurance. Corporate insurance plans routinely excluded certain personnel in sets of job categories, specifically those jobs that Black Americans "'just happen' to occupy."[74] The stereotypes and categories that insurance companies employed charge Black Americans higher premiums which further denied them medical care and perpetuated inaccessibility for minority groups.

Finally, the petition concluded the charge under Article II(c) by submitting that a lack of representation in the medical field contributed to the disparate health outcomes. Medical colleges across the United States were refusing to admit any Black students, resulting in a lack of medical professionals in Black American communities. [75] Furthermore, state-run education institutions for Black Americans in the Southern United States were routinely refusing to provide any resources for medical training in the first instance.[76] As a result of these policies, 4,409 Black individuals in the United States had only one corresponding Black American doctor available to them who could serve their medical needs.[77] The Article II(c) charge ended by finding a 40% higher rate of severe illness in Black communities, attributing the substandard health conditions and disparate healthcare access to the incomes and living conditions of the Black American population.[78]

2. The Petition Sits Idle: A Casualty of Geopolitical Conflict

By submitting a petition, Patterson and the CRC sought to elevate the Black American struggle to the world's robust new political stage. [79] Specifically, the petition sought a declaratory judgement by the United Nations, deeming that the United States had failed to uphold its obligations under the U.N. Charter and the Genocide Convention.[80] The petition did not spur a response from the General Assembly and has largely disappeared from legal discourse, but not because the argument was legally flawed or inconsistent with the original understanding of the Convention. Rather, the stagnation

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. PATTERSON, *supra* note 67, at 171.
80. We Charge Genocide, *supra* note 20, at 196.

of the petition was due to the interplay of foreign and domestic politics within the United States.

The petition was delivered at a time of increasing international scrutiny into race relations in the United States.[81] In response to the petition, the United States took great efforts to repudiate the claims, largely on political grounds. The petition authors had already aligned themselves with the pro-socialist left-wing movement in the United States; thus, government officials sought to discredit the petition as "mere Communist propaganda," suggesting those who supported the petition or verified the complaints were "disloyal" to the United States.[82] These reactions to the petition, and its ultimate downfall, turned on political ad hominem attacks. The international Communist movement further assured the endeavor's demise by giving the petition substantial support, firmly setting any discourse regarding the petition within Cold War politics.[83]

Because the petition was stymied, largely due to the efforts of U.S. emissaries, it never had a chance to be evaluated and debated in front of the U.N. General Assembly.[84] Geopolitics prevailed without any consideration of the legal merits of the claim. However, the effort

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81. Charles H. Martin, *Internationalizing "The American Dilemma": The Civil Rights Congress and the 1951 Genocide Petition to the United Nations*, 16 J. OF AM. ETHNIC HIST. 35, 36 (1997). At a time when the United States served as a global hegemon amidst widespread decolonization movements, foreign interest in American discriminatory practices against Black Americans was especially salient. *Id*.

82. *Id.* at 36–37; *see also* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 186–93 (2003) (describing State Department efforts to recruit the NAACP to undermine the credibility of CRC under an obligation to aid the United States in its anti-Communist efforts).

83. *Drew Pearson's Radio Attack on* "We Charged [sic] Genocide" *Blasted by Crc Head*, ARK. ST. PRESS, Nov. 30, 1951, at 1, 8 (reporting that William Patterson responded to allegations calling the petition a "Communist propaganda book" by drawing attention to the State Department's coordinated domestic political campaign to stop the Civil Rights Congress from pursuing the charge); Laureen White, *What Should People Read?*, ARK. ST. PRESS, June 6, 1952, at 5, 11 (citing one local who read the petition and "contended that it was specious", stating: "If colored people in other parts of the world should read that scathing indictment . . . they would fly to the arms of Russia. That would be a great tragedy for us all.").

84. Steven Leonard Jacobs, *"We Charge Genocide": A Historical Petition All but Forgotten and Unknown*, *in* UNDERSTANDING ATROCITIES: REMEMBERING, REPRESENTING, AND TEACHING GENOCIDE 125, 134–35 (Scott W. Murray ed., 2017).

did successfully highlight the problematic policies of the United States government to the rest of the world.[85] In fact, Eleanor Roosevelt recognized the legal standards and conception of Article II(c) offered by the petitioners but criticized its application; she publicly insisted that "a real effort [wa]s being made to overcome" the high death rate of Black Americans in the United States.[86]

D. Health in Human Rights Law

As the *We Charge Genocide* petitioners wrote their arguments and the delegates at the U.N. General Assembly negotiated the final language of the Genocide Convention, the international community was establishing baseline laws and foundations for human rights. In the late 1940s, responding to crimes committed by Nazi Germany in World War II, governments agreed to unite together in order to bolster peace and prevent future conflict in part by promoting respect for the human rights of all individuals.[87] The Universal Declaration of Human Rights was adopted in 1948, becoming the first human rights document which notably identified health as a human right and cemented health as a part of the identifiable purpose of human rights law.[88] Since then, the United Nations has adopted numerous treaties

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85. Patterson acknowledges in his biography that the United Nations and its agencies could not themselves bring about change, nor pass binding laws upon the United States. PATTERSON, *supra* note 67, at 175. But Patterson and the CRC recognized the potential of utilizing global political pressure and ongoing United Nations debates about genocide as a means to leverage the international community to advance progressive reform for the Civil Rights cause. GERALD HORNE, BLACK REVOLUTIONARY: WILLIAM PATTERSON AND THE GLOBALIZATION OF THE AFRICAN AMERICAN FREEDOM STRUGGLE 129 (2013). Ultimately, the Genocide Convention and the United Nations system presented a novel advocacy channel that the CRC could use to raise awareness, attempt to "break the back" of Jim Crow, and usher in pressure for civil rights reform from all potential directions—all definitive priorities of activists at the time such as William Monroe Trotter and W.E.B. Du Bois. *Id.* at 128–29.

86. PATTERSON, *supra* note 67, at 206.

87. U.N. Charter arts. 55–60.

88. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, p. 76 (Dec. 10 1948) (stating "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care"). Notably, the Universal Declaration of Human Rights itself lacks the same binding authority of a treaty, but establishes a baseline for rights defined in other international instruments that specifically discuss the right to health. *See* HUGH THRILWAY, THE SOURCES OF INTERNATIONAL LAW 91–97, 176 (2014) (explaining that to have full legal force under international law per Article 38 of the International Court of Justice statute, rights or obligations must be written into a formal convention, treaty, or

elaborating human rights, including those that prevent and prohibit specific abuses, like genocide, and others that further articulate individual rights, such as the right to health.[89]

1. The Right to Health Under International Law

Health as a human right is generally described as the right to the "highest attainable standard" of health, enshrined in Article 12 of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") and subsequently included in a wide range of additional international treaties.[90] Under Article 12 of the ICESCR, States have obligations to take steps towards the full realization of the right to health, ensuring equal enjoyment of the right, without discrimination to the maximum of available resources within the State.[91] In light of available resources, States have an obligation to intervene, prevent, and address any threats to the health of individuals or the

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covenant, and then subsequently ratified); Michèle Olivier, *The Relevance of 'Soft Law' as a Source of International Human Rights*, 35 COMP. & INT'L L.J. S. AFR. 289, 294–98 (2002) (highlighting the distinction between hard-law instruments of international law, such as international custom or treaties, and soft-law instruments of international law, such as resolution, declarations, or principles).

89. *See Timeline of Major International Human Rights Treaties*, AUSTRALIAN HUM. RTS. COMM'N, https://www.humanrights.gov.au/our-work/timeline-major-international-human-rights-treaties [https://perma.cc/283Q-UUHX].

90. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 12(1), 993 U.N.T.S. 3, 6 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 5(e)(iv), S. Exec. Doc C, 95–2, at 4, 660 U.N.T.S. 195, 5 (entered into force Jan. 4, 1969); Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, arts. 23–24, 144 U.N.T.S. 123, 10–11(entered into force Sept. 2, 1990); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, arts. 12, 14, 1249 U.N.T.S. 13, 10–11 (entered into force Sept. 3, 1981); Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, arts. 25, 28, 2515 U.N.T.S. 3, 20–21 (entered into force May 3, 2008); Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 19, 1990, art. 28, 2220 U.N.T.S. 3, 16 (entered into force July 1, 2003). All five treaties articulate a right to health. However, aside from the ICESCR, the other treaty provisions are limited in application to specific contexts. For example, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families applies specifically to the migrant worker context.

91. ICESCR, *supra* note 90, art. 12(2); Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14] (referring to Article 2.2 and Article 2.1 of ICESCR).

population.[92] Even under the narrowest conceptions of the right, States are obligated to refrain from taking actions that harm both public and individual health.[93] One hundred seventy countries, including China, are States Parties to the ICESCR, while an additional four, including the United States, are signatories.[94]

Broadly speaking, the Committee on Economic, Social and Cultural Rights ("CESCR"), the primary organ charged with monitoring interpretation of the ICESCR and providing further authoritative interpretations of the human rights enumerated therein, has situated the right to health within the larger framework of all human rights, articulating three specific obligations on States Parties: obligations to respect, protect, and fulfill.[95] In order to respect the right to health, States must refrain from "denying or limiting equal access for all persons . . . to preventative, curative and palliative health services."[96]

Furthermore, under an obligation to protect human rights, States must "adopt legislation or . . . take other measures ensuring equal access to health care and health-related services," especially if provided by third-parties.[97] Non-discrimination and equality are deemed to be fundamental components in the exercise and enjoyment

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92. Steven D. Jamar, *The International Human Right to Health*, 22 S.U.L. REV. 1, 4 (1994).

93. *Id.*

94. *International Covenant on Economic, Social and Cultural Rights in Status of Ratification: Interactive Dashboard*, OFF. OF THE HIGH COMM. OF HUM. RTS., http://indicators.ohchr.org [https://perma.cc/SH9X-MHJD]. Signatories of an international treaty are entitled to respect the obligations therein and cannot take actions that would violate the "object and purpose" of the treaty. VCLT, *supra* note 27, art. 18. Although there is widespread acceptance of the existence of a right to health, there is not necessarily a universal agreement on the specific obligations the ICESCR puts on States.

95. General Comment No. 14, *supra* note 91, ¶ 33. To respect, States must "refrain from interfering directly or indirectly with the enjoyment of the right to health." *Id.* To protect, States must "take measures that prevent third parties from interfering" with the right to health. *Id.* And to fulfill, States must "adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures." *Id.* Fulfillment has three separate elements: to facilitate by "tak[ing] positive measure that enable and assist individuals and communities to enjoy the right to health"; to provide a "specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal"; and to promote by "undertak[ing] actions that create, maintain and restore the health of the population." *Id.* ¶ 37.

96. *Id.* ¶ 34.

97. *Id.* ¶ 35.

of economic, social, and cultural rights.[98] Otherwise States must fulfill minimum core obligations for the right by ensuring the general availability of primary health care,[99] characterized as "a sufficient

98. Principles of non-discrimination and equality are deemed to be "immediate and cross-cutting obligations" by virtue of Article 2(2) of the ICESCR. States Parties must guarantee non-discrimination in the exercise of each of the economic, social, and cultural rights enshrined in the Covenant. Discrimination entails "distinction, exclusion, restriction or preference, or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination." The non-discrimination provisions cover both formal and substantive discrimination, as well as obligations to ensure that individuals or entities in the private sphere do not discriminate on prohibited grounds. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶¶ 7–11, U.N. Doc. E/C.12/GC.20 (July 2, 2009) [hereinafter General Comment No. 20]. Prohibited grounds of discrimination are detailed in Article 2(2) of the ICESCR, covering "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICESCR, *supra* note 90, art. 2(2). "Other status" is interpreted by the ICESCR to indicate that the list is not exhaustive, as the nature of discrimination varies according to context and evolves over time. As a result, other bases for discrimination may be protected under ICESCR Article 2(2). Some examples include disability, age, nationality, sexual orientation and gender identity, marital status, health status, place of residence, or socioeconomic position in society. *See* General Comment No. 20, *supra*, ¶¶ 15, 27–33. Thus, the Covenant prohibits any discrimination in the access to health care, underlying determinants of health, as well as access to the means or entitlements for health procurement. States Parties have an affirmative obligation to provide those in need with necessary health insurance and health-care facilities, and to prevent any discrimination on prohibited grounds in the provision of health care and health services. General Comment No. 14, *supra* note 91, ¶¶ 18–19.

99. The idea of a "minimum core" is considered to be the baseline obligation to progressively realize rights. A State will be considered to be failing to meet its ICESCR obligations unless it demonstrates that it has taken every effort to use all its resources to satisfy the minimum obligations. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990); *see also* SISAY ALEMAHU YESHANEW, THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: THEORY, PRACTICE AND PROSPECT 280 (2013) (describing the "minimum core" as a set of "irreducible" duties that a State ought to satisfy even in difficult economic conditions). If a State were to implement a policy or practice that limits access to an economic, social, or cultural right, the State must prove that the measures were justified based on consideration of all alternatives, and of all other economic, social, or cultural obligations, when determining how to use maximum available resources. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water, ¶ 19, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) (discussing the obligations on States Parties when they limit access, and applying the minimum core to the right to water).

number of hospitals, clinics and other health-related facilities."[100]

Other international agreements—such as those relating to genocide, the practice of war, and other human rights doctrines like the right to life—all touch on the conditions affecting one's health, as access to food or healthcare are seen as necessary preconditions of livelihood and survival.[101] In the context of healthcare, positive obligations include the duty to ensure an effective regulatory framework governing the provision of healthcare and the implementation, supervision, and enforcement of functioning healthcare systems.[102] Acts of exclusion in public health polices can trigger State responsibility when a State puts individual lives at risk through the denial of healthcare.[103]

At the outset, it appeared that the international system was poised to develop genocide law alongside the human rights doctrine. However, aside from some consideration that health serves as a

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100. General Comment No. 14, *supra* note 91, ¶ 36.

101. F. Menghistu, *The Satisfaction of Survival Requirements*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 63, 63–69 (Bertrand G. Ramcharan ed., 1985). As all human rights co-exist equally, there is notable overlap between the right to health and the right to life, especially as scholars such as Menghistu note health and health access as a necessary precondition for the enjoyment of the right to life. As a human right, the right to life has its own doctrinal jurisprudence and is explicitly enshrined in major human rights conventions. Universal Declaration of Human Rights, *supra* note 88, art. 3; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 6, S. Exec. Doc. E, 95-2, at 35 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 2, Europ. T.S. No. 5, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 145 (entered into force July 18, 1978); African Charter on Human and People's Rights, *adopted* June 27, 1981, art. 4, 21 I.L.M. 58, 59 (entered into force Oct. 21, 1986). The majority of international legal scholarship considers the right to life to have the status of *jus cogens* norms of Customary International Law, a cornerstone of international human rights law from which no derogation is permitted. These norms require States to abstain from direct violations and to take positive measures to ensure the right to life. *See, e.g.*, Jordan J. Paust, *The Right to Life in Human Rights Law and the Law of War*, 65 SASK. L. REV. 411, 413–14 (2002) (discussing the positive obligations upon states under the right to life); Comm. on Hum. Rts., General Comment No. 6, Article 6, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

102. Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, ¶ 190 (Eur. Ct. H.R. Dec. 15, 2015).

103. Cyprus v. Turkey, App. No. 25781/94, ¶ 219 (Eur. Ct. H.R. May 10, 2001); Hristozov & Others v. Bulgaria, App. Nos. 47039/11 & 358/12, ¶ 106 (Eur. Ct. H.R. Nov. 13, 2012).

precondition to survival, the right to health doctrine ultimately has developed separately from genocide and Article II(c).

II. THE LEGAL REGIME OF GENOCIDE: NARROWING THE ORIGINAL INTENT OF ARTICLE II(C)

As articulated above, the authors of the Convention originally envisioned an inherent right to health protection within Article II(c) of the Convention, a protection that was then bifurcated from the development of genocide law with the establishment of the human rights covenants. Part II argues that the contemporary applications of the Convention have developed only a vague understanding or partial awareness of the scope of Article II(c). As a result, the elements of what conduct would constitute a violation of Article II(c) have not been fully articulated or examined, resulting in a narrow application of the legal definition of genocide that significantly differs from the original conception envisioned by the Convention's drafters.

First, in order to understand the current interpretation and application of Article II(c) of the Genocide Convention, Section II.A examines the elements of an Article II(c) violation by studying international jurisprudence and case law. Then, Section II.B discusses domestic implementing statutes and international agreements concluded at the United Nations that address obligations States hold to prevent genocide. Section II.C concludes by highlighting the problem posed by a conception of genocide that is much narrower than the original intent, using an analysis of the 1975-1999 occupation of East Timor as a case study of an atrocity that transpired without genocidal inquiry, representative of the current approach to Article II(c), and characterized by internment policies akin to both the Holocaust and Uyghur Crisis.

A. Current Interpretations of the Genocide Convention: Article II(c)

Following the conclusion of the Genocide Convention in 1948, judicial discussion of the treaty remained silent for fifty years until the International Criminal Tribunal for Rwanda ("ICTR") rendered the first international genocide judgment in *Akayesu*.[104] The operative text of Article II(c) pertinent for the ICTR provides that:

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104. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 4 (ICTR Trial Chamber Sept. 2, 1998).

> In the Present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> . . .
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[105]

Since the *Akayesu* decision, scholarship has defined the elements of a genocidal crime as having two primary components: the mental state and intentionality accompanying an act, or mens rea, and the physical act itself, or actus reus.[106] The severity of the crime and the recent emphasis on genocide as a legal concept has created ongoing debate, but the discourse has primarily focused on defining the requisite intent—the mens rea—rather than the actus reus.[107] As

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105. Genocide Convention, *supra* note 2, art. II(c).

106. *See* Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 186–88 (Feb. 26); Mundorff, *supra* note 42, at 66.

107. Genocide Convention, *supra* note 2, art. II. To commit genocide, perpetrators must act with a certain intent, specifically the "intent to destroy . . . a national, ethnical, racial, or religious group" in whole or in part. Stefan Kirsch, *The Social and the Legal Concept of Genocide, in* ELEMENTS OF GENOCIDE 7, 11 (Paul Behrens & Ralph Henham eds., 2013). The criminal prosecution of any Article II crime requires proof that the conduct was committed with some purposive or knowledge-based destructive intent. The prevailing view regarding intent is referred to as the "purpose-based approach" and was commonly applied by the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). This interpretation holds that the perpetrator of a genocidal crime must act with the aim, goal, purpose, or desire to destroy the target group. *Id.* Article II(c)'s definition of genocide specifically goes further by requiring the deliberate infliction of conditions designed to destroy the group. The heightened subjective element of "deliberately," also known as the *dolus specialis,* requires that the perpetrator employ the destructive conditions with the clear intention to physically exterminate the group at issue. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 268 (2nd ed. 2009). It remains unsettled whether this criterion requires prior planning by the perpetrator or if intent similar to a purpose-based definition is sufficient. *Id.* (citing to KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS 796 (2002), which argues that "'deliberately' refers only to the general requirement of 'intent and knowledge' as articulated by Article 30 of the Rome Statute of the International Criminal Court). *But see* ROBINSON, *supra* note 64, at 60 (arguing in favor of a requirement of prior planning when it comes to assessing "deliberate" intention).

a result, there is no consensus as to the specific conduct that would constitute genocide, particularly as it relates to the "conditions of life" clause in Article II(c).[108]

1. Article II(c): Background on Actus Reus and Article II(c) Inquiries

Since far less attention has been directed towards interpreting the scope of Article II(c), genocide doctrine is vague on what conduct warrants an Article II(c) investigation and what subsequently triggers the obligations of States Parties to protect and prevent genocide.[109] At a minimum, States that face a potential genocide situation need not establish a complete evidentiary portfolio to begin an investigation and take preventative action.[110] An

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108. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. Rep. 43 at ¶ 160 (applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties to discuss the Genocide Convention's obligations). For case law applying the Vienna Convention on the Law of Treaties to an analysis of intent, see Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 35 (ICTY Appeals Chamber July 5, 2001); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶¶ 300, 303 (ICTY Appeals Chamber July 15, 1999). For principles of treaty interpretation, see VCLT, *supra* note 27, arts. 31–32.

109. See *infra* Section II.B for details on obligations to prevent and protect against genocide.

110. In *Prosecutor v. Karadzic & Mladic*, the ICTY addressed the burden surrounding genocide and specific intent, stating that "[the] intent which is peculiar to the crime of genocide need not be clearly expressed. . . . [It] may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts . . . ." Prosecutor v. Karadzic & Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94 (ICTY Trial Chamber July 11, 1996). In an attempt to clarify inferred intent, the I.C.J. held that the evidence produced "has to be convincingly shown by reference to particular circumstances" in order to infer any specific intent to destroy a group. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. Rep. 43 ¶ 373. Most have reconciled this decision as applying a "beyond a reasonable doubt" standard. Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. INT'L CRIM. JUST. 889, 903 (2007); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Dissenting Opinion of VP Al-Khasawneh, 2007 I.C.J. Rep. 43, ¶¶ 40–47 (Feb. 26) (criticizing the majority judgment and discussing the standard of inferred intent developed in the ICTR and the ICTY). However, the same analysis has not been conducted for the elevated intent provisions—or, *dolus specialis*—for alleged Article II(c) crimes. *See generally* Janine Natalya Clark, *Elucidating the* Dolus Specialis*: An Analysis of ICTY Jurisprudence on Genocidal Intent*, 26 CRIM. LAW F. 497 (2015) (highlighting the ambiguities of genocidal intent, which make

investigation would be warranted if there exists some suspicion of either intent or the presence of any actus reus specified by any Article II provision, including Article II(c).[111]

One of the few well-defined aspects of Article II's actus reus element is that the conduct in question must target or be carried out against a discernable, protected human group—not merely against a number of individuals who happen to share a common characteristic. [112] The Article II definitions are therefore best understood as underlying offenses for the crime of genocide, which can themselves be committed by a variety of methods.[113] For Article II(c), one must determine if the perpetrator's conduct qualifies as an imposition of destructive conditions of life.[114]

Importantly, actual death is not a necessary condition for an Article II(c) violation. Genocide jurisprudence has stated that during an Article II(c) assessment, the conduct in question need only be objectively capable of bringing out the destruction of the target group.[115] Furthermore, scholars of international criminal law note that genocide is possible even if only a subset of the protected group is subject to the destructive conditions of life, as opposed to the entire discernable group.[116]

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it difficult for plaintiffs to prove their case in a court of law because those committing genocide may never explicitly reveal their true intentions); *see also* Elizabeth Santalla Vargas, *An Overview of the Crime of Genocide in Latin American Jurisdictions*, 10 INT'L CRIM. L. REV. 441, 451 (2010) (noting that the crime of genocide has been found even in the absence of evidence of a physical destruction of a group).

111. *See, e.g.*, Hum. Rts. Council, Report of the Independent International Fact-Finding Mission on Myanmar, ¶ 87, U.N. Doc. A/HRC/39/64 (Sept 12. 2018)

112. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 2007 I.C.J. Rep. 43 ¶ 193.

113. GIDEON BOAS ET AL., ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 155 (2008).

114. Genocide Convention, *supra* note 2, art. II(c).

115. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 517 (ICTY Trial Chamber July 31, 2003); *see also* Claus Kreß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461, 481 (2006) (noting that the ICTY ruled in *Stakić* that a finding of genocide under sub-paragraph (c) of the Convention did "not require a proof of result").

116. Kreß, *supra* note 115, at 481.

2. Judicial Treatment and Case Law on Article II(c): Actus Reus

Supplementing the minimal academic discourse on Article II(c), the dicta of International Criminal Tribunal judgments often discuss Article II(c) and actus reus. The first case that discussed the scope of an Article II(c) violation was the ICTR *Akayesu* case. There, the tribunal concluded that Article II(c) should encompass "the methods of destruction by which the perpetrator does not immediately kill the members of the group" but will ultimately result in the group's destruction.[117]

Upon surveying subsequent case law on Article II(c), it is clear that the vast majority of judicial discussions reiterate the standard outlined in *Akayesu.*[118] In the ICTR case of *Prosecutor v. Kayishema and Ruzindana*, the tribunal elaborated upon the definition by adding that the "lack of proper housing, clothing, *hygiene and medical care* or excessive work or physical exertion" may qualify as violative conduct in an Article II(c) inquiry.[119]

Echoing the *Akayesu* decision, subsequent international criminal tribunals have ruled that violative conduct includes imposing subsistence diets, carrying out systematic forced displacement, and reducing essential medical services below a

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117. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 505 (ICTR Trial Chamber Sept. 2, 1998).

118. *See* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 692 (ICTY Trial Chamber Sept. 1, 2004); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement, ¶ 157 (ICTR Trial Chamber Nov. 16, 2001); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement, ¶ 52 (ICTR Trial Chamber May 26, 2003); *Stakić*, IT-97-24-T, ¶ 518. International bodies have also considered the application of Article II(c) to various crises outside the mandate of international criminal tribunals. For instance, the Historical Clarification Commission for Guatemala, established in the peace process following the Guatemalan Civil War, also engaged in a genocide inquiry. The commission determined, in their final report, that the scorched earth policy employed by the Guatemalan regime violated Article II(c). COMM. FOR HIST. CLARIFICATION, GUATEMALA: MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSIONS AND RECOMMENDATIONS 40 (1999), https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf [https://perma.cc/VBW5-QFQZ]. But, the arguments and reasoning of the Conclusions and Recommendations of the Guatemala Commission do not carry persuasive legal weight, and likely fall outside the scope of Article 38 of the I.C.J. statute. Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

119. Prosecutor v Kayishema & Ruzindana, Case No ICTR-95-1-T, Judgement, ¶ 548 (ICTR Trial Chamber May 21, 1999) (emphasis added).

"minimum requirement."[120] The International Criminal Tribunal for the former Yugoslavia ("ICTY") Trial Chamber in *Brđanin* further specified that conduct which results in the "*denial of a right to medical services*" would fall within the ambit of Article II(c).[121] Similarly, in the ICTY indictment of Slobodan Milošević, the Prosecutor emphasized that the internment of Bosnian Muslims and Bosnian Croats in detention facilities was a genocidal crime under Article II(c) due to the campaign of starvation, forced labor, *inadequate medical care*, provision of contaminated water, and constant physical and psychological assault.[122]

However, due to other substantive grounds for indictment including evidence of killing members of a protected groups, the judgments themselves provide very little explanation of how to assess what level of severity would be necessary to conclude an Article II(c) violation alone outside of the brief mention of minimum requirements.[123] Even today, as the international crime of genocide has been incorporated into the Rome Statute, verbatim from the Convention,[124] the official ICC *Elements of Crimes* document only

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120. *Akayesu*, ICTR-96-4-T, ¶ 506; *Musema*, ICTR-96-13-T ¶ 157; *Rutaganda*, ICTR-96-3-T, ¶ 51; *Brđanin*, IT-99-36-T, ¶ 691 (highlighting systematic expulsion from homes).

121. *Brđanin*, IT-99-36-T ¶, 691 (emphasis added) (describing the conduct as "denial of the right to medical services").

122. Prosecutor v. Milošević, Case No. IT-01-51-I, Initial Indictment "Bosnia and Herzegovina," ¶ 32(d) (ICTY Indictment Nov. 22, 2002). However, the ICTY did not render a final judgment on the merits, as Slobodan Milošević died prior to the conclusion of the trial. *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, HUM. RTS. WATCH (Dec. 13, 2006), https://www.hrw.org/report/2006/12/13/weighing-evidence/lessons-slobodan-milosevic-trial [https://perma.cc/JB9A-EUPJ]; *see also* Prosecutor v. Milošević, Case No. IT-02-54-T, Order Terminating the Proceedings (ICTY Trial Chamber Mar. 14, 2006) (explaining Termination of Proceedings for the Slobodan Milošević trial).

123. *Brđanin*, IT-99-36-T, ¶ 691 (describing generally "[t]he acts envisaged" by Article II(c) without detailing any minimum requirements).

124. *See* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 6, 37 I.L.M. 999, 1004, 2187 U.N.T.S. 90, 93 (entered into force July 1, 2002). These provisions are reproduced in almost every constituting instrument of an international or hybrid criminal court or tribunal adjudicating on crimes of genocide. *See* Genocide Convention, *supra* note 2, art. II(c); *see also Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994*, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg. at 3–4, art. 2, U.N. Doc. S/RES/955 (1944), *reprinted in* 33 I.L.M. 1598, 1603 (1994) (incorporating the

defines the term "conditions of life" in an enumerated list that includes the "deliberate deprivation of resources indispensable for survival, such as *food* or *medical services*."[125]

Because death is not a necessary condition for the existence of genocide, scholars have emphasized the invocations and enumerations of Article II(c) in subsequent case law to encompass a concept of "slow death genocide," distinct from the mass killing sprees common in Genocide Convention violations.[126] Others have debated what exactly should be considered "indispensable for survival," as articulated by the ICC for an Article II(c) violation.[127] Crucially, an assessment of an Article II(c) violation should consider the length of time a group was subject to the imposed conditions in light of the

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Genocide Convention's definitions into the instruments of the ICTR); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 4, at 2, Reach Kram No. NS/RKM/1004/006 (Oct. 27, 2004) (incorporating the Genocide Convention's definitions into the instruments of the Extraordinary Chambers in Cambodia).

125. *Elements of Crimes*, ICC 3 n.4 (2011), https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf [https://perma.cc/6N5K-WYZD] (emphasis added). The Elements of Crimes are reproduced from the *Official Records of the Assembly of State Parties to the Rome Statue of the International Criminal Court, First Session, New York, September 3–10, 2002* (United Nations Publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, 31 May-11 June 2010* (International Criminal Court publication, RC/11).

126. *See* Caroline Fournet, *The Actus Reus of Genocide*, *in* ELEMENTS OF GENOCIDE 53, 65 (Paul Behrens & Ralph Henham eds., 2013) (citing to Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 115 (ICTR Trial Chamber May 21, 1999) (describing the qualifying circumstances as "lead[ing] to a slow death")); WERLE, *supra* note 107, at 267 (describing the prohibition of "slow death measures" in Article 6(c) of the ICC Statute with citation to ICTR and ICTY decisions); *see also* FRANK SELBMANN, DER TATBESTAND DES GENOZIDS IM VÖLKERSTRAFRECHT 161 (2003) (discussing the imposition of living conditions that are intended to cause group death).

127. One leading critique of the Genocide Convention is that it does not clearly articulate the degree to which economic genocide or cultural genocide falls within the scope of the Convention text or the ICC language of "indispensable for survival." *Elements of Crime*, *supra* note **Error! Bookmark not defined.**, at 3 n.4. However, current legal interpretation does not recognize cultural genocide as an international crime. P. Sean Morris, *Economic Genocide Under International Law*, 82(1) J. CRIM. L. 18, 29–32 (2018) (arguing that economic measures can affect conditions of the life for a protected group and that, if such conduct meets the mens rea requirement of the Genocide Convention, then it ought to constitute a violation of Article II(c)).

particular living circumstances of the victims in question.[128] But it is still unclear whether it is the imposition of such conditions, the severity of a particular measure, or the accumulation of all factors in their totality that would qualify as an underlying offense under subparagraph (c) of Article II.

The dearth of legal discourse on Article II(c) reinforces the notion that this particular definition of genocide has received little attention. Lack of analysis and investigation by academics, human rights advocates, and criminal courts and tribunals reflect the ambiguous status of current scholarship and caselaw on the actus reus of Article II(c). What are consistent, however, are the prototypical examples of qualifying conduct that include: denial of access to adequate medical care; the imposition of a subsistence diet; the involuntary lack of proper housing, clothing, or hygiene; and the imposition of excessive work or physical exertion on a protected group. While there is an abstract acknowledgement about what conduct Article II(c) covers, genocide jurisprudence has yet to rule fully on the degree or the gravity of such conditions that alone would constitute a violation.[129]

B. Obligations of States to Prevent Genocide

Beyond Article II(c), State Parties of the Genocide Convention hold explicit obligations under Article I of the treaty to "prevent and to punish" genocidal crimes when indicia of a potential violation exist.[130] However, because of the ambiguity around what conduct constitutes an Article II(c) violation, there is uncertainty regarding

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128. *See* Brđanin, IT-99-36-T, ¶ 906 (describing how the "Trial Chamber [of the International Criminal Tribunal for the former Yugoslavia] ha[d] focused on" these factors in its inquiry); *see also* Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 548 (ICTR Trial Chamber May 21, 1999) (applying a similar framework).

129. Int'l Law Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, [1996] 2 Y.B. Int'l L. Comm'n 17, 46 n.124, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (quoting NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 63–64 (1960)), https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf [https://perma.cc/6PF9-V3UG] ("Instances of genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodation, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part.").

130. Genocide Convention, *supra* note 2, art. I, (articulating obligations of States Parties to "prevent and to punish" genocide).

when obligations to prevent genocide are triggered for that provision. Fundamentally, the responsibility to prevent genocide is "well established internationally-enforceable law."[131]

In *Bosnian Genocide*, the International Court of Justice ("I.C.J.") ruled that State Parties, at the very least, must adopt national laws that implement their Convention obligations to prevent and punish, and that such national legislation should encompass all of the substantive provisions of the Convention.[132] But any provisions in domestic legislation related to genocide prevention, specifically in regards to the actus reus of Article II(c), are ill-defined or nonexistent.

1. Implementing International Law of Genocide into Domestic Law

Many states that have ratified the Convention have implemented the treaty text in some fashion into their domestic legislation.[133] In the United States, legislators passed the Proxmire Act in conjunction with treaty ratification in 1988, rendering the Convention justiciable under U.S. national law.[134] This implementing

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131. MICHAEL W. DOYLE, THE QUESTION OF INTERVENTION 115–16 (2015). The Genocide Convention authorizes the exercise of preventative action across borders without necessarily requiring a UNSC resolution or a judgment by the International Court of Justice. The language in Article VIII is permissive towards the United Nations; Article VIII states that "[c]ontracting parties *may* call upon the competent organs of the United Nations to take . . . action . . . for the prevention and suppression of acts of genocide . . . ." Genocide Convention, *supra* note 2, art. VIII, (emphasis added).

132. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 162 (Feb. 26). The legislative duties determined by the I.C.J. include preventing and punishing genocide in line with Article I of the Convention, to define genocide following the examples set in Articles II and III, make punishable all perpetrators without any distinction based on status as stated in Article IV, to make trials possible under national courts or before international tribunals as required under Article VI, exclude genocide from the list of political offences for the purposes of extradition following Article VII. *Id*. ¶¶ 144, 159–62, 171.

133. Ben Saul, *The Implementation of the Genocide Convention at the National Level, in* THE UN GENOCIDE CONVENTION—A COMMENTARY 58, 83 (Paola Gaeta ed., 2009).

134. 18 U.S.C. § 1091. Although heavily involved with the drafting of the Convention text, the United States continued to debate internally for 40 years about the scope of obligations, fearing it would infringe on national sovereignty. The treaty was finally voted upon by the U.S. Senate on February 11, 1986 and

measure specifies domestic penalties for individuals found guilty of the commission of genocide, as well as provisions covering conspiracy, attempt, and complicity.[135] The United States' implementation act incorporates the treaty by copying the definitions of genocide from the Convention to define the basic offense, including a word for word recitation of Article II(c) and the "conditions of life" into 18 U.S.C. § 1091(a)(3) without further elaboration.[136]

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passed by a vote of 83–11 followed by signature from the U.S. President in 1988, completing the ratification process. The final agreement included a series of reservations and declarations specifying how the United States would interpret definitions of intent, mental health harm, and the United States reserves its right to refuse its participation to any international penal tribunal or the International Court of Justice if they have not consented. Genocide Convention, *supra* note 2, Reservation of the United States of America.

135. Genocide Convention, *supra* note 2, art. III.

136. *Id.* art. II(c); 18 U.S.C. § 1091(a)(3). U.S. case law provides little by way of interpreting the text of the Genocide Convention or the corresponding implementing statute. In *Simon v. Republic of Hungary*, the only case that has examined the language of §1091(a)(3), the DC Circuit Court of Appeals confirmed that "conditions of life" captured the practice of expropriation and ghettoization in the Holocaust, with reference to the drafting history of the Convention text. Jewish survivors of the Hungarian Holocaust bought suit against the Republic of Hungary, claiming that the plundering of Jewish property qualified as taking within the expropriation exception of the Foreign Sovereign Immunities Act (28 U.S.C § 16-5(a)(3)), because the expropriations amounted to genocide. The D.C. Circuit remanded the case to the district court ruling that jurisdiction was proper under § 1091(a)(3). But, on remand, the district court was instructed only to determine if plaintiffs had to exhaust available local remedies in Hungary before proceeding with their claims. Simon v. Republic of Hungary, 812 F.3d 127, 143 (D.C. Cir. 2016). States hold broad discretion in determining how to adopt substantive international criminal law. For instance, the Kenyan Constitution opts for direct application of their international obligations into national courts. Constitution art. 2(6) (2010) (Kenya). Alternatively, other states may opt to integrate the substance of international criminal law into their national system. Germany followed this approach by adapting substantive German law to their international obligations. Section 6 of the Code of Crimes Against International Law incorporates the crime of genocide from their former Criminal Code. Völkerstrafgesetzbuch [VStGB] [Code of Crimes against International Law] § 6 (Ger.), *translation available at* https://ihl-databases.icrc.org/ihl-nat/0/09889d9f415e031341256c770033e2d9/$FILE/Act%20to%20Introduce%20the%20Code%20of%20Crimes%20against%20International%20Law%20of%2026%20June%202002%20%5B1%5D.pdf [https://perma.cc/LBH9-QXDZ].

2. The Responsibility to Protect: Affirming Obligations to Prevent Genocide

The obligations to prevent and punish crimes of genocide are core legal obligations that the international community has sought to uphold in order to give weight to the Convention.[137] Violations of international criminal law, and particularly crimes of genocide, are considered to be crimes against the international community as a whole.[138] The I.C.J. has ruled that States must prevent genocide both within and outside their borders; in light of the universal nature of the crime, the obligations to prevent and punish are not limited by sovereign or territorial scope.[139]

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137. The duty to prevent is derived from Article I and is recognized to be a legal obligation, not just an aspirational or programmatic statement. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) Judgment, 2007 I.C.J. Rep. 43 ¶ 428 (Feb. 26); *see also* William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 4 INT'L STUD. J. 17, 20 (2007) (analyzing the I.C.J. treatment regarding Genocide); Tams, *Article I, in* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY, *supra* note 22, at 40–42 (discussing prevention obligations from treaty negotiations), Stephen J. Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide,* 46 MCGILL L.J. 187, 192 (2000) (arguing that provisions of the Genocide Convention oblige the United Nations to take steps in preventing genocide).

138. WERLE, *supra* note 107, at 64.

139. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) Preliminary Objections, 1996 I.C.J. Rep. 595, ¶ 31 (Jul. 11). The authority vested onto States under principles of universality derives from the nature of the crime itself. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L. L. 81, 96 (2001); INT'L LAW ASS'N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS VIOLATIONS 2 (2000), PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 1 (Stephen Macedo ed., 2001) (a restatement of international law on the subject of universal jurisdiction by leading scholars and jurists). The fact that the Genocide Convention explicitly grants jurisdiction to prosecution to territorial principles or an international penal tribunal (Genocide Art VI) is not an obstacle to the Customary International Law application of Genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. Rep. 43 ¶ 31. The I.C.J. has further held that the rights and obligations within the Convention are *erga omnes,* or of the interest of all States, and thus the obligations to prevent and punish are not limited territorially by the Convention. Christian Hillgruber, *The Right of Third States to Take Counter Measures*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND

At the 2005 United Nations World Summit, more than 170 heads of State and other government officials met at the U.N. Headquarters in New York City to advance and coordinate extra-territorial prevention responsibilities in the aftermath of the Rwandan and Bosnian genocides. All the members present (including all five permanent members of the U.N. Security Council) unanimously adopted the Responsibility to Protect ("R2P") doctrine as an essential part of the mandate to protect civilians against atrocity crimes, including genocide.[140] The 2005 agreement specifies moral responsibility upon States to protect against mass atrocities, expanding the legitimate grounds for international protection.[141] Specifically, it affirmed the use of appropriate diplomatic, humanitarian, and other means necessary, including collective action if peaceful efforts are inadequate within the confines of Chapters VII–VIII of the U.N. Charter.[142] The inter-governmental agreement was subsequently adopted by the U.N. General Assembly, [143] and reaffirmed by the U.N. Security Council soon thereafter.[144]

The R2P doctrine provides convincing political credibility and authoritative weight under international law regarding how States ought to respond to four specific atrocities: genocide, war crimes, ethnic cleansing, and crimes against humanity.[145] The three pillars of

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OBLIGATIONS ERGA OMNES 265, 278 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2005).

140. G.A. Res. 60/1, *supra* note 15, ¶¶ 138–39. The five permanent members of the United Nations Security Council are the United States, China, France, the United Kingdom, and Russia. All five joined the rest of the delegations present at the United Nations Headquarters in 2005 and unanimously adopted the resolution describing the Responsibility to Protect. U.N. GAOR, 60th Sess., 8th plen. mtg. at 44–46, U.N. Doc A/60/PV.8 (Sept. 16, 2005).

141. G.A. Res. 60/1, *supra* note 15, ¶¶ 138–39.

142. *Id.* ¶139.

143. G.A. Res. 63/308 (Sept. 14, 2009).

144. S.C. Res. 1674, ¶¶ 4, 8, 14 (Apr. 28, 2006). Since the 2005 World Summit, the Security Council has reaffirmed the R2P principle in more than 80 resolutions. The Global Centre for the Responsibility to Protect, an NGO that works closely with the UN, has tracked references to R2P by both the UNSC and by Heads of State. *R2P References in United Nations Security Council Resolutions and Presidential Statements*, GLOB. CNTR. FOR THE RESP. TO PROTECT (Oct. 2019), http://www.globalr2p.org/resources/335 [https://perma.cc/MHH7-T3T7].

145. R2P is "firmly anchored in well-established principles of international law." U.N. Secretary-General, Implementing the Responsibility to Protect, ¶¶ 3, 9(b), U.N. Doc. A/63/77 (Jan. 12, 2009); *see also* Madeleine K. Albright & Richard S. Williamson, *The United States and R2P: From Words to Action*, BROOKINGS INST. 13–14 (2013), https://www.brookings.edu/wp-content/uploads/2016/06/23-

R2P assert that each State has the primary responsibility to prevent or halt atrocities, other states in the international community have a duty to assist in this effort, and should a State fail to *prevent or halt* atrocity crimes within its jurisdiction, the international community has a responsibility to act collectively.[146] The license established under R2P authorizes collective action first and foremost by emphasizing non-coercive preventative measures, once a risk of a mass atrocity crime is identified, to prevent the crime from occurring.[147] Significantly, the protective action must be "timely and decisive"; R2P accordingly permits measures such as investigations, diplomacy, and unilateral sanctions.[148] Multilateral sanctions or—as a measure of last resort—military intervention require authorization by the U.N. Security Council.[149]

While R2P represented the international community's reaffirmed commitment to preventing genocide, it was not immediately incorporated with the existing international obligations and domestic law as established by the Genocide Convention.[150] For

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united-states-responsibility-protect-albright-williamson.pdf [https://perma.cc/DM43-SR37].

146. Implementing the Responsibility to Protect, U.N. Doc. A/63/77, *supra* note 145, ¶ 11.

147. *Id*. ¶ 11(c).

148. *Id.* ¶¶ 1, 9–66.

149. *Id.* ¶¶ 3, 40, 56. R2P is built on a respect of underlying principles of sovereignty, peace, security, human rights, and armed conflict. It shifts away from state-centric articulations of sovereignty that focus on a right to intervene and instead emphasizes the sovereign responsibility to protect human rights of nationals and the wider international community. *Id.* ¶ 14. In this way, R2P is distinct from rules of humanitarian intervention, as humanitarian intervention principles only refer to the use of military force without consideration of U.N. Security Council authorization. U.N. Charter arts. 39–51; HUMA HAIDER, GSDRC APPLIED KNOWLEDGE SERVICES, INTERNATIONAL LEGAL FRAMEWORKS FOR HUMANITARIAN ACTION 46–49 (2013) (describing the legal grounds for various types of humanitarian action).

150. *See* DOYLE, *supra* note 131, at 113–19 (describing the legally ambiguous nature of R2P). Part of the tension arose from the international community, especially United Nations General Assembly President Miguel d'Escoto-Brockman, who challenged the legal basis for the collective action pillar, referred to as the third pillar of R2P. Whereas the first two pillars were seen as legally uncontroversial, the third pillar produced cause for concern as domestic abuses generally do not qualify as international threats under United Nations Charter Law. Principally, R2P is not a treaty in and of itself, and was seen as impermissibly authorizing intervention for wholly domestic affairs. However, this criticism mainly pertained to crimes against humanity, war crimes, and ethnic cleansing—not genocide. That is because genocide is also outlawed by a treaty, an Article 38 instrument, even if genocide is inflicted solely domestically. Notably,

example, it was not until 2019 that the Elie Wiesel Genocide and Atrocities Prevention Act became law, making it the first U.S. law to codify R2P responsibilities and freestanding obligations to prevent genocide as derived from the Convention.[151] The law enumerates some elements within prevention obligations, such as monitoring high risk areas, conducting outreach, creating prevention protocols, and ensuring resources are made available for atrocity prevention activities.[152] However, implementation of the Elie Wiesel Act is still in its early stages, and there is much to be done in realizing the goals of preventing mass atrocities. Primarily, the Act does not specify any details on the precursors of genocide, nor what conduct would qualify as a violation of Article II(c) and thus trigger obligations to prevent and protect.[153]

C. Failure to Intervene: Narrow Conceptions of Article II(c)

Although the legal history and early applications of the Convention demonstrate a wide recognition that States have obligations to investigate and prevent future atrocities, the Convention has not been affirmatively applied as such to impede potential genocides. In part due to the vague understanding of the

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the development of R2P seemingly provides authority to the UNSC to act in response to genocide without the need for an I.C.J. ruling. *Id*. At the time of writing, the strict legality of R2P as a new basis supplementing existing instruments that address international peace and security has not been fully or formally established across all four atrocity crimes. However, R2P may evolve into customary international law in the future, as States and the United Nations continue to invoke R2P language. *Id*. at 144; *see also* North Sea Continental Shelf Cases (Den. v. Ger. & Neth. v. Ger.), Judgment, 1969 I.C.J. Rep. 4, 45 ¶ 77 (Feb. 20) (describing the factors necessary for the customary international law).

151. Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441, 132 Stat. 5586 (2019). Explicit implementation of obligations to prevent, or any details of State regulations and procedures, are absent in the Proxmire Act of 1988, the United States implementing statute.

152. *Id.* § 7. The act affirms that "nothing [within its text] shall be construed as authorizing the use of military force," echoing the R2P framework.

153. WHITE HOUSE ET AL., ELIE WIESEL GENOCIDE AND ATROCITIES PREVENTION REPORT 4–5 (2019), https://www.whitehouse.gov/wp-content/uploads/2019/09/ELIE-WIESEL-GENOCIDE-AND-ATROCITIES-PREVENTION-REPORT.pdf [https://perma.cc/4L2T-GSKG]. The first annual report under the Elie Wiesel Genocide and Atrocity Prevention Act was published in September of 2019. In the report, the authors acknowledge that civil society actors have raised concerns and proposed recommendations. *Id.* Time will tell if the U.S. Government will take sufficient action to realize the full scope of its obligations to prevent under international law and under the new act.

minimum conditions of life under Article II(c) that would trigger a violation, Parties to the Convention have failed to apply its provisions and take appropriate preventative action.[154] Instead, the Convention is only raised in a narrow set of situations, typically after widespread and targeted mass killings have occurred.[155] As a result, numerous cases of extreme violence and atrocities across the world have been relatively ignored, even when intervention on the basis of Article II(c) would have been justified. The twenty-four year Indonesian occupation of East Timor from 1975–1999 is one such case.[156]

1. East Timor: Invasion, Mass Killings, and Resettlement Camps, 1975-1979

Despite the early warning signs of an Article II(c) violation in East Timor, including forced displacement, internment of indigenous populations, denial of health care in internment camps, and widespread disease, [157] the international community failed to

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154. *See* Nagan & Haddad, *supra* note 5, at 341.

155. *Id*.

156. The occupation of East Timor is but one of many cases that have been highlight as likely rising to the level of genocide, but largely ignored by genocide scholars. *See, e.g.*, Mundorff, *supra* note 42, at 61 (arguing that the American Indian boarding school program and Australia's child separation and removal programs from Aboriginal communities should be considered genocide); Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51, 51–61 (2006) (highlighting the magnitude of abuses that continue to persist in North Korea while the international community focuses on denuclearization instead); ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 142–44 (2d ed. 2011) (discussing the facts in Guatemala); *Id.* at 178–79 (discussing Iraqi Kurdistan); *Id.* at 293–99 (discussing Cambodia); *Id.* at 340–43 (discussing Bangladesh); *Id.* at 365 n.27 (mentioning Burundi); Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57, 59–60 (2003) (recounting 37 genocides that occurred between 1955 and 2001).

157 . BEN KIERNAN, GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA: DOCUMENTATION, DENIAL AND JUSTICE IN CAMBODIA AND EAST TIMOR 118–20 (1st ed. 2007). Between 1977–1979, hundreds of thousands of East Timorese were herded into "transit" and "resettlement" camps, if they weren't killed outright. The population control policies in the resettlement camps deliberately destroyed traditional forms of social organization, designed to reduce the indigenous population to a minority constituting genocide. Deborah Mayersen & Annie Pohlman, *Introduction* to GENOCIDE AND MASS ATROCITIES IN ASIA 1, 13 (Deborah Mayersen & Annie Pohlman eds., 2013). In the camps, detainees—already in a weakened state due to malnutrition and famine—died from disease and sickness. COMM'N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE (CAVR),

intervene or prevent the atrocity consistent with their obligations under Article I of the Convention.[158]

On December 7, 1975 Indonesia invaded East Timor to counteract the possibility of a new independent nation in a postcolonial pacific.[159] With the Portuguese departure from East Timor, the central Indonesian government saw an opportunity to unify the Timor island and prevent any influence of pro-left sympathies that challenged Indonesian control over the provinces.[160] Indonesian forces took over the major cities and began a campaign of terror until March 1979, when the territory was declared "pacified" of any resistance.[161] While the "pacification" ended in 1979, East Timor remained under Indonesian occupation until 1999.

During the course of the Indonesian invasion, civilians were gunned down in the streets,[162] forcibly displaced, and subjected from a range of massacres and psychological tactics of warfare including rape, sexual violence, and other crimes against humanity.[163] The harms intensified in 1977 when the Indonesian forces deepened military operations by targeting agricultural areas and other food sources.[164] Illnesses and the resulting food shortages forced displaced civilians to come down from their mountain areas of refuge and surrender to the occupying forces.[165] Hundreds of thousands of East Timorese were herded into State "transit" and "resettlement" camps, if they were not slain outright, by Indonesian troops.[166] The East Timorese were tagged, interrogated, and killed if they were suspected to be members of the resistance.[167]

CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE: EXECUTIVE SUMMARY 81–83 (2005), https://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf [https://perma.cc/99WT-MEYS] [hereinafter CAVR Report].

158. Genocide Convention, *supra* note 2, art. I.

159. Clinton Fernandes, *International Civil Society as Agent of Protection: Responses to the Famine in East Timor*, *in* GENOCIDE AND MASS ATROCITIES IN ASIA, *supra* note 157, at 54–55.

160. *Id.* at 55–56.

161. Mayersen & Pohlman, *supra* note 157, at 13.

162. KIERNAN, *supra* note 157, at 118.

163. Mayersen & Pohlman, *supra* note 157, at 13.

164. Clinton Fernandes, *International Civil Society as Agent of Protection*, *in* GENOCIDE AND MASS ATROCITIES IN ASIA, *supra* note 157, at 56.

165. *Id*.

166. *Id*.

167. CAVR Report, *supra* note 157, at 59–71.

Despite widespread evidence and reporting of the atrocities, the international community failed to react to the early warning signs about the camps. This cautious denial that a potential genocide was proceeding can largely be attributed to a desire to maintain positive relations with the Indonesian government.[168] At the conclusion of the Indonesian occupation, reports indicated that a significant number of the 100,000–200,000 deaths overall[169] were a result of malnutrition, famine, disease, and denial of humanitarian aid and medical care in the camps.[170] The international community took action only once the occupation ended, establishing a Commission for Reception, Truth and Reconciliation in East Timor to inquire into violations and facilitate justice in 2005.[171] However, the Commission did not even consider if an Article II(c) violation had occurred in East Timor. Instead, the report focused specifically on human rights violations, unlawful killings, forced displacement, detention, and torture.[172]

Cases such as East Timor illustrate the challenges that arise in preventing genocide due to the lack of judicial scrutiny and the murky definitions of genocide, which in turn allow for geopolitical interests, rather than legal obligations to prevent genocide, to drive

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168. Clinton Fernandes, *International Civil Society as Agent of Protection*, *in* GENOCIDE AND MASS ATROCITIES IN ASIA, *supra* note 157, at 57–59. Fernandes highlights the widespread acquiescence of the United States to the invasion of East Timor. He cites the memoirs of the United States Ambassador to the United Nations, Daniel Patrick Moynihan, to demonstrate that the United States desired that the United Nations be ineffective in any measures it took. The United States ultimately provided military support to the Indonesian government. *Id.*

169. Ben Kiernan, *The Demography of Genocide in Southeast Asia*, 35 CRITICAL ASIAN STUD. 585, 593–94 (2003) (noting that the estimated death toll in East Timor is likely closer to 150,000 but some estimates have calculated the death count to be 200,000 or higher).

170. CAVR Report, *supra* note 157, at 81–82.

171. CAVR Report, *supra* note 157, at 4; *see also* BOAS ET AL., *supra* note 113, at 207 (arguing no one was charged with genocide or a related inchoate crime in East Timor due to specific intent being too difficult to establish with the evidence available). Although the Commission for Reception, Truth and Reconciliation did not engage in full genocidal inquiry, scholars have argued that the actions in East Timor truly were physically destructive, highlighting the conditions of the camps during 1975-1979 and the loss of life due to malnutrition and disease. MATTHEW JARDINE, EAST TIMOR: GENOCIDE IN PARADISE 58 (1995); JOHN PILGER, DISTANT VOICES 264–67 (rev. ed. 1994) (describing the malnutrition and horrific conditions in the camps).

172. *See generally* CAVR Report, *supra* note 157 (enumerating the findings of the Commission across one hundred pages in the Executive Summary of the final report).

the international response to a crisis situation.[173] Situations that have the characteristics of genocide have escaped reproach, partly due to narrow definitions of genocide allowing States to discredit reports that indicate the onset of serious harms, thus weakening the future application of the Convention itself. States have often justified inaction in preventing genocide by equivocating and challenging whether a situation or allegation of an atrocity in fact qualifies as legal genocide under any of the Article II provisions.[174] The legacy of East Timor is but one of many tragedies that serve as a sobering reminder of the consequences of the modern conception of genocide. Furthermore, it raises the question of how we ought to reconcile the narrow conception that international courts and tribunals have afforded to the Genocide Convention with the authors' original intent, especially as State inaction can lead to the loss of hundreds of thousands of lives.

III. IMPLICATIONS FOR TODAY: REVIVING ARTICLE II(C) FOR MODERN ATROCITIES

Understanding the legal history and subsequent application of Article II(c) provides a deeper methodology for analyzing the questions concerning the Genocide Convention's function today. Relying on legal history, this Note has demonstrated that the original scope of Article II(c) encompasses intrinsic human rights protections, including but not limited to the right to health. As a result, minimum standards to respect, protect, and fulfill healthcare ought to be recognized and subsequently included in the domestic and international frameworks that set metrics for evaluating potential genocide and upholding prevention obligations.[175]

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173. Clinton Fernandes, *International Civil Society as Agent of Protection*, *in* GENOCIDE AND MASS ATROCITIES IN ASIA, *supra* note 157, at 57 (describing the various geopolitical motivations of various nations, including the United States, Britain, and France).

174. *See generally* Human Rights in East Timor and the Question of the Use of U.S. Equipment by the Indonesian Armed Forces: Hearing Before the Subcomm. on Asian and Pacific Affs. of the H. Comm. on Int'l Rel., 95th Cong. 5–26 (1977) (demonstrating past and present administrations' acceptance and military support of Indonesia's annexation of East Timor, and reduction of the genocide as a "passive defense" against a "low level . . . insurgency [with] very few civilian casualties" through testimony from senior United States officials).

175. In 2014, United Nations Secretary-General Ban Ki-moon and the United Nations Office on Genocide Prevention and the Responsibility to Protect published the FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES: A TOOL FOR

This Part begins by discussing the original conception of the Genocide Convention that captures that protectionist intent through the lens of health as a human right. Section III.A proposes a clearer framework to preventing genocidal crimes, by using the development of the right to health in human rights law to inform indicators and elements of what constitutes an Article II(c) violation. Section III.B then demonstrates how the renewed Article II(c) framework would apply and have utility with respect to the current Uyghur Muslim Crisis in Western China. Importantly, in clarifying the definition of genocide, this Note is not advocating for increased military intervention in humanitarian crises, or for a narrower conception of State sovereignty in order to prevent genocide. Rather, it calls for a return to the Convention's intended definitions for genocide under Article II(c) to ensure accurate identification of situations and conduct as genocide. As such, preventative measures and interventions can be clarified and better implemented within the existing doctrines of the Genocide Convention and the Responsibility to Protect.[176]

PREVENTION to support prevention strategies that reflect Member States' pre-existing obligations under International Humanitarian and Human Rights Law. The Framework builds on the well-established legal obligations States have individually and collectively set to protect populations at risk of atrocity crimes (including Article I of the Genocide Convention). The Framework operates from the notion that, to engage in prevention, it is possible to identify warning signs, risk factors, and established indicators to predict when an atrocity crime may occur. By identifying the root causes, precursors, and risk factors, then States can identify measures to be taken to prevent such crimes. The risk factors identified in the Framework cover behaviors, circumstances, and elements that create an environment conductive to the commission of atrocity crimes. The Framework lists 14 risk factors, and indicators for each of the risk factors. The first eight factors are common to any atrocity crime, and the remaining six are specific to the elements of the major international crimes—genocide, crimes against humanity, and war crimes. *See* U.N. OFF. OF GENOCIDE PREVENTION AND THE RESP. TO PROTECT, FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES: A TOOL FOR PREVENTION 9 (2014), https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [https://perma.cc./L4ST-BFAF] [hereinafter U.N. Framework for Atrocity Crimes Prevention].

176. For genocide, the obligation to prevent derived from Article I has become a norm of customary international law. DOYLE, *supra* note 131, at 115–16; JOHN HEIECK, A DUTY TO PREVENT GENOCIDE 100–110 (2018) (explaining why the duty to prevent genocide is a customary norm in international law). The Responsibility to Protect agreement reaffirms preventing atrocity crimes, and is further elaborated in the 2005 World Summit Resolution. G.A. Res. 60/1, *supra* note 15, ¶¶ 138–39; *see supra* Section II.B.2 for a discussion on the Responsibility to Protect.

A. Reviving Article II(c): "Conditions of Life" and the Right to Health

The questions raised by analyzing the legal history and application of Article II(c) carry practical implications that go beyond academic discourse. A proper definition is fundamental in strengthening accountability mechanisms between States, designating the jurisdiction of any court of tribunal, and determining the appropriate methodology in addressing genocidal impunity.

1. Article II(c) and the Right to Health

Genocide reigns as the "crime of crimes" at the top of international criminality in regards to severity and moral condemnation, always intended to cover more than just situations of mass killing.[177] Examining Raphael Lemkin's writings, as well as the records of treaty negotiations, reveals that the denial of healthcare was a consistent concern amongst the delegates during negotiations and debate, and was in fact intended to be covered within the scope of Article II(c).[178]

In particular, the delegates sought to ensure that the treaty would adequately protect against the genocidal tactics used during both the Nazi regime and the earlier Armenian massacre.[179] Specifically, the substance of Nazi concentration camps, including widespread illness and the absence of medical care, acts as a fundamental example of conduct that "must certainly be regarded as an instrument of genocide."[180] While the exact language of "medical care" was omitted from the final text, the exclusion of such specific factors that constitute "conditions of life" from the final version of the text was in fact purposeful in order to ensure that an expansive array of conduct would be captured as a violation of international law.[181]

As evidenced by the legal history and subsequent invocations of Article II(c), the scope of the provision encompasses an intrinsic

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177. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, § 1.4.1, at 14 (ICTR Trial Chamber Sept. 2, 1998); *see also* Genocide Convention, *supra* note 2, arts. II(a)–(e), (defining the wide array of conduct that constitutes genocide).

178. *See supra* Section I.B.1.

179. Perlman, *supra* note 59, at 5.

180. ESCOR, Ad Hoc Comm. on Genocide, 3d mtg. at 14, U.N. Doc. E/AC.25/SR.4 (Apr. 15, 1948).

181. Lars Berster, *supra* note 52, at 79, 90–91.

right to health.[182] In its broadest sense, this inherent right to health obligates States to respect and protect access to adequate coverage and basic health services, as well as prohibits intentional interference with the enjoyment of the right to health.[183]

Examining the wide array of international instruments subsequent to the Genocide Convention that recognize a right to health, including the ICESCR, adds further detail to the essence of Article II(c) health protections. Human rights law defines standards of medical care and access, specifying a core set of obligations that States ought to recognize in discourse regarding violations of the Genocide Convention under Article II(c).[184]

In articulating health factors that would define a violation of Article II(c), the standard the *We Charge Genocide* petitioners relied on provides a valuable blueprint. In the petitioners' view, longitudinal data demonstrating disparate health outcomes, plus evidence of discriminatory policies denying healthcare to the population, sufficiently demonstrated violation of Article II(c).[185] They further establish that even in the rare instances where medical care was accessible to Black American populations, the care received was inadequate and did not appropriately address the realities that Black American communities faced.[186]

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182. The legal history and subsequent application of Article II(c) likely demonstrate protections for other rights as well, such as rights to enjoy housing, shelter, and food when available. However, this Note focuses on the specific obligations that arise as it relates to the right to health.

183. *See supra* Section I.D. Understanding Article II(c) with a right to health lens further comports with contemporary ideas of the relationship between State power and a person's existence. In the 1970s, Michel Foucault introduced his theory of biopolitics, examining how States use public health systems to control populations and livelihoods. MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÉGE DE FRANCE 1975–1976 243–55 (Mauro Bertani et al. eds., David Macey trans., 1st ed. 2003). Achille Mbembe builds on Foucauldian frameworks by arguing that social and political power can dictate how some people may live and how they must die. Under the theory of necropolitics, power structures exist that subject people to the power of death, which any extermination. This theory of the "living dead" argues that although people are technically alive, they are living in conditions in which their existence is under the control of a political power, as in cases of slavery, apartheid, and colonization. *See generally* Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11 (Libby Meintjes trans., 2003) (connecting the concept in depth to the term "necropolitics").

184. *See supra* Section I.D.

185. We Charge Genocide, *supra* note 20, at 125–32.

186. *Id.* at 128.

The legal strategy adopted by the petitioners aligns with the original vision of the Genocide Convention authors: the denial of healthcare can indeed function as a tool in committing genocide against a protected group.[187] As such, evaluating healthcare accessibility and acceptability ought to be included as a plausible framework for applying Article II(c) today.

2. Incorporating the Right to Health as Early Indicators for Preventing Genocide

Reconnecting Article II(c) to the language of a right to health carries significant normative value for identifying cases of genocide before they occur and provides insight on how the international community can best implement the Convention to prevent future occurrences of genocide.

Since the R2P obligations were articulated at the 2005 World Summit, the international community has continued to discuss how to best address genocide amongst the other atrocity crimes.[188] In 2018, the Human Rights Council invoked both the Genocide Convention and R2P, and called upon its member states to strengthen the responsibility to protect and prevent genocide through early warning mechanisms and international cooperation.[189] But, despite the continuous acceptance by States that more must be done to prevent genocide, there have been notable challenges in achieving successful results.[190]

The primary framework for prevention published by the United Nations Office of Genocide Prevention, prioritizes universal

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187. *See supra* Sections I.A–I.B. Dicta of international criminal tribunals suggest that the petitioners identified a plausible legal argument, as tribunals consistently identified lack of medical care as a possible action in violation of Article II(c). *See* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement ¶ 692 (ICTY Trial Chamber Sept. 01, 2004); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 518 (ICTY Trial Chamber July 01, 2003); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement ¶ 157 (ICTR Trial Chamber Nov. 16, 2001); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement ¶ 52 (ICTR Trial Chamber May 26, 2003).

188. The three other atrocity crimes covered by the R2P doctrine are war crimes, ethnic cleansing, and crimes against humanity. *See supra* note 145 and accompanying text.

189 . Human Rights Council Res. 37/26, 1–3, ¶ 18, U.N. Doc. A/HRC/RES/37/26 (Mar. 23, 2018).

190 . U.N. Secretary-General, Responsibility to Protect: From Early Warning to Early Action: Rep. of the Secretary General, ¶ 3, U.N. Doc. A/72/884-S/2018/525 (June 1, 2018).

implementation of early indicators to identify conflict situations.[191] However, it is widely criticized as not being comprehensive for practical application[192] and has had limited success in atrocity prevention.[193] As it relates to Article II(c), the framework tool fails to specify what metrics States should monitor or track in order to determine if a situation arises to a potential violation of the "conditions of life" provision.[194]

Additionally, scholars have criticized the current atrocity prevention scheme as focusing too much on mobilizing action or resolutions from the United Nations system or the United Nations Security Council.[195] But, international action is necessary, as it is often the State itself perpetuating the international crime against its own people, or the State itself that is unable to protect their own civilians from independent entities committing atrocity crimes within their territory.[196] Furthermore, reliance on the Security Council to take action has been impractical, as Security Council Resolutions are only passed once a situation reaches a high severity threshold.[197] Recent trends also indicate that permanent members are increasingly

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191. U.N., Framework for Atrocity Crimes Prevention, *supra* note 175.

192. SUSAN BREAU, THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL LAW AN EMERGING PARADIGM SHIFT 196–97 (2016).

193. *See* ALEX J. BELLAMY & EDWARD C. LUCK, THE RESPONSIBILITY TO PROTECT FROM PROMISE TO PRACTICE 186–88 (2018) (discussing how the U.N. Security Council involvement can displace atrocity prevention as "the practical concern").

194. U.N, Framework for Atrocity Crimes Prevention, *supra* note 175, at v. The document describes two specific risk factors for genocide. First, it highlights indicators for intergroup tensions or patterns of discrimination against protected groups. The document also elaborates signs of an intent to destroy a protected group, in whole or in part. Article I(c) is mentioned in the appendix, which cites to the Convention as the legal definition for genocide.

195. BELLAMY & LUCK, *supra* note 193, at 187. Recall that the language of the Genocide Convention is permissive towards the United Nations; Article VIII states that "[c]ontracting parties *may* call upon the competent organs of the United Nations to take such action . . . for the prevention and suppression of acts of genocide." Genocide Convention, *supra* note 2, art. VIII (emphasis added).

196. ESCOR, 69th Sess., 7247th mtg. at 4, U.N. Doc. S/PV.7247(Aug. 21, 2014) (containing a transcript from a speech delivered by then High Commissioner for Human Rights, Navi Pillay, about the responsibility to act in crisis moments).

197. BREAU, *supra* note 192, at 183; U.N. Charter art. 39 (describing the role and mandate of the U.N. Security Council).

willing to exercise their veto for proposed Security Council interventions.[198]

However, successful cases of intervention indicate that deeper and sustained political commitments from States external to the conflict or from regional alliances can be sufficient to address atrocity prevention,[199] and that the United Nations system alone cannot be relied upon for prevention.[200] As a result, States have begun to implement their own strategies through legislation and internal metrics to assess when a mass atrocity may occur,[201] such as the Elie Wiesel Act in the United States.[202]

It is critical that States incorporate factors already within the corpus of established international law when taking preventative action, or else risk criticism that the conduct impermissibly interferes on another State's sovereignty.[203] When it comes to genocide in

198. RAMESH THAKUR, REVIEWING THE RESPONSIBILITY TO PROTECT ORIGINS, IMPLEMENTATION AND Controversies 183 (2019). The veto held by the five permanent members (China, France, the United Kingdom, Russia, and the United States) of the U.N. Security Council is a well-recognized limit on Council's mandate. The ability to authorize military and political intervention renders the U.N. Security Council as an incredibly powerful international organization in the interstate system. Recent trends suggest the permanent members are more likely to exercise their veto on political grounds, not legal, when assessing "compliance" or "violations" of the U.N. Charter. The actual power of the Security Council is limited by the interests of powerful states, such as the ability of the five permanent members and their veto power. This has led to the conclusion that the U.N. Security Council operates at the "boundary between international law and politics, both undermining and reinforcing the distinction between them." Ian Hurd, *The UN Security Council and the International Rule of Law*, 7 CHINESE J. INT'L POL. 361, 361–69 (2014).

199. BELLAMY & LUCK, *supra* note 193, at 187 (highlighting OSCE efforts in Kyrgyzstan, Kofi Annan's mediation team in Kenya, and ECOWAS efforts in Guinea as successful interventions into a possible atrocity crime where the U.N. Security council took "a back seat").

200. *Id.* at 187–91 (theorizing that successful R2P efforts go beyond the United Nations. Rather, efforts must be integrated and emerge from the local, national, and regional levels).

201. *Id.* at 121–82.

202. Elie Wiesel Genocide and Atrocities Prevention Act, *supra* note 151.

203. The principle of sovereignty is fundamental to contemporary international law, reflecting the premise that States mutually recognize the political independence and the exercise of formal equality in relations amongst each other. This is further characterized by a maxim of non-intervention in domestic matters of other States. U.N. Charter art. 2. International Law however recognizes limitations on the principle of absolute sovereignty. Among the most powerful, widely shared rules, that limit State sovereignty are genocide, war

particular, State officials should revisit Lemkin's writings and the negotiating records to achieve the intended protective scope of all of the provisions within the Genocide Convention. As Article II(c) contains intrinsic health protections,[204] States should monitor and assess violations of basic standards of healthcare as one of the many indicators of potential genocide. Such metrics should build on the minimum core thresholds and principles of non-discrimination as articulated by the Committee on Economic Social and Cultural Rights ("CESCR"), and incorporate diagnostic tools for comparative population-based health outcomes and access to healthcare.

In particular, the CESCR Committee has identified that "underlying determinants of health" as well as health related goods, capacities, and services such as "adequate sanitation facilities, hospitals, [and] clinics" must be made available to uphold equal treatment and minimum obligations for health rights.[205] Where resources are demonstrably lacking, an obligation remains to provide and "ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances."[206]

The CESCR Committee has further specified four principles essential in health care accessibility: reaffirming non-discrimination, and specifying the physical availability, the economic affordability, and information accessibility in facilities and services.[207] The Committee emphasized that health services must be "respectful of medical ethics and culturally appropriate," and must be respectful of the culture of populations, gender, life-cycle requirements, and of confidentiality.[208] Finally, health services and facilities must be ethically considerate as well as "scientifically and medically appropriate and of good quality."[209] States must ensure access to properly trained medical personnel, adequate and unexpired drugs, safe hospital equipment, potable water for treatment, and sufficient sanitation services in facilities themselves.[210] Such interpretations of

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crimes, crimes against humanity, and ethnic cleansing. Implementing the Responsibility to Protect, U.N. Doc. A/63/77, *supra* note 145, ¶¶ 11, 14.

204. *See supra* Sections I.A–I.B.

205. General Comment 14, *supra* note 91, ¶ 12(a).

206. Comm. On Econ., Soc. & Cultural Rts., An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, ¶ 4 U.N. Doc. E/C.12/2007/1 (Sept. 21, 2007).

207. General Comment 14, *supra* note 91, ¶ 12(b).

208. *Id*.

209. *Id*.

210. *Id*. ¶ 11.

the right to health are particularly useful, at a minimum, to incorporate into diagnostic tools for monitoring and evaluating potential genocides. But to achieve robust indicators, States ought to look at further collected and analyzed data on a disaggregated basis, including on the basis of prohibited grounds of discrimination and amongst all conditions that impact one's health, such as food, water, or housing.[211]

By returning to the original intent of the Article II(c), States can fully incorporate the protection proffered by the Genocide Convention, work toward strengthening accountable governance structures, and utilize targeted systemic tools that include peer review, public scrutiny, NGO involvement, and mediation to successfully identify and prevent genocide before mass deaths and destruction of a protected group transpire.[212]

B. Applying Article II(c) to the Uyghur Crisis

A return to the original scope of Article II(c) would carry major implications for modern crisis situations, with particular salience to the current situation in the Xinjiang region of China and the internment of Uyghur Muslims. The information revealed in the China Cables,[213] eyewitness testimony,[214] and reports presented at the United Nations have all spurred appeals to the international community calling for a response to the detention of ethnic minorities in the internment camps in Xinjiang.[215] A revived Article II(c) framework provides for an additional and useful legal basis to address the Uyghur persecution in Western China.

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211. *Id*. ¶¶ 16, 20, 57, 63; *see also* WORLD HEALTH ORG., NATIONAL HEALTH INEQUALITY MONITORING MANUAL 19–24 (2017), https://apps.who.int/iris/bitstream/handle/10665/255652/9789241512183-eng.pdf;jsessionid=29558A18A827FB1F26DA1CAA458F5485?sequence=1 [https://perma.cc/QCR4-N558] (describing how and why States should disaggregate data collection and analysis in order to address health inequalities).

212. Implementing the Responsibility to Protect, U.N. Doc. A/63/77, *supra* note 145, ¶¶ 4, 9–66.

213. Ramzy & Buckley, *supra* note 13.

214. Mihrigul Tursun Congressional Testimony, *supra* note 14.

215. Buckley, *supra* note 12; Lau, *supra* note 12 (further describing the global outcry to the internment of Uyghur Muslims).

1. Beyond Cultural Genocide

Allegations of Chinese wrongdoing have hardly explored a violation of the Genocide Convention.[216] Instead, human rights advocates have primarily alleged that China is committing crimes of arbitrary detention, persecution, and widespread torture.[217] Others have claimed that the abuse goes further, in that the elimination of the group's identity constitutes a type of genocide by means of "re-education" or assimilation.[218] However, without any evidence of systematic mass killings, the discussion has been largely been limited to a potential cultural genocide, which is neither defined as a crime under international law nor within the reach of the Genocide Convention.[219] In late June 2020, after the publication of a report[220] describing a State sponsored campaign of mandatory birth control and sterilizations to suppress birthrates among ethnic Uyghur communities, allegations of a potential violation of the "forced sterilization" provision, Article II(d), began to emerge.[221] Yet, the new

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216. The allegations between 2017–2020 predominately alleged that the conduct was properly defined as "cultural genocide." Patrick Goff, *China's 'Cultural Genocide': Uighur Repression Continues*, IRISH TIMES (June 20, 2020), https://www.irishtimes.com/news/world/asia-pacific/china-s-cultural-genocide-uighur-repression-continues-1.4281558 [https://perma.cc/2SM8-UNUN]. However, upon the release of Dr. Adrian Zenz's report documenting systemic sterilization of Uyghur women in late June 2020, many more have been willing to label China's conduct as a violation of the Genocide Convention. *See e.g.*, Editorial Board, *supra* note 14 (noting that prior to the publication of a report documenting systemic sterilization of Uyghur women in June 2020, much of the advocacy focus has been on cultural genocide or human rights violations).

217. Kate Cronin-Furman, *China Has Chosen Cultural Genocide in Xinjiang—For Now*, FOREIGN POL'Y (Sept. 18, 2018), https://foreignpolicy.com/2018/09/19/china-has-chosen-cultural-genocide-in-xinjiang-for-now/ [https://perma.cc/S54R-N5V8]; *China: Massive Crackdown in Muslim Region*, HUM. RTS. WATCH (Sept. 9, 2018), https://www.hrw.org/news/2018/09/09/china-massive-crackdown-muslim-region [https://perma.cc/8REY-RBKZ].

218. Azeem Ibrahim, *China Must Answer for Cultural Genocide in Court*, FOREIGN POL'Y (Dec 3, 2019), https://foreignpolicy.com/2019/12/03/uighurs-xinjiang-china-cultural-genocide-international-criminal-court/ [https://perma.cc/K4GL-XQGW].

219. *See* Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?,* 29 EUR. J. INT'L L. 373, 374–75 (2018). Unlike Article II(c), cultural genocide did not survive treaty negotiations despite Lemkin's original proposal of including the concept in original drafts. Morris, *supra* note 127, at 29–32.

220. *See* Zenz, *supra* note 14.

221. *China Cuts Uighur Births with IUDs, Abortion, Sterilization,* ASSOCIATED PRESS (June 29, 2020), https://apnews.com/269b3de1af34e17c1941a514f78d764c [https://perma.cc/MT3V-SWYL]; Genocide Convention, *supra* note 2,

allegations emerging in 2020 hardly engages in a robust Article II(c) examination.

Viewing China's actions as primarily a cultural genocide or exclusively an Article II(d) violation, not only precludes the full force of international legal instruments to resolve the crisis, but also further reflects our contemporary application of the Genocide Convention that limits genocide and glosses over crucial provisions such as Article II(c). However, in light of the originalist intent behind Article II(c), the Convention has provided a sufficient legal basis for a genocidal inquiry based on evidence available prior to June 2020.[222] In particular, Article II(c) provides a framework for practitioners to examine the "conditions of life" at the internment camps, and ensure they fulfill minimum core and non-discrimination standards articulated by human rights law. If precursors of genocide were present, State Parties would then be obligated to take prevention measures and address the destructive conditions of life imposed on a protected group.

2. Healthcare Denial in Xinjiang Violates Article II(c)

There is significant evidence published before June 2020 that indicates the treatment toward Uyghur Muslims constitutes a violation of Article II(c). Reports and testimony have consistently identified diminished health outcomes and clear deprivations of health access perpetrated by Chinese officials against Uyghur Muslims. Researchers have identified that Uyghur populations in Xinjiang have long suffered population health disparities when compared to the ethnically majority Han populations in the same area.[223] Within the internment camps, individuals have been subject

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art. II(d), (defining forced sterilization as Genocide; *see, e.g.*, Press Release, United States Comm'n on Int'l Religious Freedom, USCIFR Warns that Forced Sterilization of Uyghur Muslims is Evidence of Genocide (June 30, 2020), https://www.uscirf.gov/news-room/press-releases-statements/uscirf-warns-forced-sterilization-uyghur-muslims-evidence [https://perma.cc/D6V2-PTRU] (suggesting the legal criteria for genocide may be met and citing to The Associated Press Report and Article II(d) of the Genocide Convention).

222. Even if the intent of the violative conduct was culturally motivated, an Article II violation is still possible. Under Article II, physical acts intended to destroy the group as a physio-biological entity would still amount to a violation constituting genocide. Mundorff, *supra* note 42, at 112.

223. Brenda L. Schuster, *Gaps in the Silk Road: An Analysis of Population Health Disparities in the Xinjiang Uyghur Autonomous Region of China*, 198 CHINA Q. 433, 433–34 (2009).

to militaristic discipline, rape, torture, and, in some cases, death.[224] Survivors report instances of waterboarding, [225] electrocution, [226] repeated beatings,[227] torture by stress and submission positions,[228] and injections of unknown substances.[229] Eyewitness accounts have reported that detainees are denied medical access for treatable conditions and that a number of prisoners have died as a result of poor living conditions and a lack of medical treatment.[230] Testimony from former prisoners describes denial of treatment to those suffering from severe diabetes and refusal to provide prescription medicines to recent surgery patients.[231] Additionally, human rights groups have consistently documented Chinese officials forcibly harvesting organs from religious minorities, including coerced operations on Uyghur

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224. U.S. DEP'T OF STATE, HUM. RTS. PRAC., CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2018 HUMAN RIGHTS REPORT 2–20 (2018), https://www.state.gov/wp-content/uploads/2019/03/CHINA-INCLUDES-TIBET-HONG-KONG-AND-MACAU-2018.pdf [https://perma.cc/2WAB-B3MP].

225. Simon Denyer, *Former Inmates of China's Muslim 'Reeducation' Camps Tell of Brainwashing, Torture*, WASH. POST (May 17, 2018), https://www.washingtonpost.com/world/asia_pacific/former-inmates-of-chinas-muslim-re-education-camps-tell-of-brainwashing-torture/2018/05/16/32b330e8-5850-11e8-8b92-45fdd7aaef3c_story.html (on file with the *Columbia Human Rights Law Review*).

226. Mihrigul Tursun Congressional Testimony, *supra* note 14.

227. *Id*.

228. Gerry Shih, *China's Mass Indoctrination Camps Evoke Cultural Revolution*, ASSOCIATED PRESS (May 17, 2018), https://apnews.com/6e151296fb194f85ba69a8babd972e4b/Chinese-mass-indoctrination-camps-evoke-Cultural-Revolution [https://perma.cc/44ZY-NJUP].

229. Flint Duxfield & Ian Burrows, *Uyghur Woman Details Life Inside Chinese 'Reeducation Camp' in Xinjiang,* ABC NEWS AUSTRALIA (Jan. 8, 2019), https://www.abc.net.au/news/2019-01-08/uyghur-woman-details-life-inside-chinese-re-education-camp/10697044 [https://perma.cc/JXT7-REBF].

230. Mihrigul Tursun Congressional Testimony, *supra* note 14, at 5. During her testimony, Mihrigul Tursun recounted witnessing nine women die, citing poor health and safety standards while she was in detention as the causes. *Id.*

231. Sayragul Sauytbay, a Uyghur school teacher, fled China in 2019 after her release from internment. Her story, describing what she experienced and witnessed as a prisoner in the camps, was published in October 2019. In her interview she described how, even when inmates were sick, they did not receive the medical care they needed. David Stavrou, *A Million People Are Jailed at China's Gulags. I Managed to Escape. Here's What Really Goes on Inside*, HAARETZ (Oct. 17, 2019), https://www.haaretz.com/world-news/.premium.MAGAZINE-a-million-people-are-jailed-at-china-s-gulags-i-escaped-here-s-what-goes-on-inside-1.7994216 [https://perma.cc/74BP-DX7B].

Muslim detained in the camps.[232] Repeated orders, evidenced from the leaked Xinjiang Papers, demonstrate an intent to "break their lineage, break their roots, break their connections, and break their origins," and to round up everyone who should be rounded up," with the aim of eradicating the Uyghur communities.[233]

Such evidence goes beyond allegations of cultural genocide and encompasses harm perpetrated well before the reports of forced sterilization. The health practices and abusive treatment would fulfil the requisite actus reus elements under the originalist Article II(c) framework analyzed by this Note. By shifting the conversation squarely within the Genocide Convention and Article II(c), advocates and State Officials gain access to substantial legal bases with clear legal obligations on perpetrating actors, like China, and on third-party countries that have ratified the treaty, like the United States, to take measures designed to end the Uyghur Crisis.[234]

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232. The China Tribunal, an organization dedicated to documenting cases of organ harvesting in China, testified in front of the United Nations Human Rights Council, advising the United Nations that Uyghurs have been operated upon while still alive at the camps. Nabila Ramdani, *While China Harvests Human Organs from its Persecuted Minorities, Britain is Staying Silent to Protect Free Trade*, INDEPENDENT (Sept. 25, 2019), https://www.independent.co.uk/voices/china-religious-ethnic-minorities-organ-harvesting-uighur-muslims-falun-gong-brexit-a9120146.html [https://perma.cc/74R8-TRVX]; *see also* Emma Batha, *U.N. Urged to Investigate Organ Harvesting in China*, REUTERS (Sept. 24, 2019), https://www.reuters.com/article/us-china-rights-organ-harvesting/un-urged-to-investigate-organ-harvesting-in-china-idUSKBN1W92FL [https://perma.cc/PXU5-R6RX] (elaborating on the international community's awareness of China's organ harvesting).

233. Rayhan Asat & Yonag Diamond, *The World's Most Technologically Sophisticated Genocide Is Happening in Xinjiang*, FOREIGN POL'Y (July 15, 2020), https://foreignpolicy.com/2020/07/15/uighur-genocide-xinjiang-china-surveillance-sterilization/ [https://perma.cc/N75M-J3FA]. Noteworthy, the leaked documents in the China Cables do specify rules and guidelines for the provision of basic health and physical welfare in the camps. Autonomous Region Party Pol. & Legal Affs. Comm'n, *Autonomous Region State Organ Telegram: Opinions on Further Strengthening and Standardizing Vocational Skills Education and Training Centers Work*, ¶¶ 6, 21 (2017) (China), https://assets.documentcloud.org/documents/6558510/China-Cables-Telegram-English.pdf [https://perma.cc/7KB5-EHD8]. However, testimony from prisoners, including Sayragul Sauybay's interview in 2019 to *Haaretz* and other eye-witness accounts, suggests that these guidelines are widely ignored and that sick inmates did not receive the medical care they needed. Stavrou, *supra* note 231; Mihrigul Tursun Congressional Testimony, *supra* note 14, at 5.

234. Analyzing the Uyghur crisis under the lens of the Genocide Convention carries significant legal force. The crime of genocide carries both free-standing customary international law obligations as well as treaty obligations,

Current advocacy efforts face significant barriers—namely, the narrow modern conception of genocide—characterized by superficial judicial scrutiny and geopolitical interests taking center stage over legal obligations, resulting in States navigating China's international position and influence.[235] Applying the originalist framework analyzed by this Note alleviates the ambiguity about Article II(c)'s relevance and allows individual States to take legally-sound measures against China to ensure compliance with the Genocide Convention itself.[236]

Notably, States have shown a desire and readiness to take actionable steps in response to China's conduct in Xinjiang. In June 2020, the United States Government passed the Uyghur Human Rights Policy Act, without any reference to the Convention itself, and shortly thereafter imposed sanctions and visa restrictions against senior Chinese officials responsible for the internment camps and for the abuses against Uyghur Muslims.[237] However, China quickly

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with detailed provisions such as Article II(c), to prevent and protect against atrocity crimes. *See* DOYLE, *supra* note 131, at 115–16. For genocide, obligations for States to take preventative action stem, first, from Article I of the Genocide Convention, which has risen to the level of customary international law. *Id*., Genocide Convention, *supra* note 2, art. I. Moreover, they also exist as obligations under the Responsibility to Protect doctrine, which affirms norms of preventing genocide. *See* G.A. Res. 60/1, *supra* note 15, ¶¶ 138–39 (the genocide provisions of the Right to Protect agreement); *see also supra* Section II.B.2 (discussing this agreement further). Articulating the Uyghur crisis as legal genocide would thus carry substantial weight when conducting advocacy at the international level, both in dialogue with China as well as with third-party countries like the United States.

235 . *See supra* Section II.C (highlighting the role of geopolitical considerations in the international community's response to the occupation of East Timor). In the absence of enforcement mechanisms, compliance with international obligations often relies on dialogue between States. In this realm, principles of reciprocity and comity dictate if States change their own behavior to comply with international obligation. Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 222 (2003).

236. Recall that Article I of the Genocide Convention requires States to "prevent and punish" genocide, a responsibility within well-established, internationally-enforceable law. Genocide Convention, *supra* note 2, art. I; DOYLE, *supra* note 131, at 115–16.

237. Uyghur Human Rights Policy Act of 2020, Pub. L. No. 16-145, 134 Stat. 648 (2020) (to be codified at 22 U.S.C. § 6901). The targets of sanctions, enacted by the United States Executive Branch on July 9, 2020, includes Xinjiang Communist Party Secretary Chen Quanguo, a senior member of China's Communist Party leadership, as well as other officials including Zhu Hailun, Wang Mingshan, and Huo Liujun, under the Global Magnitsky Human Rights Accountability Act. Pranshu Verma & Edward Wong, *U.S. Imposes Sanctions on*

decried the Act as a violation of international law and an interference with their national integrity and sovereignty.[238] By returning to the originalist definitions of Article II(c), subsequent diplomatic engagement and political interventions, either bilaterally or multilaterally, would carry additional credibility under the Genocide Convention and well-recognized international legal obligations.[239]

Chinese Officials Over Mass Detention of Muslims, N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/2020/07/09/world/asia/trump-china-sanctions-uighurs.html (on file with the *Columbia Human Rights Law Review*). The Act allows the United States to impose sanctions on foreign government officials implicated in human rights abuses. Global Magnitsky Human Rights Accountability Act of 2016, 22 U.S.C. § 2656, at 976–78. The amended Uyghur Human Rights Policy Act requires approval by the United States Senate before it can be sent to the President. The action by the United States is a significant shift from its previous foreign policy towards China, and calls for a stronger response by the United States in response to the Uyghur crisis. *US House Approves Uighur Act Calling for Sanctions on China's Senior Officials*, THE GUARDIAN (Dec. 4, 2019), https://www.theguardian.com/world/2019/dec/04/us-house-approves-uighur-act-calling-for-sanctions-on-chinas-politburo-xinjiang-muslim [https://perma.cc/A8G6-R3TS].

238. Xinjiang Governor Shohrat Zakir criticized the Act as a violation of international law and an interference in China's internal affairs. *US Bill on China's Xinjiang Violates International Law*, AL JAZEERA (Dec. 9, 2019), https://www.aljazeera.com/news/2019/12/bill-china-xiniang-violates-international-law-official-191209023001997.html [https://perma.cc/8EAF-Z5XP]. Notably, the jurisdictional basis for the United States bill was the Global Magnitsky Human Rights Accountability Act, not obligations under Article 1 of the Genocide Convention.

239. The lack of centralized enforcement mechanisms combined with the U.N. Security Council veto power has led critics to suggest that enforcing international law is folly when it comes to the five permanent members, as they can selectively utilize their veto power, hampering any ability to condemn illegal action. ADAM LUPEL & LAURI MÄLKSOO, INT'L PEACE INST., A NECESSARY VOICE: SMALL STATES, INTERNATIONAL LAW, AND THE UN SECURITY COUNCIL 5 (Albert Trithart & Gretchen Baldwin eds., 2019), https://www.ipinst.org/wp-content/uploads/2019/04/1904_A-Necessary-Voice_Final.pdf [https://perma.cc/PP3A-XPDY]. Such was the case during Russia's annexation of Crimea in 2014. *Id*. On the other hand, there is widespread and consistent state practice across international law demonstrating that countries do in fact respect international law, including the five permanent members of the U.N. Security Council, and that they also go to great lengths to justify the international legality of foreign and domestic policy. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) ("Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."). Governments tend comply with their international agreements due to reputation, fear of retaliation, and concern about effects of precedents. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 106 (1984). For instance, China has continuously sought to justify their actions in the South China Sea as compliant

Taking preventative action within the full scope of the Genocide Convention would result in a stronger response to the treatment of Uyghur Muslims. Invoking the language of R2P further adds additional normative political credibility on top of the freestanding legal obligations stemming from the Genocide Convention.[240] And positive action outside the U.N. Security Council is indeed possible. Responses could range from encouraging the U.N. Secretary-General to set up a U.N. Commission of Inquiry,[241] to engaging the International Courts on strategic litigation.[242] But, the

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with international law. *China Has Right to Sail Near Indonesia's Natuna Islands, Beijing Says*, RADIO FREE ASIA (Jan. 2, 2020), https://www.rfa.org/english/news/china/indonesia-natuna-01022020165115.html [https://perma.cc/BYZ7-R6EP]; Teh-Kuang Chang, *China's Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal Perspective*, 23 CASE W. RES. J. INT'L L. 399, 408–13, 420 (1991) (cataloguing China's arguments for legal claim over disputed territories).

240. R2P, explicitly and implicitly, has been invoked successfully to encourage the resolution of crises. Such examples include Kenya in 2008 and Guinea in 2009, where raising the possibility that a violation had been committed led to a response from the international community that encouraged solutions, averting a full-blown atrocity crime from occurring. *See* DOYLE, *supra* note 131, at 125–27.

241. For example, U.N. Secretary-General Ban Ki-moon established a Commission of Inquiry into an allegation of a crime against humanity in Guinea in 2009 when anti-government protesters were violently gunned down in 2009. Michelle Nichols, *UN Chief Ban Launches Inquiry into Guinea Violence,* REUTERS (Oct. 30, 2009), https://www.reuters.com/article/us-guinea-un/u-n-chief-ban-launches-inquiry-into-guinea-violence-idUSTRE59T3ZB20091030 (on file with the *Columbia Human Rights Law Review*). Due to Russian opposition, the U.N. Security Council did not support the inquiry. *Id.* In fact, on July 28, 2020 the French Foreign Minister Jean-Yves Le Drain proposed a U.N.-led observer mission headed by the U.N. High Commissioner for Human Rights, Michelle Bachelet, to assess the Uyghur situation. Nathanaël Charbonnier, *Persécution des Ouïghours en Chine: Jean-Yves Le Drian souhaite l'intervention d'une mission international au Xinjiang*, FR. INFO (July 29, 2020), https://www.francetvinfo.fr/politique/jean-castex/gouvernement-de-jean-castex/persecution-des-ouighours-en-chine-jean-yves-le-drian-souhaite-l-intervention-d-une-mission-internationale-au-xinjiang_4060211.html [https://perma.cc/CNY6-X9NN].

242. Although there are jurisdictional challenges for securing accountability in international forums, efforts led by The Gambia at the International Court of Justice addressing the Rohingya Muslim Crisis may serve as a useful precedent. Laignee Barron, *U.N.'s Top Court Orders Myanmar to Take All Measures to Prevent Genocide Against Rohingya*, TIME (Jan. 23, 2020), https://time.com/5770080/myanmar-rohingya-genocide-un-court/ [https://perma.cc/824G-R4M2]. Jurisdictional barriers also challenge the ability to acquire justice through the International Criminal Court ("ICC") as China has not acceded to the Rome Statue. However, the ICC Pre-Trial Chamber's 2018 ruling on the alleged deportation of the Rohingya from Myanmar, who like China has

most potent measure may come from individual States forming an informal, but cohesive and credible, coalition to push for unilateral sanctions and economic pressure against China, substantiated from the Genocide Convention and R2P frameworks. For the greatest normative strength, the coalition should include States from all major continents and be framed in a direct and nuanced manner.[243]

By virtue of incorporating language of a possible Genocide Convention violation when carrying out coercive or non-coercive tools addressing the Uyghur crisis, a prima facie case laying out the claim would be established at the geopolitical stage prioritizing the responsibility to prevent genocide. For example, in response to a uniform coalition of States putting economic pressure on China, China would then carry a burden to convincingly demonstrate that they have not violated any of the Genocide Convention provisions, thereby increasing transparency and taking concrete steps to preventing, or halting, a potential genocide from occurring in Xinjiang.

CONCLUSION

The ongoing Uyghur crisis in China indicates that there is still more to achieve in order to fully protect vulnerable populations against genocidal acts. As evidenced by the East Timor occupation, a failure to identify early warning signs of genocide and to take appropriate preventative measures at the initial stages of an atrocity results in the loss of numerous lives and significant harm. But, the Genocide Convention was imagined from its onset to function as a protective instrument. The earliest draft of the Genocide Convention encompassed a broad rights conception within its text, including an

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not signed onto the Rome Statute, to Bangladesh, a State Party to the ICC, may open a path for accountability in Xinjiang. Press Release, International Criminal Court, ICC Pre-Trial Chamber I Rules that the Court May Exercise Jurisdiction over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh (Sept. 6 2018), https://www.icc-cpi.int/Pages/item.aspx?name=pr1403 [https://perma.cc/M9SE-2S8L]. Complaints have already been filed in front of the ICC on the Rohingya Bangladesh precedent already. Marlise Simons, *Uighur Exiles Push for Court Case Accusing China of Genocide*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uighur-court.html (on file with the *Columbia Human Rights Law Review*).

243. For instance, one such coalition could include the United States, Mexico, the European Union, India, Indonesia, Australia, South Africa, Nigeria, Argentina, and Chile pursuing unilateral sanctions against certain persons or ministries of China.

explicit interest in protecting equal access to basic healthcare. Ultimately, the delegates who concluded the final version of the treaty shared that same interest as well, enshrining an intrinsic right to health protection within Article II(c).

An examination of the case law, preparatory materials, early invocations of the treaty, and the Genocide Convention taken together demonstrate the right to health protections envisioned therein. Significant consideration should be paid to returning Article II(c) to its originalist conception and to incorporating the standards articulated by human rights law as evaluation metrics in order to strengthen State Party obligations to protect and prevent instances of future genocide.

Reviving Article II(c) may prove insufficient on its own to properly define and prevent all forms of genocidal conduct, but the status quo of failing to identify "true" genocides when they occur cannot continue. By maintaining narrow definitions of genocide, the international community demonstrates an acquiescence to harmful conduct, allowing atrocity crimes to be perpetuated without proper checks or intervention. Avoiding proper definitions allows States, such as the United States or China, to disavow their obligations when faced with a true instance of genocide. Persistent failures to characterize actual genocides as legal genocides will continue to erode the concept and goals of the Convention to insignificance, rather than function as the tool envisioned by Lemkin designed to prevent, punish, and deter genocidal harm.