
VALUING FOREIGN LIVES IN GENOCIDES & MASS ATROCITIES: LAW, HUMANITARIAN INTERVENTION, AND THE PROMINENCE EFFECT

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I. INTRODUCTION

Genocides and mass atrocities present a stark example of foreign life devaluation. Those engaged in the killings do not just undervalue but actually negatively value the lives lost and at risk. Although the U.S. public and decision makers might highly value such foreign lives in the abstract, the rarity of humanitarian interventions leads Slovic to conclude that government action fails to track abstract valuations.¹ If, as Slovic hypothesizes, the prominence of national security concerns drives down humanitarian interventions below actually held foreign life valuation,² how does law reinforce or counteract this effect on policymakers? Relatedly, how could policymakers reconfigure the law and legal institutions to overcome the prominence effect and allow a fuller cost benefit balancing of actions to prevent genocides and mass atrocities?

While international prohibitions, requirements, and authorizations are likely not singularly dispositive in states' decisions to intervene, they can alter the costs. In this short Essay, I briefly identify international law that directly speaks to states' obligations and authorizations during such events. I conclude Part II by pointing to some reform efforts that could lower the costs for state action responding to genocides and mass atrocities.

Although states always act in the shadow of international law, much decision making on how to address genocides and mass atrocities takes

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1. Paul Slovic, *The Prominence Effect: Confronting the Collapse of Humanitarian Values in Foreign Policy Decisions*, 2015 U. ILL. L. REV. SLIP OPINIONS 26, 32–33.

2. *Id.*

place at the domestic level.³ For powerful states like the United States who can sometimes afford to go it alone or persuade other states to join costly actions, this is particularly true. The domestic law places some limits on the executive's capacity to legally intervene,⁴ but in the second part of this essay, I suggest that politics and preferences constitute the more significant constraints on executive action.

Slovic's essay posits that both the U.S. public and policymakers strongly support saving foreign lives in the abstract.⁵ Yet he concludes the combination of psychic numbing at the public level and the overvaluing of national security at the policy level crowd out a true cost benefit balancing that meaningfully incorporates the humanitarian values that decision makers and the public actually hold.⁶ Thus, humanitarian interventions are rare and, according to Slovic, undersupplied.⁷

How might domestic policymakers engage in a full accounting of foreign lives in the mass atrocities and genocide context given the dominance of national security concerns? The third and final Part of this essay explores one opportunity for combating the prominence effect with legal institutions—the recently created Atrocities Prevention Board (“APB”).⁸ While the APB currently emphasizes information acquisition, analysis, and dissemination with a particular emphasis on early warning and prevention, Slovic suggests more and better information alone will not overcome the prominence effect.⁹ I thus offer three categories of reforms to help the APB realize its goals of more fully integrating humanitarian values into decision making: thoughtful transparency, valuation quantification, and sticky persuasion.

II. INTERNATIONAL LAW AND INSTITUTIONS

International Law determines the legality, and perhaps also legitimacy, of state efforts to address genocides and mass atrocities. In the aftermath of World War II, states crafted a binding agreement to reconsti-

3. Carol Morello, *Kerry Asks Congress Not to Bar Ground Troops in Syria and Iraq*, WASH. POST, Dec. 9, 2014, http://www.washingtonpost.com/world/national-security/kerry-asks-congress-not-to-bar-ground-troops-in-syria-and-iraq/2014/12/09/791fc43c-7fec-11e4-8882-03cf08410beb_story.html.

4. See War Powers Resolution, 50 U.S.C. §§ 1541–48 (2012); International Emergency Economic Powers Act 50 U.S.C. §§ 1701–06 (2012) (limiting the ability of the President to deal with foreign conflicts unless deemed an “unusual and extraordinary threat”); 22 U.S.C. § 2261 (2012) (authorizing the President to spend up to \$25 million on international aid “contingencies”); sources cited *infra* note 19.

5. Slovic, *supra* note 1, at 32.

6. *Id.* at 29–30.

7. *Id.* at 32.

8. WHITE HOUSE, FACT SHEET: THE OBAMA ADMINISTRATION'S COMPREHENSIVE EFFORTS TO PREVENT MASS ATROCITIES OVER THE PAST YEAR 1 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/fact_sheet_-_administration_efforts_to_prevent_mass_atrocities5.pdf.

9. See JOHN NORRIS & ANNIE MALKNECHT, CTR. FOR AM. PROG., ATROCITIES PREVENTION BOARD: BACKGROUND, PERFORMANCE, AND OPTIONS 13–18 (2013) <https://cdn.americanprogress.org/wpcontent/uploads/2013/06/AtrocitiesPrevBoard.pdf>; Slovic, *supra* note 1, at 32–33.

tute the international order.¹⁰ After two bloody world wars, states were understandably and self-servingly concerned with preventing invasions into their own territories as well as more broadly interested in reducing mass casualties from inter-state violence. Thus, the United Nations charter embodies a strong principle of noninterference including prohibitions against physical incursions on state sovereignty and in particular, sets significant limits on the use of force.¹¹ Article 2(4) precludes member states from “the threat or use of force against the territorial integrity or political independence of any state.”¹² Such a rule prohibits unilateral interventions—treating expansionist interventions such as Vietnam’s 1979 incursion into Cambodia and Russia’s invasion of Crimea as on par with humanitarian efforts in the former Yugoslavia or the hypothesized deployment of troops to curb civilian atrocities in Syria.¹³

The U.N. Security Council may, however, authorize the use of unilateral or multilateral force with a recognized threat to international peace or security, and it allows for the invocation of self defense under Article 51. Given the composition and veto power of the Security Council, however, securing a resolution authorizing force for a humanitarian intervention is quite difficult. For example, while the U.N. recently authorized force in Libya, China and Russia have blocked a U.N. approved intervention in Syria, as well as condemnations of political repression in Burma and Zimbabwe. Given the shadow of the veto, many states may not even seek resolutions authorizing humanitarian interventions or lesser condemnations of genocides and mass atrocities.

Of course, states may act collectively or unilaterally without clear U.N. approval as they did in Kosovo. But doing so incurs extensive political costs and states may be wary of weakening the international system. Given that U.S. policymakers hail from a highly legalistic culture, claim to take international law seriously, and possess a general interest in states submitting to the United Nations’ will, they may find these costs coupled with or considered as part of national security concerns particularly weighty.

As Arden Rowell and I discussed in our original paper, *Valuing Foreign Lives*, international law also contains some doctrine that weighs in favor of humanitarian intervention. In short, both the Genocide Convention and the emerging responsibility to protect doctrine encourage states to engage in a fulsome consideration of foreign lives. But it seems the Genocide Convention’s duty to protect rarely, if ever, compels the United States to engage in humanitarian intervention as evidenced by its noninterventions in Rwanda, Darfur, and the Democratic Republic of Congo. And although states have referenced the responsibility to pro-

10. U.N. Charter art. 1.

11. *Id.* art. 2.

12. *Id.* art. 2, para. 4.

13. S.C. Res. 189, U.N. Doc. S/RES/189 (Jun. 4, 1964) (Vietnam-Cambodia conflict); G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014) (Russia-Ukraine); S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992) (Yugoslavia); *see, e.g.,* Morello, *supra* note 3.

tect doctrine as entailing broader obligations to act than the Genocide Convention, most states and commentators believe that this emerging doctrine still requires U.N. Security Council approval to authorize humanitarian interventions.

Motivated states may still act despite legal prohibitions and may attempt to weaken the limits on humanitarian interventions. One might view U.S. action regarding Kosovo and Syria in this light.¹⁴ Other states have suggested U.N. Security Council states adopt a nonveto policy in cases of proposed actions to respond to genocides and mass atrocities as part of their larger responsibility to protect duties.¹⁵ And the United States is “actively developing a mass atrocity prevention and response doctrine” that includes policy, rules of engagement, military doctrine, and predeployment training in anticipation of potential humanitarian interventions.¹⁶ In support of such actions, the United States has made pronouncements suggesting the legality of unilateral, non-U.N. sanctioned responses.¹⁷ But even if the United States could lower or simply ignore international barriers, Slovic suggests domestic risk assessment regarding national security would still serve as a major impediment to humanitarian interventions.¹⁸ Thus, in the next section, I turn to domestic limitations on the use of force as well as potential mechanisms to enhance its consideration.

III. DOMESTIC LAW AND INSTITUTIONS

As the Commander-in-Chief, the President possesses much greater latitude to legally deploy force under domestic law than under international law. The Constitution does impose some structural limits granting Congress the power to declare war; to organize, arm and discipline the militia; to regulate commerce with foreign nations; to investigate and oversee the President as well as to impeach; along with the powers of the purse.¹⁹ But such powers are rarely exercised in the use of force context and seem unlikely to deter a President determined to engage in a humanitarian intervention.

Rather, the real domestic constraints on the President are decisional and political. In order to overcome general public apathy and engage in a

14. Jutta Brunnee & Stephen J. Toope, *The Rule of Law in an Agnostic World: The Prohibition on the Use of Force and Humanitarian Exceptions*, in KOSKENNIEMI AND HIS CRITICS (Wouter Werner et al., eds., forthcoming 2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547022.

15. See MATTHEW C. WAXMAN, COUNCIL ON FOREIGN REL., INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES: INTERNATIONAL NORMS AND US POLICY, 23–24 (2009), available at http://i.cfr.org/content/publications/attachments/Mass_Atrocities_CSR49.pdf.

16. Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT'L L. 745, 768–70 (2013).

17. *Id.* at 768 (referencing the 2006 and 2012 National Security Strategies, the 2010 Department of Defense Quadrennial Defense Review, Senate Resolution 71 (2010) and President Obama's Study Directive of 2011).

18. Slovic, *supra* note 1, at 32.

19. U.S. CONST. art. 1, § 8, art. 2, § 4.

humanitarian intervention, a rational executive would need to conclude that such action is cost-benefit justified given the potential domestic and international political fallout. It is here that the prominence effect that Slovic identifies could pose particular problems: Slovic suggests that national security costs will crowd out a full weighing of the humanitarian interest in saving foreign lives.²⁰

In light of this phenomenon, a policymaker wanting to enhance the prospects for a humanitarian intervention might broaden and deepen the national security conversation or find ways to make humanitarian values more salient and sticky. Those committed to the benefits of humanitarian interventions might reframe or make additional national security arguments to add weight to the pro-intervention calculation. Policymakers often have wide latitude in framing U.S. action; those interested in addressing mass atrocities and genocide nearly always have a plausible argument that U.S. national security interests are implicated if the killings continue or escalate. For instance, the Boko Haram killings in Nigeria²¹ could eventually challenge the authority of an oil exporting state and the fighting and resultant civilian casualties in Syria²² could further destabilize the Middle East.

But relying on such a strategy poses two significant dangers. By ceding the prioritization of national security concerns, intervention will remain off the table when the national security justifications to abstain are more compelling than the national security reasons to act. Even as the world grows smaller and more interdependent, the national security justifications for preventing or responding to genocides and mass atrocities can be quite tenuous.

More importantly, reframing humanitarian interventions as national security missions can undermine the goal of protecting foreign lives even as it makes intervention more likely. Foreign interventions are deeply complex operations where mission goals will affect on the ground implementation.²³ If the government views itself as engaged in regime change, promoting regional stability, or ensuring access to oil and other natural resources, it may be much less protective of civilians and less attuned to the needs of persecuted groups. A state's willingness to sustain collateral damage to the domestic population is likely higher in such instances.

This suggests policymakers ought to make humanitarian values more salient and sticky, either as a stand alone approach or in conjunction with reframing. Triggers, whether used to generate automatic action

20. Slovic, *supra* note 1, at 32.

21. Farouk Chothia, *Who Are Nigeria's Boko Haram Islamists?*, BBC NEWS, Jan. 21, 2015, <http://www.bbc.com/news/world-africa-13809501>.

22. Rick Gladstone & Mohammed Ghannam, *Syria Deaths Hit New High in 2014*, *Observer Group Says*, N.Y. TIMES, Jan. 1, 2015, http://www.nytimes.com/2015/01/02/world/middleeast/syrian-civil-war-2014-deadliest-so-far.html?_r=0.

23. See TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS OF SUCCESS AND FAILURE 177-220 (2007).

or as alarm bells calling for scrutiny, might provide one such approach. For instance, the executive branch could use “red lines” or “magic words” as a precommitment strategy.²⁴ For red lines, the president might let it be known that he will respond with force to some preordained event or consequence suggestive of a genocide or mass atrocity. This type of red line might bind the president to expending significant resources to save foreign lives after the crossing of a particular threshold. Similarly, a “magic words” approach might hold that when a sufficiently high level executive branch official labels as a situation a genocide or mass atrocity, it would automatically trigger humanitarian intervention or some other costly action.

Relatedly, the executive branch could also utilize an alarm bell approach by generating genocide and mass atrocity indicators that would automatically trigger early stage assessments of the risks to foreign lives if potential genocides or mass atrocities are left unchecked. Furthermore, by using early stage alarm bells, U.S. decision makers may have the flexibility to choose less costly actions than those available once the genocides or mass atrocities are well underway.

That said, triggers may not themselves overcome the prominence effect during the decision-making process. Early warning is an important piece of the puzzle as it raises the salience of the risk to foreign lives, but it only provides more information sooner—it may not change the priorities assigned in a cost-benefit analysis. Similarly, automatic triggers can serve as a possible deterrent for the malfeasant actors, but recent historical examples involving the invocation of redlines and magic words did not in fact lead to humanitarian interventions in Syria²⁵ or Darfur.²⁶ Rhetorical comments invoking red lines or other supposedly automatic triggers are costly, but they can be walked back as they are not truly automatic. Ultimately, the executive branch may be unwilling to enforce an inflexible, preordained commitment to intervene even when the threshold events occur for many reasons, including Slovic’s observation about ongoing national security concerns.²⁷ To enhance the consideration of humanitarian interventions and thus the meaningfulness of automatic triggers and alarm bells, policymakers also need more processes designed to reinforce an ongoing strong and sticky commitment to the positive valuation of foreign lives.

24. See Margaret Jones, *Tear Down These Red Lines: A Comparison of Israel’s and the United States’ Approach Towards Iran’s Nuclear Program*, 18 PUB. INT. L. REP. 54, 56 (2012); Michael S. Lund, *Bridging the Gap Between Warning and Response: Approaches to Analyzing Effective Preventive Interventions*, in EARLY WARNING AND EARLY RESPONSE (Susanne Schmeidl & Howard Adelman eds., 1997) available at http://www.davidmlast.org/MPA567-2015/4_Prevention_files/Lund%281998%29bridging%20the%20gap.pdf.

25. Glenn Kessler, *President Obama and the ‘Red Line’ on Syria*, WASH. POST (Sept. 6, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/>.

26. See Luke Glanville, *Is “Genocide” Still a Powerful Word?*, 11 J. GENOCIDE RES. 467, 476 (2009).

27. Slovic, *supra* note 1, at 32.

Durable institutional remedies for the prominence effect, as for other forms of bias, must be constructed with a simultaneous understanding of the underlying behavioral phenomena and the constraints and opportunities offered by existing institutions. In light of this, how can an executive branch that wants to fully value foreign lives in the face of genocides and mass atrocities remain committed to them throughout the decision-making process?²⁸

The first step is to create and embed structures and institutions devoted to these values in decision making. The APB, a standing interagency committee, is a promising example.²⁹ After a Presidential Study aimed at the successful prioritization of genocide and mass atrocities, President Obama appointed administration heavyweight Samantha Power to chair this new Board.³⁰ The APB seeks to institutionalize a procedure for atrocities prevention by improving the quality of, access to, and assessment of information, as well as integrating such information into interagency personnel training across executive agencies such as the CIA, Defense, Justice, and State Departments. The APB emphasizes early warning as a formal priority of the administration and was tasked with creating a mass atrocities alert channel across departments and agencies as well as use of early warnings as an automatic trigger of policy review.³¹ The APB is also charged with coordinating international efforts on genocide prevention and response such as: elevating the priority of genocide prevention at the U.N. and building the capacity of other states willing to engage in humanitarian interventions.³²

For a budget neutral, no-dedicated-personnel enterprise, the APB is surprisingly active. The working staff meets weekly to focus on structural issues like atrocity prevention training across agencies with a monthly follow up meeting.³³ The APB also performs “deep-dive analysis” on a quarterly basis to focus on discrete geographic risks in places like Kenya, Burma, and Bangladesh.³⁴

That said, the APB has certainly not fulfilled all—or perhaps even most—of the tasks in its mandate. A recent report concludes that while the President has shown that atrocity prevention is a priority, neither Congress nor the public have been included in the process.³⁵ Nor has the APB made much progress on many of its early prevention initiatives such as alarm bell policy reviews and establishing early warning as a priority. Indeed, the APB has made only limited headway on preventive di-

28. President Obama has declared that the prevention of mass atrocities and genocide is a “core national security interest and core moral responsibility.” Presidential Study Directive 10/ PSD-10, *Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review*, (Aug. 4, 2011), available at <https://www.hsdl.org/?view&did=690868>.

29. See WHITE HOUSE, FACT SHEET, *supra* note 8.

30. NORRIS & MALKNECHT, *supra* note 9, at 1.

31. See Presidential Study Directive 10, *supra* note 29.

32. See WHITE HOUSE, FACT SHEET, *supra* note 8.

33. NORRIS & MALKNECHT, *supra* note 9, at 9.

34. *Id.*

35. *Id.* at 10.

plomacy and efforts to persuade other states of the nonuse of the Security Council veto.³⁶

As the APB is still working through early implementation of its mission, speculations about the overall success or failure of the APB are a bit premature. Since its founding, the Obama Administration has intervened to protect the Yazidis in Iraq but not to protect persons in Syria or the Central African Republic.³⁷ This could be because even a full cost-benefit balancing counseled against such action, because the APB failed to fully weigh foreign lives in the face of national security concerns, because the APB failed to convince higher level decision makers to do so, or because the APB simply came to the table too late—or not at all—for these crises.³⁸ Similarly, distilling the APB's role in less dramatic actions like recent trade sanctions on the DRC, Zimbabwe, Iran, and Burma is challenging as is ascertaining the ultimate significance of those actions.³⁹ Without better information from and about the APB, drawing conclusions about the APB's work is hasty at best.

That said, I offer three modest suggestions all consistent with Arden Rowell's and my larger framework approach to foreign life valuation: promoting systematic interrogation of valuation processes through thoughtful transparency, encouraging the quantification of valuation, and increasing the salience of foreign valuation issues. None of these prescriptions demands a particular substantive outcome. Rather, all serve to enhance decision-making procedures governing humanitarian interventions and genocide prevention and response more generally.

First, given its institutional role, the APB ought to consider enhancing its transparency, where doing so will not interfere with its core functions. Described as utilizing a “level of secrecy similar to that accorded to national intelligence reviews,”⁴⁰ the APB has not declassified its annual report to the President and conducts neither Congressional hearings nor briefings.⁴¹ Given its low visibility, it has built no constituency within Congress or the public at large. Although specific details might need to remain classified, the APB could be more forthright about its general activities, its progress on tasks identified in the Presidential Directive, and its role in decision making. Such information serves multiple functions. It can help scholars and policymakers determine the effectiveness of the

36. JAMES P. FINKEL, CTR. FOR THE PREVENTION OF GENOCIDE, ATROCITY PREVENTION AT THE CROSSROADS: ASSESSING THE PRESIDENT'S ATROCITY PREVENTION BOARD AFTER TWO YEARS, 30–31 (2014), available at <http://www.ushmm.org/m/pdfs/20140904-finkel-atrocity-prevention-report.pdf>.

37. See Helene Cooper et. al, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES, Aug. 7, 2014, <http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html>.

38. NORRIS & MALKNECHT, *supra* note 9, at 15–18.

39. See *Sanctions Programs and Country Information*, U.S. DEPT. OF THE TREASURY (Mar. 5, 2015), <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

40. Mark Landler, *Task Force Gives Insight on U.N. Nominee*, N.Y. TIMES, Jun. 22, 2013, <http://www.nytimes.com/2013/06/23/us/politics/work-on-task-force-gives-insight-on-un-nominee.html>.

41. NORRIS & MALKNECHT, *supra* note 9, at 10.

APB in specific crises as well as in altering the knowledge and priorities of agencies. At the same time, procedural transparency may help the APB develop and maintain thoughtful decision procedures.

Second, the APB might consider explicit, but potentially confidential, foreign life valuation as we discuss in our original article. President Obama already tasked the APB with developing a National Intelligence Estimate on the global risk of mass atrocities and genocide.⁴² Speaking more broadly, National Intelligence Estimates are efforts to draw information from across agencies to predict the course of future events.⁴³ In the context of mass atrocities and genocides, such an estimate could include a quantification of foreign (and domestic) lives at risk with humanitarian interventions and other policy options. Such numbers facilitate comparisons with other atrocities and genocides as well as with other significant life threatening events like natural disasters in which the United States routinely values foreign lives.⁴⁴ The APB might also consider monetizing such estimates as to allow an “apples to apples” comparison with monetized national security costs and benefits. Such quantification might encourage policymakers to engage in a full blown cost-benefit analysis rather than simply deferring to psychologically prominent concerns like national security.

Third, the APB might draw lessons from psychology to enhance the stickiness and salience of foreign life valuation at the elite decision-making level. In order to counteract the prominence effect, the APB might prime expert audiences to lock in humanitarian valuations. For instance, they might open meetings with a brief personalized example of people at risk of genocide or mass atrocities and call for a moment of silence in which attendees reflect on these harms and their commitment to eradicating them. Relatedly, such moments might accompany the President’s daily security briefing or perhaps the President could receive a separate and earlier genocide and mass atrocity briefing. Such efforts are consistent with the APB’s original mandate which seeks to improve the quality, quantity, and access of information on mass atrocities and genocide not as an end in itself, but as a way to ensure the prioritization of humanitarian values.

IV. CONCLUSION

Domestic policymakers and the public have international commitments to address foreign genocides and mass atrocities. In many cases, these commitments may also represent the ethical and personal preferences of domestic decision makers. The prominence of national security concerns and the limitations posed by the U.N. Security Council may

42. WHITE HOUSE, FACT SHEET, *supra* note 8.

43. Gregg Bruno & Sharon Otterman, *National Intelligence Estimates*, COUNCIL ON FOREIGN REL. (May 14, 2008), <http://www.cfr.org/iraq/national-intelligence-estimates/p7758>.

44. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 525–27 (2014).

raise an indefensibly high barrier to expressing these commitments and preferences in the form of humanitarian interventions. This Essay has explored one opportunity for using legal institutions to counter psychological biases effect on foreign life valuation: the Atrocities Prevention Board. It also identified new procedures that could enhance the APB's decision-making capabilities to allow better assessment of the need for intervention in light of the prominence effect. These reforms may help improve the deeply difficult process of cost benefit analysis in the face of a genocide or mass atrocity. More generally, the analysis here speaks to the need for further exploration of opportunities to use law to combat the prominence effect, in genocide policy and elsewhere.

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