INTRODUCTION TO THE SYMPOSIUM ON NON-STATE ACTORS AND NEW TECHNOLOGIES IN ATROCITY PREVENTION

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As Instagram and Facebook accounts turned blue last June to mourn state violence in Sudan, some users seized the moment to gather thousands of new followers on false promises of aiding the Sudanese victims.[1] Meanwhile, the Sudanese military ordered an Internet blackout, an attempt to quell unrest that also had the effect of hampering humanitarian efforts. New technologies—and social media in particular, as these instances show—are reshaping the landscape of atrocity prevention and response. They make gathering and sharing information by non-state actors more accessible and less centralized than ever before. But they also facilitate the spread of false information and other misuses that can thwart the work of states, international organizations, and international tribunals. This symposium examines the role that non-state actors, empowered with ever more sophisticated technological tools, are taking (or should be taking) in the realm of atrocity prevention. It forms part of the American Society of International Law's Signature Topics initiative.[2]

Under international law, it is states, of course, that have the primary duty to prevent and punish atrocities. But state obligations have proven to be insufficient to halt those atrocities. The territorial state is often directly or indirectly involved in the dynamics of violence and thus unlikely to be willing or able to act decisively. And while the ICJ has unequivocally reaffirmed that third party states have an extraterritorial obligation to prevent genocide[3] and the International Law Commission recently added several provisions on prevention to its Articles on Crimes against Humanity,[4] the exact scope of these provisions remains elusive. Myanmar, the Central African Republic, and the Anglophone regions of Cameroon are just some examples where the operationalization of an extraterritorial obligation by third party states to prevent genocide is being tested, and where its lack of true weight is exposed. The obligation to punish has, perhaps, more teeth, but is by its nature too little, too late. Moreover, despite some creative approaches,[5] many situations of mass atrocity are out of reach of the

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[1] Taylor Lorenz, *Sudan and the Instagram Hustle*, ATLANTIC (June 17, 2019).

[2] *Signature Topics*, AM. SOC'Y INT'L L.

[3] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43 (Feb. 26).

[4] Int'l Law Comm'n, Draft Articles on Crimes Against Humanity, Adopted by the ILC on First Reading, UN Doc. A/72/10, paras. 35-46 (2017). For comments on the obligation to prevent, see the Dutch reply, Int'l Law Comm'n, Additional Comments and Observations Received from Governments, International Organizations and Others, UN Doc. A/CN.4/726/Add.1 (Mar. 28, 2019).

[5] *See, e.g.*, the ICC decision that it could exercise jurisdiction pursuant to art. 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People's Republic of Bangladesh, Case No. ICC- RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (Sept. 6, 2018).

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International Criminal Court (ICC), and, as the case of Western foreign fighters in Syria illustrates, states may not always have the appetite to prosecute their nationals at home.[6]

The international community, therefore, has long relied on the help of non-state actors in this realm. Although such actors are not bound by international law in the same way that states are, they are uniquely placed to team up with states or to play their own part in delivering on legal or moral obligations to prevent and punish. They can help detect impending crises; they report on atrocities and create pressure for states to take preventive action; they help gather evidence of crimes that may trigger and inform prosecutions in international or domestic courts; and they can help forestall violence by working directly with communities to create more cohesion. Their work, in other words, while taking place beyond the direct regulatory framework of international law, has important legal implications for the work of states and international lawyers in atrocity prevention.

New technologies further empower non-state actors to achieve these ends. Increasingly, however, they may also facilitate the spread of misinformation and, at times even unwittingly, help seed hate. The symposium's first four essays explore these risks and opportunities in more depth.

Open source intelligence gathering and eyewitness reporting through social media can be of great value for atrocity deterrence in later stages of the conflict, and for criminal prosecutions more specifically. But they also have a dark side. In her essay, Alexa Koenig of Berkeley Law School shows how digital content derived from open sources is having an impact on the practice of international criminal law.[7] This content expands the role that non-state actors such as human rights NGOs can play by locating, preserving, verifying, and analyzing online visual imagery. Koenig zeroes in on one challenge to this role: the risk of deep fakes, or "videos generated via algorithms that make it look like a person said or did something she did not."[8] Through the use of deep fakes, malicious actors can suppress or falsify evidence related to atrocities and more generally undermine trust in open source information. Koenig maps the legal responses as well as the educational and technical solutions available to counter the "deep fakes" phenomenon and thus enhance the ability of non-state actors to use new technology to detect and deter atrocity.

Emma Irving of Leiden Law School further examines the role that social media platforms play during violent conflict.[9] Taking the 2018 Myanmar Fact Finding Report as a starting point, Irving identifies ways in which social media companies are inadvertently facilitating incitement to atrocities on their platforms. She inquires which steps social media companies are or should be taking to detect and remove hate speech on their platforms. She argues that, in the absence of an appropriate international legal framework, a self-regulatory approach seems, for now, to be the best option on the table.

Rebecca Hamilton, from American University's Washington College of Law, turns our attention to the changing media landscape and the role of international journalists in preventing atrocities in conflict zones.[10] Hamilton highlights how the new media landscape, and in particular the demise of foreign bureaus and the decrease in foreign correspondents, has changed the flow and nature of information available to states and the broader public. Distinguishing between different stages of a violent conflict's life cycle, Hamilton argues that social media has great potential to put violence in the spotlight—and keep it there past the immediate news cycle. She also observes,

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[6] Cynically, the proposal to create an International ISIS Tribunal could also be viewed as a way to prevent foreign fighters from returning home. *See* Helen Warrell, *Sweden Proposes International Tribunal to Try ISIS Fighters*, Financial Times (May 19, 2019).

[7] Alexa Koenig, *"Half the Truth is Often a Great Lie": Deep Fakes, Open Source Information, and International Criminal Law*, 113 AJIL Unbound 250 (2019).

[8] *Id.* at 251.

[9] Emma Irving, *Suppressing Atrocity Speech on Social Media*, 113 AJIL Unbound 256 (2019).

[10] Rebecca Hamilton, *Atrocity Prevention in the New Media Landscape*, 113 AJIL Unbound 262 (2019).

however, that the demise of traditional foreign bureaus undermines the ability of the media to participate in early warning, thus diminishing its role in *true* prevention.

The growing role of non-state actors in gathering information and shaping the debate has implications, in turn, for international and hybrid criminal tribunals. William & Mary Law School's Nancy Combs looks at the reliance by international criminal prosecutors on evidence gathered by third parties, and highlights the ethical challenges involved.[11] While the ICC in particular has limited data-gathering capacity and could benefit from the information gathered by third parties, Combs also highlights the inherent limits in the ability of a criminal court to use information collected by outsiders. Moving beyond diagnosing the excessive reliance on third-party evidence, Combs makes the broader claim that lack of adequate state support has in fact compelled the ICC to turn to non-state actors instead.

The last essay shifts the focus to non-state actors beyond the realm of information sharing, and into the field of action offline. Colette Rausch of the U.S. Institute of Peace examines how local leaders and civil society on the ground can be empowered to contribute to atrocity prevention.[12] Describing the Justice and Security Dialogue Project (JSDP) in Iraq and Nepal, Rausch demonstrates how non-state actors can further recommendations of the Responsibility to Protect's second pillar in tandem with and supported by international community actors. Rausch shows how the JSDP has helped build critical societal capacities and rule of law structures, thus contributing to enhancing societal resilience. She argues that those actors working on rule of law activities and those working on atrocity prevention should view their work in tandem.

Taken together, the essays throw into relief the issues that are changing the landscape of atrocity prevention and its relation to international law. They point our attention to emerging challenges that need further scholarly exploration, including the need for new regulation or self-regulation of social media, the limits of the new tools available to state and non-state actors, and a new set of considerations criminal lawyers must keep in sight as they update their practice.

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[11] Nancy Amoury Combs, *Investigative Delegations: Predictable Predicaments*, 113 AJIL UNBOUND 267 (2019).

[12] Colette Rausch, *The Justice and Security Dialogue Project: Building the Resilience of Non-state Actors to Atrocity Crimes*, 113 AJIL UNBOUND 273 (2019).