

NOTE

ROHINGYA IN MYANMAR: THE UNITED NATIONS' FAILURE TO ENFORCE VIOLATIONS OF CRIMES AGAINST HUMANITY AND GENOCIDE

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ABSTRACT

In light of the current humanitarian crisis of the Rohingya in Myanmar, it is worth questioning the U.N.'s effectiveness in preventing mass atrocities. Despite the substantial amount of U.N.-created policies aimed at eradicating genocides, these policies have failed in their implementation. While the U.N. has never used the Genocide Convention to punish states that have failed to comply with investigative missions, this should be well within the U.N.'s authority based on the Article I requirement that countries work to prevent genocide.

I. INTRODUCTION

Like many eldest children, Nur Hafes has had to take on additional responsibilities to help care for his younger siblings.¹ But unlike most twelve-year-old boys, Nur is the sole breadwinner for his seven younger siblings and mother.² He supports his family by seeking donations from Muslim clerics who distribute money collected at mosques for refugees.³ Some days Nur is able to supplement this money with an additional fifty cents or a dollar earned by shading visitors from the sun with an umbrella, but other days he comes home with nothing.⁴

Nur and his family left their home in Tharay Kone Yoe Dan village in Rakhine's Maungdaw township to escape a counter-insurgency operation by the Myanmar military that began in August

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1. Adnan Abidi, *An Umbrella for Shade: Rohingya Refugee Boy Works to Support Family*, REUTERS (Nov. 10, 2017, 6:05 AM), https://www.reuters.com/article/us-myanmar-rohingya-boy/an-umbrella-for-shade-rohingya-refugee-boy-works-to-support-family-idUSKBN1DA1AU?utm_source=34553&utm_medium=partner [<https://perma.cc/XL69-CACJ>].

2. *Id.*

3. *Id.*

4. *Id.*

2017.⁵ Nur's mother Rabia saw people injured from gunshot wounds and watched the Myanmar army burn houses while people were still inside of them.⁶ Rabia quickly gathered a blanket, identity papers, and a couple of old photos, and traveled south to her parents' village.⁷ Rabia and her family found little respite there—the Myanmar army showed up the next day.⁸ The family's flight continued on a three-hour boat journey to the Bangladesh side of the Naf River, this time without Rabia's husband who had suddenly disappeared.⁹ The family is now living in a tent in the Palong Kahli refugee camp in southern Bangladesh and two of Nur's younger siblings are suffering from malnourishment.¹⁰

The United Nations (U.N.) High Commissioner for Human Rights has labeled the violent actions that have taken place in Myanmar as ethnic cleansing, and another top U.N. official said the events have “the hallmarks of a genocide.”¹¹ Despite these powerful remarks, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) has not been invoked to protect the Rohingya in Myanmar. Further, the Myanmar government has refused to give the U.N.'s fact-finding mission access to the country, which has prevented the U.N. from gaining the necessary information to formally declare that the situation in Myanmar constitutes genocide.¹² In order to more effectively enforce the Genocide Convention in circumstances similar to those in Myanmar, this Note proposes that U.N. should recognize the refusal to comply with U.N. fact-finding missions to investigate alleged human rights violations that may constitute crimes against humanity or genocide as a violation of the Genocide Convention.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Investigation of Alleged Human Rights Violations and Abuses Against the Rohingya*, OHCHR (Sept. 26, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/Investigation-AllegedHRViolationsAgainstRohingya.aspx> [hereinafter *Investigation of Alleged Human Rights Violations*] [<https://perma.cc/JDM3-RRJ2>]; Nahal Toosi, *The Genocide the U.S. Didn't See Coming*, POLITICO MAG. (Mar.-Apr. 2018), <https://www.politico.com/magazine/story/2018/03/04/obama-rohingya-genocide-myanmar-burma-muslim-syu-kii-217214> [<https://perma.cc/B5RE-ZQ4S>].

12. *Fact-Finding Mission on Myanmar: Concrete and Overwhelming Information Points to International Crimes*, OHCHR (Mar. 12, 2018), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22794&LangID=E> [hereinafter *Fact-Finding Mission on Myanmar*] [<https://perma.cc/2HHK-5WR8>].

Part II of this Note provides background information about the U.N.'s current policies regarding genocide. Part III proposes that the U.N. should construe denying access to investigators on fact-finding missions the power to investigate alleged human rights violations that may constitute crimes against humanity or genocide to be a violation of the Genocide Convention. This will reinforce the importance of complying with U.N. fact-finding missions to Contracting Parties and help to ensure that the U.N. and the rest of the international community have access to complete and accurate information. Finally, Part IV briefly concludes by reinforcing the importance of making such changes.

II. BACKGROUND

First, this Section will describe the ongoing crisis in Myanmar. Next, it will explain the potential legal consequences of committing genocide or crimes against humanity. Then it will outline the process of referring cases involving genocide crimes against humanity to the International Criminal Court (ICC). Lastly, it will address the ways in which the obligation to prevent genocide and crimes against humanity may be enforced, as well as the failure to enforce this requirement against Myanmar.

A. *Rohingya Crisis in Myanmar*

The Rohingya are a Muslim ethnic minority group that live primarily in the Rakhine State and have their own language and cultural practices.¹³ The Rakhine State is one of the poorest states in Myanmar.¹⁴ The Rohingya have been denied citizenship by Myanmar since 1982.¹⁵ Myanmar's government and citizens regard the Rohingya as unwanted foreigners from Bangladesh and portray them as an existential threat to Buddhist culture.¹⁶ In 2014, Myanmar had its first census in 30 years and did not count the Rohingya; instead its members were told to register as Bengali.¹⁷

13. Megan Specia, *The Rohingya in Myanmar: How Years of Strife Grew into a Crisis*, N.Y. TIMES, (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/world/asia/myanmar-rohingya-muslim.html> [<https://perma.cc/3FZF-VUHW>].

14. *Id.*

15. SIMON-SKJODT CTR. FOR THE PREVENTION OF GENOCIDE & FORTIFY RIGHTS, "THEY TRIED TO KILL US ALL": ATROCITY CRIMES AGAINST ROHINGYA MUSLIMS IN RAKHINE STATE, MYANMAR 2 (2017), https://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocitiy_Crimes_against_Rohingya_Muslims_Nov_2017.pdf [hereinafter "THEY TRIED TO KILL US ALL"] [<https://perma.cc/3UUN-9BGT>].

16. *Id.*

17. Specia, *supra* note 13.

The government's refusal to recognize the Rohingya makes them one of the largest stateless groups in the world.¹⁸

On August 25, 2017, the Arakan Rohingya Salvation Army (ARSA) attacked 30 police posts and an army base in Myanmar killing twelve state security officials.¹⁹ ARSA is made up of Rohingya, which is the group facing persecution in Myanmar. Security forces responded aggressively – they have been accused of killing, raping, burning villages, and shooting civilians from helicopters.²⁰ The Myanmar Army made these attacks as part of “clearance operations,” a term coined by the military to describe the ongoing efforts to combat and apprehend Rohingya militants.²¹ By mid-September, over 400,000 Rohingya had fled into Bangladesh, and an additional 12,000 people, primarily Buddhists and other non-Muslims from the Rakhine region where the Rohingya live, were displaced within Myanmar.²² Myanmar claims that the “clearance operations” are a necessary counterinsurgency operation.²³ There is strong evidence, however, that the military and Government of Myanmar have used these operations as a guise to commit mass atrocities against the Rohingya population.²⁴

The recent attacks against the Rohingya are not the first instances of violence.²⁵ The rape and murder of a Buddhist in May 2012 was followed by a number of revenge attacks against Muslims.²⁶ The violence between Rakhine Buddhists and Rohingya Muslims escalated and eventually resulted in a state-sanctioned attack against Rohingya and other Muslims in Rakhine State.²⁷ Buddhist men carried out further attacks on Muslim villages in Rakhine in October 2013.²⁸ The International Human Rights Clinic at Yale Law School and Fortify Rights published a legal analysis in October 2015 in which it found “strong evidence” that the Myanmar Army, Air Force, Police Force, and armed civilians com-

18. *Id.*

19. *Id.*

20. *Id.*

21. “THEY TRIED TO KILL US ALL”, *supra* note 15, at 1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Specia*, *supra* note 13.

26. *Id.*

27. “THEY TRIED TO KILL US ALL”, *supra* note 15, at 1.

28. *Specia*, *supra* note 13.

mitted genocidal acts against the Rohingya.²⁹ Based on this conclusion, the report recommended that the U.N. adopt a resolution to establish a commission of inquiry on the human rights situation in Rakhine State, Myanmar.³⁰

The Human Rights Council decided to dispatch an independent international fact-finding mission in March 2017 to investigate the alleged human rights violations by military and security forces in the Rakhine State located in Myanmar.³¹ Myanmar refused to grant access to human rights investigators, which has inhibited the investigators from completing their mission.³² In his address to the 36th session of the Human Rights Council in Geneva, Zeid Ra'ad Al Hussein, the U.N. High Commissioner for Human Rights, told Member States “the situation seems like a textbook example of ethnic cleansing.”³³ Despite Commissioner Zeid’s statement, there is still open debate as to whether the treatment of the Rohingya in Myanmar should be classified as genocide or as crimes against humanity.³⁴

In order to adequately assess the situation in Myanmar, the U.N. must have full access to the country. A report written by the Simon-Skjodt Center for the Prevention of Genocide and Fortify Rights recommended that the U.N. demand unfettered access to Myanmar for the fact-finding mission.³⁵ The U.N. did not demand access, but instead:

“Encourage[d] the Government of Myanmar to cooperate fully with the fact-finding mission . . . and stresse[d] the need for the fact-finding mission to be granted full, unrestricted and unmonitored access to all areas.”³⁶

29. “THEY TRIED TO KILL US ALL”, *supra* note 15 (citing Alina Lindblom et al., Allard K. Lowenstein Int’l Human Rights Clinic, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State?* 64 (2015)).

30. ALINA LINDBLOM ET AL., ALLARD K. LOWENSTEIN INT’L HUMAN RIGHTS CLINIC, *PERSECUTION OF THE ROHINGYA MUSLIMS: IS GENOCIDE OCCURRING IN MYANMAR’S RAKHINE STATE?* 64 (2015).

31. See Human Rights Council Res. 34/22, U.N. Doc. A/34/22, at 3 (Mar. 24, 2017).

32. *Investigation of Alleged Human Rights Violations*, *supra* note 11. Other countries that have routinely refused to comply with U.N. human rights investigators include Syria, Belarus, Eritrea, North Korea, and Iran. See Tom Miles, *U.N. Rights Chief Condemns Syria Abuses Under Assad’s Rule*, REUTER (Sept. 13, 2016), <https://uk.reuters.com/article/uk-mideast-crisis-syria-rights-idUKKCN11J0RW> [<https://perma.cc/DA9E-BJFQ>].

33. *Investigation of Alleged Human Rights Violations*, *supra* note 11.

34. See “THEY TRIED TO KILL US ALL”, *supra* note 15, at 13.

35. *Id.* at 3.

36. Human Rights Council Res. 34/22, U.N. Doc. A/34/22, ¶ 12 (Mar. 24, 2017).

This encouragement effort was unsuccessful in persuading the Government of Myanmar to provide the U.N. fact-finding mission with unrestricted access to the country.³⁷

The chair of the fact-finding mission maintained his confidence that unrestricted access would be granted by early 2018.³⁸ As of April 2018, unrestricted access has not yet been granted.³⁹ He further asserted that lack of access did not hinder the fact-finding mission “apart from denying [them] the Myanmar Government’s perspective.”⁴⁰ Despite this assertion, the statement also refers to “many unanswered questions” and “respectfully suggests” that Myanmar work with the mission through a task force in order to acquire answers to these questions.⁴¹ In addition to denying the U.N. unrestricted access, Myanmar authorities have also begun bulldozing Rohingya villages, which both destroys the possibility that the Rohingya will be able to return to their homes and destroys evidence of the crimes that have taken place there.⁴²

B. *U.N. Convention on the Prevention and Punishment of the Crime of Genocide*

The Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, and entered into force on January 12, 1951.⁴³ The Genocide Convention outlines the actions and mens rea required to commit the crime of genocide as follows:

[A]ny of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a. Killing members of the group;

37. See Marzuki Darusman (Chair, Independent Fact-Finding Mission on Myanmar), Statement to the Special Session of the Human Rights Council on the “Situation of Human Rights of the Minority Rohingya Muslim Population and Other Minorities in Rakhine State of Myanmar,” <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22495&LangID=E> (last visited Jan. 5, 2019) [<https://perma.cc/LLD2-RZWE>].

38. *Id.*

39. *Fact-Finding Mission on Myanmar*, *supra* note 12.

40. Darusman, *supra* note 37.

41. *Id.*

42. See *id.*

43. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/64/Add.1 (Dec. 9, 1948) [hereinafter Genocide Convention]. The term “genocide” was created by Raphaël Lemkin in 1944 as a response to the Nazi’s systematic destruction of Jewish people during the Holocaust, as well as prior events in history aimed at the destruction of particular groups of people. The word “genocide” combines the Greek prefix *genos*, which means race or tribe, with the Latin suffix *cide*, which means killing. See *Genocide*, U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/> (last visited Apr. 9, 2018) [<https://perma.cc/7HHU-DFUB>].

- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.⁴⁴

The Genocide Convention protects minority groups from mass killings and other harms that may be committed against them.⁴⁵ In addition to perpetrating genocide, the conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are also punishable.⁴⁶ Further, the Convention states that “[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.”⁴⁷ In contrast to the Convention’s specific outline of what constitutes genocide, the Convention leaves the punishment for its violation open ended.⁴⁸ Article V states that “[t]he Contracting Parties undertake to. . . provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III,” but it does not enumerate what these effective penalties might be.⁴⁹

The prosecution of violations of the Genocide Convention is within the jurisdiction of the ICC.⁵⁰ The Rome Statute of the International Criminal Court (Rome Statute), which established the ICC and entered into force on July 1, 2002, states in Article 5 that “[t]he jurisdiction of the [ICC] shall be limited to the most serious crimes of concern to the international community as a whole.”⁵¹ Article 5 goes on to state that the ICC has jurisdiction over the crime of genocide.⁵²

The first mention of the duty to prevent appears in Article I, which states that Contracting Parties must undertake to prevent

44. Genocide Convention, *supra* note 43.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Rome Statute of the International Criminal Court art. 5, July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

51. *Id.*

52. *Id.*

genocide.⁵³ This language has proven to be sufficient to criminally charge a contracting party after genocide has been committed; however, it lacks any sort of specificity about what types of prevention efforts are required.⁵⁴ Article VII elaborates on the prevention requirement:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.⁵⁵

Although Article VIII establishes that Contracting Parties may rely on the U.N. to assist in prevention efforts required to satisfy their duty to prevent, it also lacks specificity about what types of prevention efforts are required.⁵⁶

C. *Crimes Against Humanity*

The U.N. adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Convention on Crimes Against Humanity) on November 26, 1968, and it was entered into force on November 11, 1970.⁵⁷ As its name suggests, this treaty exists for the narrow purpose of eliminating statutory limitations to war crimes and crimes against humanity.⁵⁸ It is not a comprehensive treaty on crimes against humanity.⁵⁹ The treaty addresses the non-applicability of statutory limitations to crimes against humanity in Article I, which states that State Parties shall undertake to eliminate statutory limitations to crimes against humanity.⁶⁰

The Convention on Crimes Against Humanity references the definition of crimes against humanity, but does not itself define it.⁶¹ The U.N. defines crimes against humanity as “acts committed as part of a widespread or systematic attack directed against any

53. Genocide Convention, *supra* note 43.

54. See Marlise Simons, *Court Declares Bosnia Killings Were Genocide*, N.Y. TIMES (Feb. 27, 2007), <https://www.nytimes.com/2007/02/27/world/europe/27hague.html> [<https://perma.cc/C2GQ-QEZB>].

55. Genocide Convention, *supra* note 43.

56. *Id.*

57. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter Convention on Crimes Against Humanity].

58. *See id.*

59. *See id.*

60. *Id.*

61. *See id.*

civilian population, with knowledge of the attack.”⁶² Crimes against humanity include, but are not limited to, murder, extermination, enslavement, torture, and rape.⁶³ Article 7 of the Rome Statute requires that crimes against humanity be committed pursuant to a “State or organizational policy.”⁶⁴ Because crimes against humanity may be prosecuted during peacetime, their prosecution allows ICC to intervene before a war begins and creates further destruction.⁶⁵

There is no comprehensive treaty on crimes against humanity, which has made it difficult to apply charges in both national and international courts for three reasons.⁶⁶ First, there are concerns about fairness to the accused because bringing criminal cases under customary international law may be construed as an infringement on national sovereignty.⁶⁷

Second, there are substantial variations in the way international tribunal statutes define crimes against humanity.⁶⁸ For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) defines crimes against humanity as crimes “committed in armed conflict, whether international or internal in character, and directed against any civilian population,” whereas the International Criminal Tribunal for Rwanda (ICTR) defines crimes against humanity as crimes “committed as part of a widespread or systematic attack against any civilian population on national political, ethnic, racial or religious grounds.”⁶⁹

The ICTR’s definition of crimes against humanity is much narrower than that of the ICTY because it limits them to crimes committed as part of a widespread or systematic attack rather than any crime committed in armed conflict.⁷⁰ The ICTR’s definition is further limited to attacks on national political, ethnic, racial or religious grounds, whereas the ICTY’s definition applies to any civilian

62. ICC, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 13, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (last visited Apr. 9, 2018) [<https://perma.cc/VBM9-UXS7>].

63. *Id.*

64. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 335 (2013).

65. *Id.* at 334.

66. Leila Nadya Sadat & Kate Falconer, *The UN International Law Commission Progresses Towards a New Global Treaty on Crimes Against Humanity*, 21 AM. SOC’Y INT’L L. (2017); Sadat, *supra* note 64.

67. Sadat & Falconer, *supra* note 66.

68. *Id.*

69. S.C. Res. 1877, art. 5 (July 7, 2009); S.C. Res. 1774, art. 3 (Sept. 14, 2007).

70. *Compare* S.C. Res. 1877, art. 5 (July 7, 2009) *with* S.C. Res. 1774, art. 3 (Sept. 14, 2007).

population.⁷¹ Many of these statutes have limited retroactive application to crimes committed only during one specific conflict and therefore cannot be used to prosecute crimes that occur during subsequent conflicts.⁷²

Third, the International Court of Justice (ICJ) cannot assert jurisdiction for crimes against humanity unless it is also a case of genocide because there is no treaty with a compromissory clause.⁷³ A compromissory clause is necessary because such a clause would indicate that the relevant State Party accepted in advance the jurisdiction of the ICJ.⁷⁴

D. *Referring Cases of Genocide and Crimes Against Humanity to the ICC*

The ICC has jurisdiction over cases relating to the commission of genocide or crimes against humanity pursuant to Article 5 of the Rome Statute.⁷⁵ Such cases come before the ICC in three ways.⁷⁶ First, a party to the Rome Statute can request the Office of the Prosecutor to carry out an investigation.⁷⁷ Second, a non-party can accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals, and request the Office of the Prosecutor to carry out an investigation.⁷⁸ Third, the U.N. Security Council may refer a situation to the ICC.⁷⁹ The Office of the Prosecutor may also open an investigation on its own initiative if it determines that there is a reasonable basis to proceed with an investigation based on reliable information about crimes involving nationals of a party to the Rome Statute or a non-party to the Statute that has accepted the jurisdiction of the ICC.⁸⁰ Reliable informants include individuals and intergovernmental or non-governmental organizations, among others.⁸¹ In situations where

71. *Id.*

72. Sadat & Falconer, *supra* note 66.

73. *Id.*

74. *Frequently Asked Questions*, ICJ, <https://www.icj-cij.org/en/frequently-asked-questions> (last visited Apr. 9, 2018) [<https://perma.cc/EE5F-Y2HJ>]. The International Law Commission voted to move the topic of a new treaty on crimes against humanity to its active agenda on July 17, 2014. Sadat & Falconer, *supra* note 66.

75. Rome Statute, *supra* note 50, art. 5.1.

76. *See* ICC, *supra* note 62, at 17.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

the Office of the Prosecutor plans to initiate an investigation, it must first receive permission from the Pre-Trial Chamber judges.⁸²

Once a case is referred to the ICC for investigation, the prosecution must determine whether the ICC has jurisdiction over the alleged crimes.⁸³ Because the ICC has jurisdiction over genocide and crimes against humanity, when these crimes are alleged, this first element will be met.⁸⁴ The prosecution must then review the available information and decide whether there is a reasonable basis to proceed with an investigation.⁸⁵ The prosecution will proceed with the investigation if it establishes that genocide or crimes against humanity may have been committed after July 1, 2002.⁸⁶ The prosecution must also establish whether any national authorities are conducting a genuine investigation or trial of the alleged perpetrators of the crimes.⁸⁷ Finally, the prosecution must notify parties and non-parties that may have jurisdiction of its intention to initiate an investigation.⁸⁸ The Office of the Prosecutor conducts investigations by sending investigators to collect evidence in the area where the crime is alleged to have been committed.⁸⁹

E. *Enforcing the Obligation to Prevent Genocide and Crimes Against Humanity*

First, this Section will examine the prosecution of the Bosnian genocide as a case study of the way in which the ICJ⁹⁰ enforced the Genocide Convention's Article I obligation to prevent genocide.⁹¹ Then it will discuss the implementation of the Responsibility to

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. This date restriction is based on the date on which the Rome Statute entered into force. *Id.*; Rome Statute, *supra* note 50.

87. ICC, *supra* note 62, at 17.

88. *Id.*

89. *Id.*

90. The ICC did not have jurisdiction over the Bosnian Genocide because it took place before July 1, 2002, and the Rome Statute limits the jurisdiction of the ICC to genocide or crimes against humanity committed before that date. *See* Rome Statute, *supra* note 50. However, genocide and crimes against humanity alleged after that date, such as those in Darfur, Sudan, have fallen within the jurisdiction of the ICC. *See Darfur, Sudan*, ICC, <https://www.icc-cpi.int/Darfur> (last visited Apr. 10, 2018) [<https://perma.cc/UN78-7QQH>]. Because this Note recommends a proposal relevant to the current crisis in Myanmar as well as any future instances of genocide or crimes against humanity, the ICC would have jurisdiction pursuant to the Rome Statute. *See* Rome Statute, *supra* note 50.

91. Genocide Convention, *supra* note 43.

Protect doctrine. Finally, this Section will address Myanmar's failure to prevent atrocity crimes in northern Rakhine State.

1. Prosecution of the Bosnian Genocide

In July 1995, in the midst of war in Bosnia, Bosnian Serbs killed close to 8,000 Muslim men and boys.⁹² In 2007, the ICJ held that the Bosnian Serbs were not perpetrators of genocide.⁹³ In determining when a state should be held accountable for a genocide based on the rule of customary international law⁹⁴ set out in Article 8 of the International Law Commission (ILC) Articles on State Responsibility,⁹⁵ the court held that:

Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.⁹⁶

This indicates that the Federal Republic of Yugoslavia (FRY) is guilty of genocide only if the genocide was committed by the State's own agents or under the direction or control of the State.⁹⁷ Based on this assertion, the court concluded that the massacres at Srebrenica were not committed by the State because it was not established that the massacres were committed under the direction of organs of that state or that the State exercised effective control over those massacres.⁹⁸ In order to prove that the FRY was responsible for the genocide, Bosnia and Herzegovina would have had to demonstrate that instructions were issued by the federal authorities in Belgrade, or an organ of the FRY to commit the massacres with the intent of committing genocide.⁹⁹

92. Simons, *supra* note 54.

93. See *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26) [hereinafter *Bosn. & Herz. v. Serb. & Montenegro*].

94. Customary international law is one of the sources of international law. It refers to a sense of legal obligations arising from established state practice rather than from formal written international treaties. *Customary International Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/customary_international_law (last visited Apr. 9, 2018) [<https://perma.cc/47X3-V44F>].

95. The International Law Commission was created by the General Assembly to initiate studies and make recommendations in order to develop and codify international law. *International Law Commission*, INT'L LAW COMM'N, <http://legal.un.org/ilc/> (last visited Apr. 9, 2018) [<https://perma.cc/HEM6-C8AM>].

96. *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 93, ¶¶ 401, 407.

97. *Id.*

98. *Id.* ¶ 413.

99. *Id.*

After determining that the FRY was not guilty of genocide, the court considered whether the FRY was complicit in the genocide as defined by Article III, paragraph (e).¹⁰⁰ The court derived a definition for this crime from Article 16 of the ILC's Articles of Responsibility and found that to be complicit is to provide aid or assistance in the commission of an internationally wrongful act.¹⁰¹ The court found that the FRY was also not complicit in the genocide pursuant to Article III, paragraph (e) of the Convention because it could not be established that the decision to eliminate the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authority at the time it was made.¹⁰² Therefore, the ICJ held that the FRY did not aid the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.¹⁰³

The final question explored by the court's ruling is whether the FRY had complied with its obligations to prevent and punish genocide under Article I of the Convention.¹⁰⁴ Article I of the Convention states that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish."¹⁰⁵ The court noted that the obligation of each contracting state to prevent genocide is not merged in the duty to punish, but has its own independent scope.¹⁰⁶ In order to satisfy this requirement, states must "employ all means reasonably available to them, so as to prevent genocide so far as possible."¹⁰⁷ A state is responsible for breaching the obligation to prevent genocide only if the genocide was actually committed, and the state failed to employ means to prevent it.¹⁰⁸ This does not mean that the obligation to prevent genocide is triggered only once the perpetration of genocide begins.¹⁰⁹ Rather, it means that if neither genocide nor any of the crimes enumerated in Article III of the Genocide Convention have been committed, then a state that failed to act cannot be held responsible since the event did not happen.¹¹⁰

100. *Id.* ¶ 418.

101. *Id.* ¶ 419.

102. *Id.* ¶ 423.

103. *Id.*

104. *Id.* ¶ 425.

105. *Id.* ¶ 426.

106. *Id.* ¶ 427.

107. *Id.* ¶ 430.

108. *Id.* ¶ 431.

109. *Id.*

110. *Id.*

The court's ruling did recognize that the leaders in Belgrade were aware of the hatred between the Bosnian Serbs and the Muslims in the Srebrenica region and that massacres were likely to occur.¹¹¹ The court focused specifically on the FRY president's own comments indicating he was aware of a serious risk of genocide and the fact that no initiative was taken to prevent what happened.¹¹² Therefore, by doing nothing to prevent the killings, the FRY violated the duty to prevent genocide established by the Convention.¹¹³ Because the ICJ held that FRY failed to prevent and punish genocide but did not commit genocide, the Court determined that the appropriate reparation was limited to a declaration that the FRY "(1) has failed to comply with its obligation to prevent the crime of genocide, (2) has failed to comply with its obligation to punish genocide, and shall immediately take effective steps to ensure full compliance with this obligation by transferring accused individuals to the ICTY, and (3) has failed to comply with the Court's Orders indicating provisional measures."¹¹⁴

2. The U.N. Implements the Responsibility to Protect Doctrine

Following the mass atrocities that took place during the 1990s in Darfur, Kosovo, Liberia, Rwanda, Sierra Leone, and Srebrenica, the international community began to rethink its role in responding to such events.¹¹⁵ In his September 1999 address to the U.N. General Assembly, Kofi Annan challenged Member States to "find common ground in upholding the principles of the Charter, and acting in [defense] of common humanity."¹¹⁶ This call to action inspired the International Commission on Intervention and State Sovereignty (ICISS), which was set up by the Canadian government to issue a 2001 report entitled the Responsibility to Protect.¹¹⁷ The report was grounded in the idea that sovereign states have an

111. Simons, *supra* note 54.

112. *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 93, ¶ 438.

113. Simons, *supra* note 54.

114. J. Morgan-Foster & Pierre-Olivier Savoie, *World Court Finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide*, 11 AM. SOC'Y INT'L L. (2007).

115. Rebecca Salk, *Strengthening the Responsibility to Prevent: Reforming the United Nations' Genocide and Mass Atrocity Prevention Efforts Through Emphasis on Rule of Law*, 46 GEO. J. INT'L L. 561, 563 (2015) (citing JULIA HOFFMANN & ANDRÉ NOLLKAEMPER, INTRODUCTION TO RESPONSIBILITY TO PROTECT FROM PRINCIPLE TO PRACTICE 1, 13 (2012)).

116. *Responsibility to Protect*, U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/> (last visited Apr. 9, 2018) [<https://perma.cc/7HHU-DFUB>].

117. *Id.*

affirmative “responsibility to protect their own citizens from avoidable catastrophe . . . but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”¹¹⁸

The concept of the Responsibility to Protect doctrine was first included in the outcome document of the 2005 U.N. World Summit meeting, and the first General Assembly Resolution on the Responsibility to Protect was adopted on September 14, 2009.¹¹⁹ Secretary-General Ban Ki-Moon then released a report entitled *Implementing the Responsibility to Protect* on January 12, 2009.¹²⁰ This report advocated for a three-pillar strategy to advance the agenda.¹²¹ The pillars are: (i) the protection responsibilities of the State, (ii) international assistance and capacity-building, and (iii) timely and decisive response.¹²²

3. Myanmar’s Failure to Prevent Atrocity Crimes in Northern Rakhine State

On October 18, 2017, Adama Dieng, U.N. Special Adviser on the Prevention of Genocide, and Ivan Simonovic, U.N. Special Adviser on the Responsibility to Protect, issued a note to correspondents on the situation in Myanmar.¹²³ This note called on the Government of Myanmar to “take immediate action to stop and address the commission of atrocity crimes that are reportedly taking place

118. *Id.*; INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/E3JN-3GNU>].

119. *Key Developments on the Responsibility to Protect at the United Nations from 2005-2017*, INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop> (last visited Apr. 9, 2018) [<https://perma.cc/RJT2-D873>].

120. *Id.*

121. U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009) <http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf> [<https://perma.cc/DQT7-NBRS>].

122. *See id.* at 8–9.

123. *See* Statement, U.N. Special Adviser on the Prevention of Genocide Adama Dieng & U.N. Special Adviser on the Responsibility to Protect Ivan Simonovic, Note to Correspondents on the Situation in Northern Rakhine State, Myanmar (Oct. 18, 2017), <https://www.un.org/sg/en/content/sg/note-correspondents/2017-10-18/note-correspondents-statement-adama-dieng-un-special> [<https://perma.cc/D3RE-GN96>]. This Note acknowledged that the Special Advisers had been monitoring the situation in Myanmar for several years and had previously identified the risk of atrocity crimes being committed in the region. The Note identified based on factors that “included very deeply rooted and long-standing discriminatory practices and policies against the Rohingya Muslims population, a failure to stop acts of violence against the group and a failure to put in place conditions that would support the peaceful coexistence of different communities in the Rakhine state.” *Id.*

in northern Rakhine state.”¹²⁴ The Special Advisers use the term “atrocities crimes” to encompass genocide, crimes against humanity, and war crimes.¹²⁵

In addition to imploring the Government of Myanmar to end military operations, the international community encouraged authorities to cooperate with humanitarian efforts as well as fact-finding missions.¹²⁶ Specifically, the United Kingdom “stressed that the authorities of Myanmar must allow full humanitarian access to Rakhine” given that only the U.N. and its partners have the capacity to provide aid at the scale required.¹²⁷ Kazakhstan emphasized the importance of determining the facts on the ground, noting that the influx of 14,000 refugees into Bangladesh on September 24, 2017 demonstrated the necessity of dispatching a U.N. fact-finding team to provide an objective assessment of the situation.¹²⁸

U Thaung Tun, the National Security Adviser of Myanmar, was not prepared to validate the level of concern expressed by the international community. He said that “while [assertions that a campaign of terror had been unleashed in northern Rakhine] may appear reasonable at first glance to a lay observer, experts with knowledge of the history of Myanmar . . . will see such comments for what they were – malicious and unsubstantiated chatter.”¹²⁹ Although U Thaung Tun acknowledged that there was a serious problem that needed to be addressed, he also insisted that there was no ethnic cleansing and genocide occurring in Myanmar and went so far as to say that “[i]t would be a sad commentary of our times if we allowed emotions to cloud our view and assert that what is happening in Rakhine is ethnic cleansing without first undertaking a legal review.”¹³⁰ The U.N. did not do anything in response other than to call on the Government of Myanmar to take action to stop the violence that is taking place.¹³¹

124. *Id.*

125. *See id.*

126. *See* Meetings Coverage, Security Council, Amid ‘Humanitarian and Human Rights Nightmare’ in Myanmar, Secretary General Urges Full Access for Aid, Safe Return of Displaced Rohingya, End to Military Operations, U.N. Meetings Coverage SC/13012 (Sept. 28, 2017).

127. *See id.*

128. *See id.*

129. *Id.*

130. *Id.*

131. *Id.*

III. ANALYSIS

Despite the Genocide Convention's requirement that Contracting Parties actively work to prevent genocide, this has not proven to be successful in halting violence before it begins.¹³² Instead, it has been utilized only to hold actors accountable after the genocide has occurred.¹³³ The implementation of the Responsibility to Protect doctrine aimed to resolve this shortcoming of the Genocide Convention by explicitly stating that the international community has a responsibility to assist states in exercising their responsibility to prevent genocide "and in building their protection capacities."¹³⁴ The Responsibility to Protect doctrine has failed to fill a gap in the prevention component of the Convention in practice based on the current crisis of the involving the Rohingya Muslims in Myanmar.¹³⁵ Despite "Special Advisers . . . following the situation in northern Rakhine state for several years and hav[ing been] warned that there was a risk that atrocity crimes could be committed there," the U.N. did nothing to prevent these events from occurring.¹³⁶

This Note proposes that U.N. should recognize the refusal to comply with U.N. fact-finding missions to investigate alleged human rights violations that may constitute crimes against humanity or genocide as a violation of the Genocide Convention. First, this Section will address the problems with the Genocide Convention and the Responsibility to Protect doctrine that have rendered these mechanisms ineffective. Then it will outline how the proposal would be implemented. Finally, it will consider potential shortcomings of the proposal.

A. *The Genocide Convention and Responsibility to Protect Doctrine Have Not Been Applied Effectively*

The U.N. has worked to create a framework that will identify potentially volatile regions and make efforts, whether through peacekeeping efforts or diplomatic or military intervention, to ensure that genocide will not be committed.¹³⁷ Myanmar, a Contracting Party to the Genocide Convention, is failing to engage in prevention efforts, allowing its army to perpetrate genocide, and

132. See *supra* Section II.E.

133. See *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 93, at 238.

134. U.N. Secretary-General, *supra* note 121, at 1.

135. See Statement, *supra* note 123.

136. Meetings Coverage, *supra* note 126.

137. See Genocide Convention, *supra* note 43.

denying that genocide is occurring.¹³⁸ This Note proposes that the U.N. should recognize the refusal to comply with U.N. fact-finding missions to investigate alleged human rights violations that may constitute crimes against humanity or genocide as a violation of the Genocide Convention. The concern expressed for the Rohingya people is the same as the concern expressed by the original ICISS report that introduced the Responsibility to Protect doctrine in 2001: there is a “gap between rhetoric and financial and political support for prevention.”¹³⁹ Accordingly, the U.N. must enforce the existing requirement that parties to the Genocide Convention prevent genocide as soon as violence begins rather than waiting until after the violence has concluded to prosecute these crimes.¹⁴⁰

Article VIII of the Genocide Convention establishes that Contracting Parties may rely on the U.N. to assist in prevention efforts required to satisfy their duty to prevent, but this Article lacks particularity as to when the duty to prevent is triggered, what types of prevention efforts are necessary to satisfy the Convention, and to what extent the parties may rely on the U.N. to take action.¹⁴¹ Further, when the FRY violated the duty to prevent, the consequences were minimal.¹⁴² Even though the FRY president made comments indicating he was aware of a serious risk of genocide and took no initiative to stop the violence, an egregious violation of the duty to prevent, the ICJ determined that the appropriate reparation was limited to nothing more than an apology and future compliance with court orders.¹⁴³ In the case of the prosecution of the FRY, punishment of the violation of the duty to prevent could not have prevented genocide from occurring because it had already taken

138. See Hannah Beech & Saw Nang, *Myanmar Rejects U.N. Findings: ‘No Ethnic Cleansing or Genocide in Our Country,’* N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/world/asia/un-myanmar-rohingya-genocide.html> [<https://perma.cc/3HPP-EEZQ>]; Poppy McPherson, *US Holocaust Museum Says Evidence of Genocide Against Rohingya in Myanmar,* GUARDIAN (Nov. 14, 2017, 6:47 PM), <https://www.theguardian.com/world/2017/nov/15/us-holocaust-museum-evidence-genocide-rohingya-myanmar>; Toosi, *supra* note 11 [<https://perma.cc/SD5Y-USU2>]; Bard Wilkinson, *UN Official Convinced of Myanmar Rohingya ‘Genocide,’* CNN (Mar. 12, 2018, 10:44 AM), <https://www.cnn.com/2018/03/12/asia/myanmar-rohingya-un-violence-genocide-intl/index.html> [<https://perma.cc/P9VZ-YFBW>].

139. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 118, at 20.

140. See *supra* Section II.B.

141. *Id.*

142. See *supra* Section II.E.

143. See Morgan-Foster & Savoie, *supra* note 114 (noting that the ICJ limited reparation to a declaration that the FRY failed to comply with its obligation to prevent and punish genocide and compliance with future court orders).

place.¹⁴⁴ However, if this Note's proposal were to be implemented, punishments for violations should be made more substantial in order to incentivize Contracting Parties to comply with the duty to prevent before genocide occurs.

The language of the U.N.'s report on implementing the Responsibility to Protect doctrine provides more detail than the language of the Genocide Convention as to the obligations of Contracting Parties as they relate to prevention efforts.¹⁴⁵ The report acknowledges that "[g]enocide and other crimes relating to the responsibility to protect do not just happen" and therefore tactics including "[c]andid self-reflection, searching dialogue among groups and institutions, both domestically and international, and periodic risk assessment . . . in all regions of the world" are useful prevention tools.¹⁴⁶ More specific detail relating to these reflection mechanisms is included in the report's reference to state-to-state learning processes, such as the African Peer Review Mechanism and the standards established for obtaining membership in the European Union.¹⁴⁷

Despite the substantial amount of detail included in the report in contrast to the Genocide Convention, the implementation of the Responsibility to Protect doctrine lacks effectiveness in preventing genocide.¹⁴⁸ These shortcomings could be overcome with more timely enforcement efforts.

B. *The U.N. Must Punish Contracting Parties for Failure to Comply with Genocide Prevention Efforts*

This Note proposes that failure to comply with U.N. fact-finding missions to investigate potential violations of the Genocide Convention should be treated more seriously and responded to more forcefully. The U.N. should treat it more seriously by recognizing failures to comply with U.N. fact-finding missions as violations of the Genocide Convention's stated obligation to prevent genocide.¹⁴⁹ The practical effect of recognizing failures to comply with fact-finding missions as a violation of the Genocide Convention is that these violations, such as those currently taking place in Myanmar, would

144. See *supra* Section II.E.

145. U.N. Secretary General, *supra* note 121.

146. *Id.* at 12.

147. *Id.* at 13.

148. For discussion of implementation of the doctrine and the treatment of the Rohingya as an example of genocide which the doctrine failed to prevent, see *supra* Sections II.E.2, II.E.3.

149. See *supra* Section II.B.

be prosecuted as they occur, rather than waiting until after violence subsides.¹⁵⁰ If implemented, this change would mean that in cases where the U.N. dispatches a fact-finding mission to respond to violations of international humanitarian law and international human rights law, and the country under investigation refuses to comply with the mission, as is the case with Myanmar, the case should be referred to the ICC for prosecution.¹⁵¹

The current crisis in Myanmar is a perfect example of why it is insufficient to rely on Contracting Parties to initiate preventative measures either through their own means or with the help of international assistance.¹⁵² If a Contracting Party's government is perpetrating genocide, that country's government is not going to initiate preventative measures.¹⁵³ Myanmar's decision to block all access to areas impacted by violence, with narrow exceptions for guided tours of select areas for diplomats and journalists, is representative of this notion.¹⁵⁴ Further, by flattening Rohingya villages to the ground with bulldozers, the Myanmar government has done irreversible damage to the U.N.'s ability to investigate the crimes that have taken place there, even if full access were to be granted to the fact-finding mission.¹⁵⁵ This proposal would address this issue by enforcing the requirement to initiate preventative measures through prosecution of this violation.¹⁵⁶ This method of enforcement would be effective because the threat of prosecution by the ICC and the punishments that might result should be a sufficient incentive to obtain compliance.¹⁵⁷

The U.N.'s failure to obtain unrestricted access to Myanmar for the fact-finding mission and the Myanmar government's subsequent destruction of evidence has potentially fatal consequences for the prevention efforts of the international community.¹⁵⁸ While the chair of the fact-finding mission on Myanmar insists that lack of access did not impact the investigation, he also fails to recognize the ethnic cleansing taking place in Myanmar as genocide or crimes against humanity, even though many credible authorities

150. See *supra* Section II.D.

151. See *Fact-Finding Mission on Myanmar*, *supra* note 12; *supra* Section II.B.

152. See *supra* Section II.A.

153. *Id.*

154. See "THEY TRIED TO KILL US ALL", *supra* note 15, at 3.

155. See *supra* Section II.E.

156. See *supra* Section II.D.

157. See *supra* Section II.B.

158. See "THEY TRIED TO KILL US ALL", *supra* note 15, at 3.

have labeled them as such.¹⁵⁹ If the U.N. does not obtain sufficient evidence to determine whether the case should be referred to the ICC, this will have substantial implications for the measures that might be taken by the international community to resolve the crisis in Myanmar.¹⁶⁰ Additionally, if the U.N. fails to address what is happening in Myanmar in clear terms, it gives legitimacy to the statements by Myanmar's government that the accusations of the violence that have been taking place in the country are "malicious and unsubstantiated chatter."¹⁶¹

As a Contracting Party to the Convention, Myanmar has an obligation to prevent genocide.¹⁶² Refusing to comply with U.N. fact-finding missions relating to the Genocide Convention and destroying evidence relating to the investigation should be considered a violation of the obligation to prevent genocide.¹⁶³ The proposal would require the U.N. to refer such cases to the ICC for adjudication because refusal to comply is a violation of the Genocide Convention and therefore it falls within the jurisdiction of the ICC pursuant to the Rome Statute.¹⁶⁴ Once the case is referred, Contracting Parties in violation will be forced to acknowledge the seriousness of their violations. Further, Contracting Parties found guilty of violating the prevention requirement will incur sanctions. This referral will pressure Contracting Parties to comply with fact-finding investigations, and it will also indicate the significance of the event to the international community. This should also act as an impetus for the international community to relinquish financial or political hesitations to contribute to prevention efforts and subsequently comply with their obligations pursuant to the Responsibility to Protect.

C. *There Are Some Potential Shortcomings of This Approach*

Opponents of this proposal would argue that treating failure to comply with U.N. fact-finding missions as a violation of the Convention's requirement to work to prevent genocide will infringe

159. Toosi, *supra* note 11; *see* Darusman, *supra* note 37.

160. *See supra* Section II.A.

161. *See* Security Council, *supra* note 126.

162. Genocide Convention, *supra* note 43, art. 1, 300.

163. *See* Genocide Convention, *supra* note 43 (stating that Contracting Parties agree to undertake to prevent genocide); *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 93, at 430 (holding that states must "employ all means reasonably available to them, so as to prevent genocide so far as possible").

164. *Supra* Section II.B.

upon the right to national sovereignty.¹⁶⁵ When the Convention was first created, a *Washington Post* editorial endorsing it wrote that “[g]enocide . . . [w]herever it occurs, it must concern the entire civilized world.”¹⁶⁶ The Convention has been somewhat of an exception to traditional notions of the national sovereignty.¹⁶⁷ Madeleine Albright, former U.S. Ambassador to the U.N. and Secretary of State, has also advocated for national sovereignty issues to be viewed in a different light in the context of humanitarian crises.¹⁶⁸ In an address regarding the enforcement of international law, Albright said, “we respect the principle of national sovereignty but find ourselves confronted by humanitarian emergencies within states to which we may sometimes see a need to respond—with or without the endorsement of the local regime.”¹⁶⁹ Non-violent fact-finding missions should be mandated through the prevention requirement of the Genocide Convention because humanitarian crises have already been found to supersede concerns of national sovereignty, and this proposal will not further infringe on national sovereignty but rather more stringently enforce existing law.

Another concern is the effectiveness of these changes. Governments that stand by while genocide is perpetrated may not be persuaded to comply with the requirements of the Genocide Convention.¹⁷⁰ However, the threat of prosecution and the punishments that come with it might be sufficient to scare countries into compliance.¹⁷¹ Further, any progress that would improve the U.N.’s ability to access accurate information could be vital to both prevention efforts and prosecutions after mass atrocity has occurred.¹⁷²

One final concern about this approach is the timeline. Because the proposal would require prosecutions for failure to comply with fact-finding missions and other similar violations, these prosecutions would take place before genocide has occurred. However, the ICC’s only enforcement of the duty to prevent indicated that a

165. See Samantha Power, *A Problem From Hell* 55–56, (2002); Madeleine Albright, *Enforcing International Law: Address at the American Society of International Law Annual Meeting*, 89 *STRUCTURES OF WORLD ORDER* 575 (Apr. 5-8, 1995).

166. POWER, *supra* note 165.

167. GEERT-JAN ALEXANDER KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 344 (2005).

168. Albright, *supra* note 165.

169. *Id.*

170. *Supra* Section II.A.

171. See *supra* Section II.D.

172. “THEY TRIED TO KILL US ALL”, *supra* note 15, at 3.

state is responsible for breaching the obligation to prevent genocide only if the genocide was actually committed, and the state failed to employ means to prevent it.¹⁷³ While prosecuting violations of the Genocide Convention before genocide has been committed would be a departure from past practices, as it stands, the enforcement of the Genocide Convention's duty to prevent is not effective in preventing genocide from occurring.¹⁷⁴ Further, the mechanisms in place make it easy to implement this change.¹⁷⁵ The U.N. already refers cases relating to the Genocide Convention to the ICC.¹⁷⁶ The U.N. also dispatches fact-finding missions based on allegations of violations of international humanitarian law and international human rights law.¹⁷⁷ The only change will be that the U.N. will refer cases to the ICC as soon as there is refusal to comply with a fact-finding mission or a similar violation, rather than waiting until after genocide has been committed to refer the case.

IV. CONCLUSION

The U.N. has made strides to improve the international community's approach to preventing genocides. However, if enforcement of the current policies is not strengthened, they will continue to be ineffective. The U.N. should change its approach of enforcing the Genocide Convention by treating failure to comply with U.N. fact-finding missions to investigate potential violations of the Convention as a violation of the Article I requirement to prevent genocide. This should also be seen as a violation of the Responsibility to Protect doctrine. This change will serve as an incentive for Contracting Parties to comply with fact-finding missions, and as a result, the U.N. will have more accurate information relating to mass atrocities that may be occurring.

173. *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 93, at 431.

174. *See supra* Section II.E.

175. *See supra* Section II.D.

176. *See id.*

177. *See Fact-Finding Mission on Myanmar*, *supra* note 12.