A CRIME UNIVERSALLY ACKNOWLEDGED

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Abstract

Following World War II, the international community acknowledged its obligation to both prevent and punish genocide. It accomplished the latter through the establishment of courts and tribunals with the authority to exert universal jurisdiction over the crime of genocide. However, efforts to prevent genocide generally took the form of soft law or were part of much broader human rights initiatives that lacked substantive enforcement mechanisms. Consequently, the international community has struggled to fulfill its full range of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and new initiatives must be implemented to bolster established treaties and programs.

An examination of one of the most recent incidents of genocide reveals that the exercise of free speech can be an extremely effective tool in the fight to both expose and prevent genocidal acts. However, those who exercise this right often suffer grave personal consequences. Included in this Note is a proposed resolution that would promote the exercise of free speech and criminalize the suppression of such speech when it is used to expose or combat genocide.

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I. Introduction

Following World War II (WWII), the United Nations (U.N.) enacted what came to be known as the Genocide Convention. Its primary aims were to prevent and punish genocide, but the approaches to fulfilling these obligations were quite different.[1] Efforts to punish were rooted in international criminal law and took the form of binding treaties which directed action, assigned jurisdiction, and defined the elements of the crime. Throughout the years, international courts and tribunals have been established to try those who perpetrated the crime, and the world generally united around a uniform definition of the crime and the legal penalties for its commission. For decades, however, the international community relied heavily on the promotion of human rights and the deterrent effect of punishment as the exclusive means of preventing genocide. Independent preventative efforts that ultimately emerged took the form of aspirational, non-binding human rights declarations and mandates, or binding treaties that lacked substantive enforcement mechanisms and to which numerous reservations, understandings, and declarations were lodged. What became evident in the latter half of the twentieth century is that the world could unite in its condemnation of genocide, but when it came to adopting certain human rights standards, which acted as the foundation of efforts to prevent genocide, countries had extraordinarily different interpretations of those rights, the ways in which they should be implemented, and whether they should be implemented at all.

Consequently, those who promote and carry out efforts to prevent genocide, individuals who rely heavily on human rights protections to accomplish their mission, often operate without the protection of government or the law. They tiptoe around controversial issues of sovereignty and cultural divides and seek to educate, to ease tensions, to address small acts that could escalate, to care for, to heal, and to expose.[2] Given the arena in which these individuals operate, governed by divergent laws and varying levels of commitment to human rights, it is

1. G.A. Res. 260(A)(III), The Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

2. Human rights activists operating in this space may be professional or non-professional and often hail from vastly different professions: medical, academic, political, etc. *Who is a Defender,*

only natural that initiatives promoting their work would be supported by much softer law. Unfortunately, soft law, which often lacks penalties for noncompliance, is prone to misinterpretation, abuse, and outright dismissal by those who find it politically expedient to deviate from its terms.[3] It is in these environments that the pliable nature of soft law, particularly in reference to human rights, becomes most detrimental, allowing segments of the population to be marginalized, vilified, and dehumanized without substantive recourse. While soft law may be useful in some circumstances, it is not an appropriate tool for genocide prevention. Over and over, efforts to promote human rights and prevent genocide have proven insufficient and the international community has failed to respond by changing course.[4] The community has continued to approach prevention with soft law and diplomacy, urging universal respect for human rights that have not been universally adopted.

While there could be any number of ways to confront genocide prevention in a more targeted and robust fashion, an examination of both historical and modern-day acts of genocide reveals a very particular common thread: the exercise or suppression of speech. Messaging and communication of facts can be critical to both the perpetrators of genocide and those who seek to prevent it. "Without propaganda founded on the total eclipse of the freedom of press and of speech, it would not have been possible for German fascism to realize its aggressive intentions."[5] Decades after WWII, local media was used to incite violence in Rwanda and minimal international coverage allowed the genocide to

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OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx (last visited May. 21, 2020) [hereinafter *Who is a Defender*].

3. *Soft Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining soft law as "rules that are neither strictly binding nor completely lacking in legal significance"). In international law, soft law refers to "guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." *Id.*

4. Since WWII, at least twenty-four acts of genocide have been identified, the last four of which took place in the 21st century. In addition to those identified by the Inter-Parliamentary Alliance for Human Rights and Global Peace, the United Nations has investigated acts of genocide in Myanmar over the last two years. *See* Sarah Demuynck et al., *Acts of Genocide Committed Since the Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1951*, INTER-PARLIAMENTARY ALLIANCE FOR HUM. RTS. AND GLOBAL PEACE, http://www.ipahp.org/index.php?en_acts-of-genocide (last visited Mar. 21, 2020); *see also Myanmar Military Leaders Must Face Genocide Charges – UN Report*, UN NEWS (Aug. 27, 2018), https://news.un.org/en/story/2018/08/1017802 [hereinafter *UN Report Myanmar*].

5. Hans Fritzsche, Int'l. Mil. Trib. (Nuremberg), Judgment and Sentences: The Unfounded Acquittal of Defendant Fritzsche (1946) (Maj. Gen. Nikitchenko, dissenting), https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

go unchecked.[6] By contrast, investigative reporting in Myanmar exposed government involvement in attacks and campaigns against the Rohingya in a much shorter timeframe with much fewer casualties.[7] If speech is such a vital tool, the question remains: what is being done to prevent its use for nefarious purposes and to promote and protect its use for good? The former is a much more difficult problem to address, as suppression of false information may entail restrictions on free expression as a whole. But promoting and protecting the use of speech to prevent atrocities is possible and has the potential to, quite literally, change the conversation.

The following pages will examine current efforts to prevent genocide and identify possible deficiencies in these approaches. Why have these tools historically proved insufficient? What can be done to bolster their effectiveness? Answering these questions, and reengaging with the purpose for which these tools were created, will allow the international community to identify alternative ways to better accomplish the overall objective: preventing genocide in a modern world. This Note proposes one such alternative: the implementation of enhanced protections for the exercise of free speech when it is used to expose or combat genocide. Rather than continuing to address prevention predominately with diplomacy and soft law, this initiative will follow the direction of efforts to punish genocide, using the substance and structure of international criminal law. A proposed amendment to the Rome Statute of the International Criminal Court (Rome Statute)[8] will protect the work of human rights activists and prevent genocide by criminalizing not simply the act of genocide itself, but retaliatory acts against those who work to expose genocidal activity. It will also promote uniformity of understanding among parties to the Rome Statute. While this approach to protecting and promoting speech could be used in a much broader context, the specific purpose of this proposal is combatting genocide, a narrow objective that has already been adopted by the majority of U.N. member states and, as such, will be much more likely than the sweeping efforts of the past to gain widespread support and, possibly, universal acceptance.

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6. Allen Thomspon, *Preface* of THE MEDIA AND THE RWANDA GENOCIDE xi (Allan Thompson ed. 2007); *see generally* Noam Schimmel, *An Invisible Genocide: How the Western Media Failed to Report the 1994 Rwandan Genocide of the Tutsi and Why*, 15 THE INT'L J. OF HUM. RTS. 1125 (2011).

7. *See infra* note 32.

8. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter *Rome Statute*].

II. Current International Efforts to Combat Genocide

Following WWII, the U.N. proposed a number of reforms to both prevent the outbreak of further armed conflict and codify individual rights that should be extended to all persons no matter their nationality, efforts that were expected to protect individuals from the types of atrocities committed during the war.[9] In the decades that followed, initiatives built upon one another, fluctuating between aspirational declarations designed to obtain global consensus and political advantage, and legally binding treaties designed to elicit commitments and prompt action.[10]

However, in the 1990s when conflicts broke out resulting in genocide in Rwanda and the Balkans, the U.N. began to recognize the deficiencies in its efforts to effectively prevent these types of atrocities.[11] In response, it enacted a series of mandates designed to provide a more holistic approach to combatting genocide and related crimes.

In 2001, the International Commission on Intervention and State Sovereignty issued a report entitled "The Responsibility to Protect."[12] Subsequently, the U.N. General Assembly adopted the 2005 World Summit Outcome, in which heads of state acknowledged a responsibility to protect their own populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[13] They also recognized the international community's responsibility, through the U.N., to use "appropriate diplomatic, humanitarian and other peaceful means" to protect foreign populations from the same.[14] Coupled with the Responsibility to Protect Initiative (Initiative), the Secretary-General launched an Action Plan to Prevent Genocide (Action Plan) in 2004, culminating in the creation of the United Nations Office on Genocide Prevention and the Responsibility to Protect.[15] The office

> collects information, conducts assessments . . . and alerts the Secretary-General . . . to the risk of atrocity crimes, as well as

9. U.N. Charter, preamble.

10. Philip Alston & Ryan Goodman, International Human Rights: The Successor to International Human Rights in Context 142 (2013).

11. *The Office*, U.N. Off. on Genocide Prevention and the Resp. to Protect, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml (last visited Feb. 22, 2020) [hereinafter *Genocide Prevention Mandate*].

12. *Id.*

13. G.A. Res. 60/1, ¶ 138, 2005 World Summit Outcome (Oct. 24, 2005).

14. *Id.* at ¶ 139.

15. *Genocide Prevention Mandate*, *supra* note 11.

> their incitement. The Office also undertakes training and technical assistance to promote greater understanding of the causes and dynamics of atrocity crimes and of the measures that could be taken to prevent them. . .[16]

Additionally, in the fight to combat genocide, the Secretary-General identified the importance of preventing armed conflict, protecting civilians in armed conflict, ending impunity for those who have committed atrocities, early and clear warning of possible and impending atrocities, and the need for swift and decisive action when faced with the realization that genocide is happening or is about to happen.[17]

Although these high-level objectives demonstrate a reasonably clear understanding of some of the potential causes of genocide, such as national crisis and fractionalization,[18] the question remains whether the Action Plan provides enough specific guidance to call leaders to action. Those who have fallen victim to preparatory or actual genocidal acts in the decades since the Initiative began would likely answer in the negative.

Where did the Initiative fail these vulnerable populations? The answer likely lies in the Action Plan itself:

> If we are serious about preventing or stopping genocide in the future, we must not be held back by legalistic arguments about whether a particular atrocity meets the definition of genocide or not. By the time we are certain, it may often be too late to act. We must recognize the signs of approaching or possible genocide, so that we can act in time to avert it.[19]

This simple statement follows an ambitious but largely unrealistic chain of thought. If we know the signs of approaching genocide, will we impinge on state sovereignty to prevent the possibility of its occurrence? Are we capable of effectively protecting civilians in a war zone? Will we actually punish heads of state who set the policy and give the orders for targeted killings and genocidal activity? Are we capable of swift calls to action when faced with these types of atrocities? More often

16. *Id.*

17. Press Release, Secretary General, U.N. Press Release SG/SM/9197 (Apr. 7, 2004) [hereinafter *Action Plan*].

18. Max Roser & Mohamed Nagdy, *Genocides*, OUR WORLD IN DATA, https://ourworldindata.org/genocides (2020).

19. *Action Plan*, *supra* note 17.

than not, we apply diplomatic pressure, but we do not intervene. We publicly scold, but we rarely prosecute. Be it out of a fear of retaliation, fear that we will have made the wrong assessment, fear of souring international relations, or political and diplomatic gridlock, we as an international community have proven our limitations. It is therefore time to reassess our capabilities to identify our strengths in the context of proven successes.

III. Genocide and Journalism: Learning from the Myanmar Example

The international community's strength lies not in its ability to prevent war or to act swiftly and decisively in times of crisis—it lies in the ability to identify issues and facilitate communication. This means that free speech and the protection of those who exercise it are critical tools in the effort to prevent atrocities like genocide. Examination of one of the world's most recent incidents of genocide, the attacks on the Rohingya in Myanmar, demonstrates the impact free speech can have in a genocidal or pre-genocidal context.

Prior to 2017, approximately one million of Myanmar's fifty-three million residents identified as Rohingya, a primarily Muslim ethnic minority practicing a "Sufi-inflected variation of Sunni Islam."[20] Though many Muslims who now identify as Rohingya settled in Myanmar in the nineteenth and twentieth centuries, some trace their roots to the Arakan Kingdom, which ruled the region in the fifteenth century.[21] By identifying as Rohingya, which means "from" Arakan, the group asserts ties to the land which predate the establishment of Burma as a nation.[22] Since the country gained independence from colonial rule in 1948, "successive governments in Burma, renamed Myanmar in 1989, have refuted the Rohingya's historical claims and denied the group recognition as one of the country's 135 ethnic groups."[23] Having been refused citizenship by the Myanmar government, the Rohingya have effectively become a stateless people.[24] They are victims of "institutionalized discrimination," denied the right to vote and subjected to "restrictions on marriage, family planning, employment, education, religious choice, and freedom of movement."[25] Settled primarily in the most

20. Eleanor Albert & Lindsay Maizland, *The Rohingya Crisis*, Council on Foreign Relations (Jan. 23, 2020), https://www.cfr.org/backgrounder/rohingya-crisis.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

underdeveloped, poverty-stricken region of Myanmar, tensions between the Rohingya and the local Buddhist population have been building for decades.[26]

In August 2017, "the Arakan Rohingya Salvation Army (ARSA) claimed responsibility for attacks on police and army posts."[27] In response, Myanmar declared the ARSA a terrorist organization and state military began what appeared to be an indiscriminate campaign against the wider Rohingya population, the vast majority of whom had no affiliation with the ARSA.[28] This campaign included both acts of violence and the use of social media to spread propaganda designed to incite hatred, fear, and violence against the Rohingya.[29] Myanmar claimed that its operations represented "a legitimate response to attacks by Rohingya insurgents."[30] However, as new statistics and reports emerged, the government's claim became less plausible. The Rohingya accused the army of "arson, rapes and killings aimed at rubbing them out of existence."[31] It is estimated that as a result of the military's "clearance operation" more than 670,000 Rohingya fled to Bangladesh, 6,700 were killed in the first month of violence alone, and tens of thousands remain missing and are presumed dead.[32]

On September 2, 2017, Buddhist villagers and Myanmar troops killed ten Rohingya men in Rakhine state, Myanmar.[33] "At least two were hacked to death by Buddhist villagers. The rest were shot by Myanmar troops. . ."[34] Villagers dug a single shallow grave, and the men, if not already dead, were left to die as they were buried together.[35] Reuters journalists Wa Lone and Kyaw Soe Oo, both Myanmar nationals, investigated this incident as one of the first confirmed reports of military involvement in the attacks on the Rohingya.[36] In early December 2017, in the midst of their investigation but prior to the publication of

26. *Id.*

27. *Id.*

28. *Id.*

29. Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

30. Wa Lone et al., *Massacre in Myanmar*, REUTERS (Feb. 8, 2018, 10:00 PM), https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/.

31. *Id.*

32. Laignee Barron, *More Than 43,000 Rohingya Parents May be Missing. Experts Fear They Are Dead*, TIME (Mar. 7, 2018), http://time.com/5187292/rohingya-crisis-missing-parents-refugees-bangladesh/.

33. Wa Lone et al., *supra* note 30.

34. *Id.*

35. *Id.*

36. *Id.*

their piece, Wa Lone and Kyaw Soe Oo were invited to meet with police at a restaurant in Yangon.[37] The journalists claim they were handed documents by the police, whom they had never met, and arrested almost immediately thereafter.[38]

The two men were charged with a violation of section 3.1(c) of the Burma Official Secrets Act.[39] The prosecution alleged that they "collected and obtained secret documents pertaining to the security forces with the intention to harm national security."[40] In a hearing on July 2, 2018, the prosecution said that the documents found in their possession when they were arrested detailed the movements of security forces.[41] Further, it is alleged that "documents found on their mobile phones ranged from confidential to top secret."[42] Earlier in the proceedings, Police Captain Moe Yan Naing had testified that a senior officer had ordered subordinate officers to frame the reporters by planting secret documents on them.[43] The officer was later sentenced to a year in jail and his family was evicted from police housing, though the government has characterized this as a disciplinary matter unrelated to his testimony.[44] On September 3, 2018, the two journalists were sentenced to seven years in prison and the documents handed to them during the alleged setup were central to that conviction.[45]

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37. *Timeline: Reuters Journalists Detained in Myanmar*, REUTERS (Aug. 25, 2018), https://www.reuters.com/article/us-myanmar-journalists-timeline/timeline-reuters-journalists-detained-in-myanmar-idUSKCN1LB015.

38. *Id.*

39. *Id.*; The Burma Official Secrets Act at 3.1(c), 1923, (India) ("If any person for any purpose prejudicial to the safety or interests of the State . . . (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly, useful to an enemy; he shall be punishable with imprisonment for a term which may be extended, where the offence is committed in relation to any work or defense, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of [the State] or in relation to any secret official code, to fourteen years and in other cases to three years."), *translation available at* http://www.icnl.org/research/library/files/Myanmar/secrets.pdf.

40. Antoni Slodkowski & Shoon Naing, *Myanmar Court Files Secrets Act Charges Against Reuters Reporters*, REUTERS (Jul. 9, 2018), https://www.reuters.com/article/us-myanmar-journalists-ruling/myanmar-court-files-secrets-act-charges-against-reuters-reporters-idUSKBN1JZ095.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Richard C. Paddock, *Myanmar Sentences Reuters Journalists to 7 Years in Prison*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/world/asia/myanmar-reuters-journalists-sentenced-trial.html.

Although initial U.N. investigations into the situation in Myanmar predated the two journalists' arrest and subsequent reporting,[46] their struggles and revelations heightened the international community's response. The U.N. report, which was released in the same month as Wa Lone and Kyaw Soe Oo's conviction, found that crimes committed against the Rohingya included "murder, rape, torture, sexual slavery, persecution and enslavement."[47] The international community also rallied around the Rohingya, deploying humanitarian aid to Bangladesh to support overflowing refugee camps.[48] More recently, the country of Gambia brought a case against Myanmar to the International Court of Justice (ICJ), and the International Criminal Court (ICC) authorized prosecutors to open an investigation into the treatment of the Rohingya.[49]

Additionally, prominent human rights advocates called for the convictions of Wa Lone and Kyaw Soe Oo to be overturned and for the men to be pardoned and released. Michelle Bachelet, the U.N. High Commissioner for Human Rights, noted that the legal process which brought about their conviction "clearly breached international standards" and sent a message to journalists that "they cannot operate fearlessly, but must rather make a choice to either self-censor or risk prosecution."[50] Thomas Kean, Wa Lone's former editor at the *Myanmar Times*, told Kyaw Ye Lynn of the *Washington Post* that "[t]he right to freedom of expression [in Myanmar] is not guaranteed—it is conditional on not challenging the government or the military, on not crossing their red lines . . . [i]f you do . . . there are always laws on hand that can

46. *UN Independent International Fact-Finding Mission on Myanmar*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx (last visited Apr. 8, 2020).

47. *UN Report Myanmar*, *supra* note 4.

48. Press Release, USAID, United States Announces Additional Humanitarian Assistance for Rohingya Refugees (Mar. 5, 2019), https://www.usaid.gov/news-information/press-releases/mar-5-2019-usaid-humanitarian-assistance-rohingya-refugees.

49. Shibani Mahtani & Michael Birnbaum, *Suu Kyi's Defense of Genocide Charges May Shock the West. But it Bolsters Her Status at Home*, THE WASH. POST (Dec. 9, 2019), https://www.washingtonpost.com/world/asia_pacific/suu-kyis-defense-of-genocide-charges-against-myanmar-may-shock-the-west-but-it-solidifies-her-cult-status-at-home/2019/12/09/8ae9dbf4-17ee-11ea-80d6-d0ca7007273f_story.html.

50. *Comment by UN High Commissioner for Human Rights Michelle Bachelet on the Conviction of Two Reuters Journalists in Myanmar*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Sept. 3, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23495&LangID=E.

be dusted off and used."[51] On April 23, 2019, the Myanmar Supreme Court rejected defense counsel's final appeal to overturn the convictions, leaving the two journalists with very little hope of effective recourse.[52] It was not until May 7, 2019, after serving more than sixteen months in prison, that Wa Lone and Kyaw Soe Oo were pardoned and released. However, this was not a victory for free expression, nor an indication of change in Myanmar. "It is customary in Myanmar for authorities to free prisoners around the time of the traditional New Year, which began on April 17."[53] President Win Myint pardoned 6,520 prisoners, including Wa Lone and Kyaw Soe Oo, in two mass amnesties.[54] It is suspected that the journalists were included in this group of prisoners to lessen some of the immediate pressure on Myanmar officials, but dozens of other activists remain behind bars.[55]

This case demonstrates two key points in the larger discussion. First, the international community is capable of supporting one important facet of the Action Plan—early and clear warning of possible and impending atrocities—and while the international response may fall short of that which was envisioned by the Secretary-General, it can be a meaningful response all the same.[56] Second, speech and the dissemination of information are critical to the ability to provide early and clear warning, but they are not always protected and individuals operate at great personal risk in pursuing these objectives.

The international community has not neglected activists like Wa Lone and Kyaw Soe Oo. Over twenty years ago, well before the Action Plan was developed and the associated mandate took effect, the U.N.

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51. Shibani Mahtani & Kyaw Ye Lynn, *Myanmar Judge Sentences Reuters Journalists to 7 Years in Prison*, THE WASH. POST (Sept. 3, 2018), https://www.washingtonpost.com/world/myanmar-judge-sentences-reuters-journalists-to-7-years-in-prison/2018/09/03/53b89674-af27-11e8-a810-4d6b627c3d5d_story.html.

52. Shoon Naing & Simon Lewis, *Myanmar's Top Court Rejects Final Appeal by Jailed Reuters Journalists*, REUTERS (April 22, 2019), https://www.reuters.com/article/us-myanmar-journalists/myanmars-top-court-rejects-final-appeal-by-jailed-reuters-journalists-idUSKCN1RZ06O.

53. Thu Thu Aung & Shoon Naing, *Myanmar to Release 6,500 Prisoners in Amnesty on Tuesday: President*, REUTERS (May 6, 2019), https://www.reuters.com/article/us-myanmar-journalists-amnesty/myanmar-to-release-6500-prisoners-in-amnesty-on-tuesday-president-idUSKCN1SD04A.

54. *Id.*; Richard C. Paddock et al., *Myanmar Freed Two Reporters From Prison. It's Not a Paradigm Shift.*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/world/asia/myanmar-press-freedom.html.

55. Paddock et al., *supra* note 54.

56. It is also possible that the International Criminal Court investigation and the charges brought before the International Court of Justice will support the goal of ending impunity. However, this harkens back to the use of punishment as a deterrent to future would-be perpetrators, not a strictly preventative measure.

deployed a broader mandate to recognize the efforts of human rights activists and volunteers, and to elicit promises to protect their work and ensure their safety. If the U.N. has recognized the importance of this kind of work and devoted specific resources to protecting it, why do these types of issues continue to arise? What is lacking in this mandate that has restricted its reach?

IV. Defending the Defenders: Deficiencies In Efforts to Protect Human Rights Activists

In 1999, the U.N. General Assembly adopted Resolution 53/144, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of the Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration), also known as the Declaration on Human Rights Defenders.[57] Human rights defenders are individuals who work to promote civil and political rights and to support the realization of economic, social, and cultural rights.[58]

The Declaration recognized the importance of human rights defenders and the integral part freedoms of association and expression play in their ability to carry out their work. In conjunction with the adoption of the Declaration, the U.N. established a mandate on human rights defenders.[59] Originally led by Hina Jilani, Special Representative of the Secretary-General on the situation of human rights defenders, the mandate was intended to support implementation of the Declaration and to gather information on the treatment of human rights defenders and the conditions in which they operate.[60]

In adopting the Declaration, the U.N. recognized that everyone has a role to play in supporting and defending human rights.[61] The Declaration sought to protect the work of activists like Wa Lone and Kyaw Soe Oo by advocating for renewed attention to and enhanced support for freedom of assembly and freedom of expression.

The Declaration primarily calls on member states to reestablish their commitment to recognize and support rights codified in the Charter of the United Nations (U.N. Charter), the Universal Declaration of

57. G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Mar. 8, 1999) [hereinafter *Declaration on Defenders*].

58. *Who is a Defender*, *supra* note 2.

59. Commission on Human Rights Res. 2000/61, Human Rights Defenders (Apr. 26, 2000).

60. *Id.* ¶ 3(a) ("To seek, receive, examine and respond to information on the situation and the rights of anyone, acting individually or in association with others, to promote and protect human rights and fundamental freedoms.").

61. *Declaration on Defenders*, *supra* note 57.

Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and other binding and non-binding international agreements and declarations.[62] Beginning with Article 5, the Declaration on Human Rights Defenders sets out the types of activities defenders may engage in to promote human rights and fundamental freedoms. These activities include peaceful assembly, communicating with non-governmental organizations and intergovernmental bodies, accessing information on human rights, advocating for the acceptance of new human rights, participating in government, criticizing and submitting alternate proposals for improving policies, and "draw[ing] attention to any aspect of [the work of governmental bodies] that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."[63]

The Declaration and associated mandate might appear perfectly designed to support the kind of work that would provide early and clear warning of possible and impending atrocities. The Declaration both promotes freedom of expression and seeks to protect the individuals who exercise it, the very tools and work that have been shown to effectively prevent genocide. Unfortunately, as attacks on human rights defenders have escalated—particularly against those who expose the crimes of government—it has become clear that the Declaration has fallen short of the intended goal.[64] Where, then, did this initiative lose momentum?

Article 12 of the Declaration specifically addresses protections for human rights defenders. It calls upon each state to take necessary steps to protect defenders from "violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of [their] legitimate exercise of the rights referred to in the . . . Declaration."[65] There are three key issues with the approach adopted by the Declaration and the mandate as a whole. First, member states are prompted to take "necessary measures" to promote the

62. *Id.*

63. *Id.* art. 8.

64. *International Day to End Impunity for Crimes Against Journalists*, UNITED NATIONS, http://www.un.org/en/events/journalists/ (last visited Mar. 21, 2020).

65. Declaration on Defenders, *supra* note 57, at art. 12. ("In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.").

purpose and effect of the Declaration,[66] but no specific guidance is provided concerning expectations and no minimum standards are set. Second, much like the Action Plan and its associated mandate, the Declaration carries neither legal weight nor penalties for noncompliance. Finally, while the Declaration supports the very tools needed to combat genocide, it is a much broader initiative that could be called upon to support causes that are not universally understood and accepted. For the Declaration and the mandate on human rights defenders to provide the kind of support needed to effectively protect human rights defenders and prevent genocide in accordance with the Action Plan, these issues must be addressed, and a new way must be forged.

A. *Uniform Standards and Guidance Must Be Identified to Ensure Compliance*

Following WWII and throughout the last seventy years, the international community has sought to codify uniform definitions of fundamental human rights, including the right to free expression. The 1948 UDHR, which expressed general outrage over the atrocities committed during WWII, sought to codify a universal understanding of the obligations of government and the rights of citizens.[67] Among these was the right to free expression: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."[68] Like many international initiatives of the time, however, the UDHR was intended to exert moral and political influence rather than elicit legally binding commitments.[69] In 1976, the ICCPR[70] expanded upon the language of the UDHR, providing more concrete definitions of fundamental human rights. Article 19 of the ICCPR, addressing freedom of expression, states in part that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his

66. *Id.*
67. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
68. *Id.* art. 19.
69. ALSTON & GOODMAN, *supra* note 10, at 141.
70. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

choice." Unlike the aspirational focus of the UDHR, the ICCPR sought to bind parties to its terms.[71]

Despite widespread ratification of the ICCPR, however, uniformity in the adoption and implementation of the right to freedom of expression was not achieved. Each nation adopted its own interpretation of the right to free expression, and many definitions that predated the ICCPR remained virtually unchanged following its entry into force.[72] Certain members of the international community labeled efforts to reach uniformity as ideological imperialism, attempts to impose western values on the whole world without diverse input or full consent.[73] Uniform definitions did not take into account cultural, ideological, or political differences between nations.[74] And even among like-minded nations, the scope of protected speech has varied. For example, in Germany, Holocaust denial is punishable under laws criminalizing incitement to hatred.[75] In 2002, in an effort to prevent future violence between ethnic groups, Rwanda passed the Divisionism Law, which has been used to censor speech and suppress political opposition.[76] And in the United States, there are restrictions on speech that constitutes incitement or obscenity.[77]

The realities of this diverse landscape beg the question: are uniform definitions practical, feasible, or even useful? For human rights initiatives that depend on a uniform understanding of rights and responsibilities, the answer is undoubtedly yes. While some initiatives may be seen as inherently western, others, like combatting genocide, are inherently human and require a more concrete and universally understood foundation. Without that universal foundation, differences in practice may

71. ALSTON & GOODMAN, *supra* note 10, at 148.

72. *See generally*, U.S. Const., which incorporated the Bill of Rights in 1791. *See also*, Nikonkoku Kenpō [Kenpō] [Constitution], art. 21, which came into effect in 1947; European Convention on Human Rights, Nov. 4, 1950, E.T.S. No. 005.

73. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 224 (2001).

74. *Id.*

75. Strafgesetzbuch [StGB][Penal Code], §130, as amended, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

76. Research Directorate, Immigration and Refugee Board of Canada, Ottawa, *Rwanda: Legislation governing divisionism and its impact on political parties, the media, civil society and individuals (2004-June 2007)*, Immigration and Refugee Board of Canada, RWA102565.E (Aug. 3, 2007), https://www.refworld.org/docid/474e895a1e.html.

77. *See* Schenck v. United States, 249 U.S. 47 (1919) (holding that in the United States speech can be restricted in a time of war); Brandenburg v. Ohio, 395 U.S. 444 (1969) (calls for imminent lawless action not protected); Miller v. California, 413 U.S. 15 (1973) (obscenity not protected by the First Amendment).

become increasingly exaggerated and detrimental to a vital mission. For example, when countries restrict opposition viewpoints in the press, under normal circumstances there may be political ramifications, but in the context of genocide thousands of lives may be lost.

Neither the "defending the defenders initiative" nor the Action Plan to prevent genocide provide foundational definitions of free expression, a tool that is vitally important to the success or failure of their missions. They rely on definitions and interpretations that have, as noted above, already proved problematic. However, genocide prevention is too important a goal for the international community simply to agree to disagree.

B. *Enforcement Mechanisms Are Needed to Enhance Protections*

In addition to inconsistencies in law and interpretation, a lack of legal obligation and enforceability also constrains the Declaration and its associated mandate. Be it out of notions of independence or a distrust of the motivations of allies and enemies alike, many nations have balked at the idea of submitting to the jurisdiction of an international body. This invocation of sovereign independence led nations like the United States, the Soviet Union, and China to rally against the automatic compulsory jurisdiction of the ICJ.[78] A number of nations have rejected efforts to bring their actions before the ICJ.[79] And nearly every major human rights treaty since WWII has been subjected to vigorous debate, years of negotiations and edits, and numerous reservations.[80]

These objections and reservations very clearly demonstrate a major reason why international agreements rarely include substantive enforcement mechanisms or strict penalties for noncompliance, and often leave it to member states to create domestic legislation to honor the spirit of the agreement. The ability to obtain more widespread political support for the objectives of the agreement is valuable and likely would not be possible with the imposition of more stringent

78. Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 52 (Cesare Romano ed. 2009).

79. J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 YALE J. INT'L L. 342, 348 (1987), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1505&context=yjil.

80. *See generally*, Declarations, Reservations, Objections, and Derogations to International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407, which held its first drafting session in February 1947, opened for signature in December 1966, and entered into force in January 1976; *see also* Declarations, Reservations, Objections, and Derogations to the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3, which was negotiated in a similar timeframe.

requirements, but, in the context of genocide, consensus alone is insufficient. Consensus must be followed by commitment, to be followed by action, to be followed by reaction and reflection and reengagement. This means that a multifaceted and ever-evolving approach is needed to combat genocide. The international community must build on the efforts of the past; modern efforts must alter in their intensity and adapt to changing conditions.

As noted above, current efforts in the realm of genocide prevention and "defending the defenders" rely on fact-finding, recommendations, reports, and diplomatic pressure, not on the imposition of penalties. However, fear of fractionalization should not be the only guide when determining the merit or feasibility of a proposal. There are some crimes so heinous and some initiatives so important that a forceful approach is warranted.

C. *In Order to Gain Support for Substantive Enforcement Mechanisms, A Clear and Narrow Focus is Required*

Finally, while the Action Plan is specific to genocide, the Declaration is not. It has the ability to support very narrow causes, but it may also cross into inherently cultural and national interests. The trend for human rights initiatives is to remain broad and somewhat open to interpretation, but the reverse is true in criminal law. Criminal law is narrow, clearly defined, bureaucratic, and calculated in its construction and execution. This is the kind of specificity needed to provide appropriate notice of what conduct is considered illegal and the corresponding penalties for noncompliance.[81]

As noted above, a uniform definition of free expression has not been adopted by members of the United Nations, and the treaties that impose uniform standards, the UDHR and the ICCPR, either do not maintain substantive enforcement mechanisms or rarely use them to challenge domestic law that is inconsistent with the standards set by the treaty. If free expression, a very expansive right, is the necessary

81. The maxims *nullum crimen sine lege*, no crime without law, and *nulla poena sine lege*, no punishment without law, are seen as some of the foundations of legality. Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008). The law must provide fair warning of what conduct is considered both criminal and punishable, such that a person of ordinary intelligence could ascertain what conduct is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). This principle of legality was a particular point of contention in the Nuremberg trials, which, while just in their motivations, punished responsible officials for crimes that were neither codified in international legal doctrine, nor held precedent for the imposition of individual criminal responsibility. Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L. CRIM. JUST. 830, 832 (2006).

element in a campaign to prevent genocide and the imposition of penalties for violation of that right is also necessary to add gravitas to the movement, perhaps the avenue to accomplish the latter and impose a more uniform understanding of the right is to narrow its scope by linking it to a concept that *is* universally understood and accepted: genocide.

In order to remedy the deficiencies discussed above and provide more support for efforts to prevent genocide, a vehicle must be identified to codify a uniform definition of free expression, provide clear notice of what conduct would be considered criminal in the suppression of that right, and impose international penalties for violation of that right. To obtain broad support for this initiative, however, the right must be narrowly defined and designated for the specific purpose of genocide prevention. This would by no means limit the scope of the right as a whole, as international treaties and individual nations could still impose broader definitions of protected speech, but international criminal liability would be reserved for the lowest common denominator, the most egregious violations of the right leading to the most dire consequences.

V. Enhancing Genocide Prevention Through an Amendment to the Rome Statute

Although there is no formal "hierarchy of gravity," genocide is often referred to as the "crime of crimes," and its prohibition has an elevated status in international law.[82] The prohibition on genocide is considered *jus cogens*, a peremptory norm that is accepted and recognized by the international community such that no derogation is permitted.[83] Genocide is also considered a crime of universal jurisdiction, which is jurisdiction "based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim."[84] As the preceding would suggest, given the elevated status of the crime of

82. United Nations Office on Genocide Prevention and the Responsibility to Protect, When to Refer to a Situation as "Genocide", http://www.un.org/en/genocideprevention/documents/publications-and-resources/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf (last visited Jan. 1, 2019).

83. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

84. Princeton Univ. Program in law and Pub. Affairs, The Princeton Principles on Universal Jurisdiction 16 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

genocide, no international treaty is necessary to support its prohibition —however the primary instrument used to bring charges against perpetrators of genocide and codify the elements of the crime is the Rome Statute.[85] Parties to the Rome Statute agree to the ICC's jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.[86] The Rome Statute defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[87]

Although the Rome Statute, on its face, only establishes crimes under the jurisdiction of the ICC, it has the potential to reach much farther than the confines of the court. The four crimes of the Rome Statute were incorporated based on broad, longstanding support for their status as the most serious international crimes.[88] While a number of

85. *Rome Statute*, *supra* note 8.

86. *Id.* For the purposes of this Note, it is not currently recommended that the proposed amendment be extended to all crimes under the jurisdiction of the ICC. Both crimes against humanity and war crimes encompass a broad scope of prohibited acts and are somewhat complex in their structure and wording. *Id.* at art. 7 and 8. The crime of aggression was only recently defined and was incorporated into the Rome Statute without a number of key signatories who argued that "greater clarity" is needed before it should come into force. *See* Owen Bowcott, *ICC Crime of Aggression Comes into Effect Without Key Signatories*, THE GUARDIAN, Jul. 17, 2018, https://www.theguardian.com/law/2018/jul/17/icc-crimeof-aggression-comes-into-effect-without-key-signatories-uk-law-war. Review of the application of these recommendations to the crime of Genocide and continued dialogue concerning the adaptation of this approach to other crimes under the purview of the ICC would be required prior to extension of this proposal in the context of broader reaching criminal activity.

87. *Rome Statute*, *supra* note 8, art. 6.

88. International Criminal Court, *Understanding the International Criminal Court*, https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (last visited Jan. 8, 2019).

countries have not signed on to the Rome Statute and, consequently, do not submit to the jurisdiction of the ICC, they remain bound by customary international law,[89] including the prohibition against genocide.[90] Consequently, as long as a crime receives this classification, a nation need not be party to a specific international treaty or convention for a citizen of that country to be subject to punishment by the international community.

Given the characteristics of the Rome Statute—legal enforceability, clearly defined criminal acts, procedures for enforcement, and its codification of crimes that reach beyond parties that have ratified it in full—it is an excellent vehicle for establishing additional bases of criminal liability designed to prevent its most serious crimes. It provides an avenue to expand on the definition of the crime of genocide to include retaliation against those who act to expose genocidal acts—individuals not currently protected by the Rome Statute.

By modifying the crime of genocide in the Rome Statute to include retaliation against those who work to expose such acts, this new, broader definition could become firmly established in international criminal law and might ultimately be customary international law binding upon all nations. This kind of far-reaching acceptance of a new definition of genocide will not happen immediately and the process of amending the Rome Statute is long and cumbersome. A recent amendment to the Rome Statute on the crime of aggression had been in negotiations since before the statute came into force and only came into effect in 2017, nearly 20 years after the statute was drafted.[91] There, negotiations were fraught with complications, such as consideration for the jurisdiction of other treaty bodies and U.N. organizations.[92] As daunting as amendment efforts might seem, the eventual success of the aggression amendment demonstrates that change and conciliation are, in fact, possible. Further, the potential benefits of such an initiative as described in this Note—acceptance of the new definition of genocide on a global scale—are well worth the effort. Once the expanded definition receives this recognition by the international community, individuals will be placed on notice that retaliation against human rights defenders, in the context of genocide, is both a prohibited act and an

89. *See Vienna Convention on the Law of Treaties, supra* note 83; *see also* Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990).

90. When to Refer to a Situation as "Genocide", *supra* note 82.

91. Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, 20 EUR J. INTL L. 1103, 1113 (2010).

92. *Id.*

act the international community is prepared to punish, thus creating a legally enforceable way to support efforts to prevent genocide.

The following proposed resolution and imbedded amendment to the Rome Statute would address the aforementioned issues by increasing the scope of ICC jurisdiction to encompass not only the crime of genocide, but also efforts to conceal this crime through retaliation against those who act to expose it. Additionally, it would serve as the first step in elevating this newly expanded definition of the crime to a more universal status, binding both parties and non-parties to the Rome Statute. The proposed resolution could read as follows:

The Assembly of States Parties,

Noting with regret that in all periods of history, including the present day, genocide has inflicted and continues to inflict great losses on humanity,

Recalling our commitment to both prevent and punish the crime of genocide, be it in time of peace or in time of war,

Concerned that current efforts to prevent genocide have proved insufficient,

Aware that freedom of expression is a critical tool in the fight to prevent genocide,

Mindful that current interpretations of the broader right of freedom of expression vary among nations,

Seeking to unite nations in a common understanding of this right when it is used to combat genocide,

Believing that punishing attempts to suppress the exercise of this right is the most effective deterrent,

Adopts the following amendment to the Rome Statute of the International Criminal Court, which criminalizes retaliatory acts against those who seek to expose acts of genocide or genocidal intent.

Article 6(a)
Crimes against defenders

For the purpose of this Statute, speech, both public and private, calling attention to activities reasonably believed to be indicative of crimes enumerated in Article 6, Genocide, is protected and individuals may exercise this right free from retaliation. The following acts shall be considered 'crimes against defenders' when committed in retaliation for or in an effort to suppress the exercise of this right:

(a) Committing or threatening acts of violence against the individual or the individual's family;
(b) Prosecuting, imprisoning, and/or threatening to prosecute or imprison;
(c) Restricting movement;
(d) Killing.

As noted above, it can be difficult to obtain consensus and the treaty amendment process is quite lengthy, but it is not impossible and, even without consensus, the benefits of codification would be valuable.

VI. Conclusion

Through the Genocide Convention, the Action Plan, and the Rome Statute, the international community has taken on very specific obligations, obligations which reflect the elevated status of the prohibition of genocide. By adopting this amendment to the Rome Statute, the U.N. would move one step closer toward satisfying its obligation to effectively prevent genocide. Carving out a category of free speech and expression that supports efforts to prevent genocide is not the only mechanism to further this goal, but it is currently one of the most accessible solutions and supports a broad range of activist pursuits. It provides protections for those who, at great personal risk carry out work that is vitally important to the international community.

Efforts to promote free expression and human rights as a whole will continue, as will attacks on journalists, human rights activists, and political adversaries. This solution does not address all of these problems, but it does provide a possible model for incremental progress in other areas. The international community can continue to think big thoughts, to paint a picture of the world as it should be, but that is only the first step. Where the gravity of possible outcomes increases, efforts must be strengthened, issues must be delved into at a granular level, and problem-specific solutions must be proposed.

The broader issue highlighted by this discussion is more ominous and overwhelming. Since WWII, the make-up of world powers has changed. The U.N. was built on a common understanding of democracy and the fundamental rights and freedoms which make up its foundation. However, as the international community moves further and further from that common understanding, world leaders cannot continue to approach international issues of human rights and criminal law in the same manner. Baseline treaties and conventions must be the

subject of continuous analysis to determine if current circumstances necessitate greater or more nuanced efforts to further their aims. In short, over the last 70 years, we have changed, our view of the world has changed, the challenges we face have changed, and our approaches to addressing issues, old and new, must also change. Complacency and inaction in an ever-evolving world will only serve to erode the rights and freedoms we hold dear.