

ARTICLES

ROHINGYAS' EXODUS CONTINUES TO OBLIVION*

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Abstract: Since 1948 Myanmar's government has subjected the Rohingya ethnic minority to institutionalized violence. Myanmar's government has stripped Rohingyas of the basic right of citizenship, condemning them to live in dismal conditions. The abuses and crimes perpetrated against them have escalated over the years, reaching its tipping-point on August 27, 2017 when the extermination operations started. Since Myanmar is reluctant to end this pattern of human rights violations against the Rohingya, the impulse for justice must come from the international community. Myanmar's responsibility for the genocidal campaign can only be secured if the International Court of Justice's jurisdiction is triggered under article IX of the Genocide Convention. Further, the path towards a transitional justice process can solely be achieved through the intervention of the United Nations Security Council under Chapter VII of the U.N. Charter that would enable the creation of an internationalized tribunal to address individual criminal responsibility.

Keywords: institutionalized violence, statelessness, extermination operations, State responsibility, transitional justice, internationalized tribunal.

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I. PRELIMINARY CONSIDERATIONS

The Rohingya¹ Muslims are the world's "most persecuted minority."² Over decades, they have been facing systematic oppression, segregation, and repression stemming from institutionalized violence in the Republic of the Union of Myanmar^{3,4} Many factors have paved the way in this direction: intolerance towards their religious beliefs, discrimination based on their ethnicity, and resentment due to their past political alliances with British colonizers during the nineteenth century, and invading Japanese military forces during the 1940s.⁵

1. The term "Rohingya" has been

commonly used to refer to a community of Muslims generally concentrated in Rakhine (Arakan) state in Myanmar . . . In the early 21st century, the Rohingya made up an estimated one-third of the population in Rakhine state, with Buddhists constituting a significant proportion of the remaining two-thirds. The use of the term Rohingya is highly contested in Myanmar . . . the broader Buddhist populace in general rejected the Rohingya terminology, referring to them instead as Bengali, and considered the community to be largely composed of illegal immigrants from present-day Bangladesh.

Rohingya, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Rohingya> (last visited May 29, 2019) [<https://perma.cc/P2EB-4T56>].

2. *The Rohingyas: The most persecuted people on Earth?*, THE ECONOMIST (June 13, 2015), <https://www.economist.com/asia/2015/06/13/the-most-persecuted-people-on-earth> [<https://perma.cc/XX6W-EU9U>].

3. Myanmar formerly

"Burma" until 17 June 1989 and "Union of Myanmar" until 30 March 2011. The official name since 30 March 2011 is the "Republic of the Union of Myanmar" . . . Burma, which was formerly a part of India, was separated from the latter on 1 April 1937 and had possessed since that time the status of an overseas territory of the United Kingdom. It was as such that Burma continued to be bound by a ratification or accession to various multilateral treaties recorded on behalf of India. In accordance with the Chapter 1 of the Basic Principles of the Union, article 2 of the State Constitution of the Republic of the Union of Myanmar, the State is officially known as the Republic of the Union of Myanmar. Consequently, as the Union Government of Myanmar was formed on 30th March 2011, the State is officially named as the Republic of the Union of Myanmar effective from that date.

Multilateral Treaties Deposited with the Secretary-General, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/HistoricalInfo.aspx?clang=_en#Myanmar (last visited May 29, 2019) [<https://perma.cc/RCH9-HMDK>].

4. The extermination of the Rohingya is the result of specific state policies and mechanisms that prevent them access to basic necessities. The term structural (or institutionalized) violence is theorized as avoidable impairment of fundamental human needs or, to put it in more general terms, the impairment of human life, which lowers the actual degree to which someone is able to meet their needs below that which would otherwise be possible. John Galtung, *Violence, Peace and Peace Research*, 6 J. PEACE RES. 167, 170-72 (1961).

5. For a deeper understanding, see generally MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY (1991).

As a consequence, the Rohingya people have been living in dismal conditions inside Myanmar, particularly because of their illegal status. The Rohingya have been deprived of the basic right of citizenship for the reason that they do not meet any of the constitutional or legal requirements to acquire it.⁶ Since the enactment and subsequent entry into force of the 1982 Citizenship Law⁷ the Rohingya have been in an inferior position to both the State and other national groups, depriving the Rohingya of other human rights.

The 1982 law sponsors de facto statelessness without proof of legal identity, disparately impacting the Rohingya community.⁸ This law endorses stigmatizing

6. Article 345(a) of the Myanmar's Constitution –adopted on May 29, 2008-, ties the acquisition of citizenship to the *jus sanguinis* principle (providing that both parents are nationals of the Republic). Further, articles 345(b) and 346 limit “citizenship, naturalization and revocation of citizenship” to the prescriptions made by law. *Myanmar 2008*, CONSTITUTE, https://constituteproject.org/constitution/Myanmar_2008?lang=en (last visited May 29, 2019) [<https://perma.cc/L49D-LCCJ>]; “The denial of human rights cannot be based on an arbitrary deprivation of nationality.” Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, Office of the High Comm’r on Human Rights, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), ¶ 68, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf [<https://perma.cc/LGV4-D53J>].

7. The 1982 Citizenship law –or Pyithu Hluttaw Law No. 4 of 1982 [hereinafter 1982 law]- designs three clear-cut categories of citizens, *i.e.* full citizens –persons who belong to one of the national races (such as, Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine and Shan, leaving the Rohingya Muslims) or can prove their ancestors established in the country before 1823-, associate citizens –individuals who only meet the citizenship’s requirements under the 1948 law if they applied for it prior to the 1982 law entered into force-, and naturalized citizens –foreigners that convincingly demonstrate that they or their parents resided in the State before its 1948 independence. Under certain circumstances, citizenship could also be obtained by marriage or descent. See Pyithu Hluttaw, Burma Citizenship Law, § 3, 7, 23-24, 42-45, 47-49 (1982), <http://eudo-citizenship.eu/NationalDB/docs/1982%20Myanmar%20Citizenship%20Law%20%5BENGLISH%5D.pdf> (last visited May 29, 2019) [<https://perma.cc/9MQD-2UEU>].

The classification of human beings into distinct biological races is a system of governance that arose out of European conquest, enslavement, and colonization of people in Africa and Asia . . . its [race] function is to include or exclude residents from full citizenship according to their assignment to a political hierarchy based on invented biological demarcations and justifications. Social scientists’ conclusion that race is socially, politically, and legally constructed was confirmed by genomic studies of human variation, including the Human Genome Project. These studies showed high levels of genetic similarity within the human species. Genetic differences among human beings are “clinically distributed” . . . Most genetic variation occurs within populations, not between them.

Dorothy Roberts, *Race and the New Biocitizen*, in *WHAT’S THE USE OF RACE? MODERN GOVERNANCE AND THE BIOLOGY OF DIFFERENCE* 259, 261-62 (Ian Withmarsh et al. eds., 2010).

8. Despite that Myanmar is not a party to the Convention relating to the Status of Stateless Persons. 360 U.N.T.S. 117 (Sept. 28, 1954) (entered into force June 06, 1960)), the current situation

practices, violating the State's obligations under international law.⁹ By not officially bestowing citizenship on them, Myanmar not only denies the Rohingya mere existence as subjects under the rule of law, but also undermines and erodes their capability to exercise the rights inalienable to every human being.¹⁰ This exclusionary policy has had immediate repercussions, fostering constant and heinous abuses from the authorities and civilians alike, including harassment and violence by police forces, death in custody, restrictions on their freedom of movement, right to work, discriminatory limitations on access to education, healthcare services, marriage, and construction of places of worship, arbitrary confiscation of property, forced labor.¹¹

The military entrenchment in political power, the deeply-rooted immemorial cultural divergences, and the national legal system designed hinder the possibility of achieving peace.¹² These factors impair the possibility of transitioning towards a reconciliation that could enable considering reparations to the victims. For example, there is independent and detailed documentation exposing the crimes committed, yet not a single perpetrator has ever been criminally prosecuted or convicted by domestic courts.¹³ Because of the pervasive impunity at the local level, it becomes necessary to examine the State's along with the individuals' responsibility for the international law infringements based on the treaties ratified

of the Rohingya people, particularly since the enactment of the 1982 law, can be encapsulated under the definition of stateless persons provided in article 1. 360 U.N.T.S. 117, art. 1 (Sept. 28, 1954) (entered into force June 06, 1960). See Jacques Leider, *Rohingya: The History of a Muslim Identity in Myanmar*, OXFORD RESEARCH ENCYCLOPEDIA OF ASIAN HISTORY, DOI:10.1093/acrefore/9780190277727.013.115 (2018).

9. Nationality, which encompasses the legal status of any individual within a certain political entity—or citizenship—is a basic human right. “Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948).

10. “The importance of the right to a nationality—and the reason why the statelessness issue is so important—is that having a nationality is a gateway to other rights.” Andrés Ordonez Buitrago, *Statelessness and Human Rights: The Roles of the United Nations High Commissioner for Refugees (UNHCR)*, 2 EAFIT J. INT'L L., July 2011, at 7, 11.

11. The Rohingya are “often harassed or beaten by police forces . . . mainly during controls or at checkpoints. Cases of rape of young women and children, perpetrated by different police forces, have been reported.” Paulo Sergio Pinheiro, *Report of the Special Rapporteur on the situation of human Rights in Myanmar*, ¶ 78, U.N. Doc. A/HRC/7/18 (March 7, 2008).

12. “National justice institutions within Myanmar lack the independence, capacity and often also the will to hold perpetrators of human rights violations to account, particularly when members of security forces are involved. The latest government-established inquiry in Rakhine State also seems designed to deter and delay justice. *Myanmar: Creation of UN Mechanism a Step Toward Accountability*, INTERNATIONAL COMMISSION OF JURISTS (Sept. 27, 2018), <https://www.icj.org/hrc39-myanmarres/> (last visited Nov. 11, 2018) [<https://perma.cc/5FZD-CWJC>] (quoting Matt Pollard, Senior Legal Adviser for the International Commission of Jurist).

13. Eleanor Albert, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELATIONS (Dec. 5, 2018), <https://www.cfr.org/backgrounder/rohingya-crisis> [<https://perma.cc/9H67-RZ2J>].

by Myanmar. A plethora of documents,¹⁴ reports,¹⁵ concluding observations,¹⁶ fact-finding missions,¹⁷ and statements¹⁸ issued by the human rights mechanisms demonstrate that the impulse for State accountability at the international arena and individual criminal justice at the domestic level for the crimes under international law perpetrated in Myanmar must come from the intervention of the international community, specifically by triggering the International Court of Justice (I.C.J.) jurisdiction regarding the violations of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and by establishing a hybrid or internationalized criminal tribunal through the political impulse of the United Nations Security Council (U.N.S.C.) respectively.¹⁹

14. See Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar, Office of the High Comm'r on Human Rights (Dec. 05, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E> [<http://perma.cc/J2DQ-WU8R>].

15. See Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Myanmar*, U.N. Doc. A/HRC/31/13 (Dec. 23, 2015); United Nations High Comm'r for Human Rights, *Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar*, U.N.Doc. A/HRC/32/18 (June 29, 2016); U.N. Secretary-General, *Situation of Human Rights in Myanmar*, U.N. Doc. A/72/382 (Sept. 8, 2017).

16. See Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined fourth and fifth periodic reports of Myanmar*, U.N. Doc. CEDAW/C/MMR/CO/4-5 (July 25, 2016); Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Myanmar*, U.N. Doc. CRC/C/MMR/3-4 (Mar. 14, 2012).

17. See Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, Office of the High Comm'r on Human Rights, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf [<https://perma.cc/LGV4-D53J>].

18. See Zeid Ra'ad Al Hussein (High Comm'r on Human Rights), *Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar*, United Nations Human Rights Council (Dec. 5, 2017), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E> [<https://perma.cc/67LK-83TN>]. See also Office of the High Comm'r on Human Rights, *End of mission statement by Special Rapporteur on the situation of the rights in Myanmar*, RELIEF WEB (July 8, 2018), <https://reliefweb.int/report/myanmar/end-mission-statement-special-rapporteur-situation-human-rights-myanmar-8-July-2018> [<https://perma.cc/6MWQ-7VNY>].

19.

Peace is likely to institutionalize violence in some form; indeed, peace may not be possible without institutionalizing violence in some way. One way of looking at the problem of contemporary conflicts to consider those who mobilize violence from above and to consider those who embrace it –willingly or unwillingly- from below. External interventions will need to try to make peace appear a more attractive option than war for both of these groups. This may be a messy, compromising business. Peace could also be called order, a word that carries a different set of associations and assumptions.

A. Thesis Statement

Myanmar's future depends on reaching national reconciliation,²⁰ which requires: acknowledging the crimes perpetrated; averting impunity by ensuring State's accountability; conceiving a scheme of reparations; dispensing criminal justice; and guaranteeing non-repetition of the past events. The primary responsibility rests with the State. However, Myanmar's unwillingness to end this pattern of human rights violations combined with the ongoing transgressions committed against the Rohingya—*i.e.* genocide—constitutes a threat to international peace and security, dragging the international community into the equation.²¹

The need for international intervention is dire because the overall assessment regarding the Rohingya situation demonstrates Myanmar's unwillingness and contempt to fulfill its international obligations to stop, prevent, investigate, prosecute, and punish the perpetrators of basic rights violations domestically. The systematic impunity that reigns at national level makes accountability and justice in respect of the abuses and crimes committed against the Rohingya an illusion. When left exclusively to the domestic authorities, there is evident escalation of the amount and quality of crimes committed by Myanmar security forces and non-state actors with the acquiescence of the authorities, demands the intervention of the international mechanisms for the protection of human rights.²² There is profuse evidence produced by, *inter alia*, the United Nations High Commissioner of Human Rights as well as the Human Rights Council that corroborates the perpetration of (international) crimes against the Rohingya across Myanmar particularly in the Rakhine, Kachin and Shan regions for the past

David Keen, *War and Peace: What's the Difference?*, 7 INT'L PEACEKEEPING J. 10, 11 (Nov. 2007).

20. In the state of nature human beings' efforts are not concentrated on building for a better future. Cf. THOMAS HOBBS OF MALMESBURY, *LEVIATHAN OR THE MATTER, FORME, & POWER OF COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 77 (1651); Sustainable peace, on the contrary, is the essential condition for development of any community. In fact,

[t]he Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. Charter art. 1, ¶ 1, <https://www.un.org/en/sections/un-charter/chapter-i/index.html> [<https://perma.cc/2E8R-ED7W>].

21. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39.

22. See Human Rights Council, *supra* note 17.

two decades.²³ However, because of the intricacy of the situation, this discussion focuses on crimes committed since August 2017 in the state of Rakhine.

The International Court of Justice (I.C.J.) is the sole body capable of pursuing international State's responsibility for the genocidal campaign against the Rohingya.²⁴ But the adjudication process must be properly prompted according to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")²⁵. Moreover, the intervention of the United Nations Security Council (UNSC) under Chapter VII of the United Nations Charter ("Charter") is the only feasible prospect to put an end to such crimes, to contribute to the process of national reconciliation, and to bring to justice those criminally accountable.

B. Overview

The case study conducts a four parts analysis. Part I, above, addressed the preliminary considerations of the subject matter, including the thesis statement. Part II succinctly illustrates the historical background that explains the dynamics and intricacies of the Rohingya crisis. Part III details the facts of the case to describe the analysis of Myanmar's legal obligations at the international forum, both from the universal and regional systems. And it discusses the ramifications of a transitional justice process, including the accomplishment of the right to truth, the promotion of the right to reparations, and the viability of seeking individual criminal responsibility—*i.e.* justice. Part IV draws the closing arguments, recapitulating first that the State's international responsibility will not be attainable unless the I.C.J.'s jurisdiction is triggered under article IX of the Genocide Convention, and second that individual criminal liability will be accomplished through the intervention of the U.N.S.C.

II. HISTORICAL BACKGROUND

In order to understand the contemporary violence of genocide, ethnic cleansing,²⁶ and crimes against humanity it is necessary to swiftly dive into the

23. For a detailed account on the human rights violations on those regions, see United Nations High Comm'r of Human Rights, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, ¶¶ 58-61, U.N. Doc. A/HRC/32/18 (June 29, 2016); Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, ¶¶ 15-74, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

24. On the possibility of a contentious case before the ICJ, see Lee J. F. Deppermann, *Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study*, 14 CHI. J. INT'L L., 307, 309, 291-316 (2013).

25. Convention on the Prevention and Punishment of the Crime of Genocide art. 9, December 09, 1948, 1021 U.N.T.S. 278 (entered into force January 12, 1951) [hereinafter Genocide Convention].

26. Ethnic cleansing means "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area." U.N. Secretary-General, Letter dated May 24, 1994 from Secretary-General addressed to the President of the Security Council, ¶

underlying historical complexities and political tangles that have laid the foundation for the current situation. Note, there is a long background to this conflict. This historical study will be strictly circumscribed to describe the religious tensions within Myanmar's population, the geographical location and the origin of the inhabitants of Rakhine state, and relevant contemporary events until the state reached its independence.

Though the majority of Myanmar's population is Theravada Buddhist,²⁷ including in the Rakhine region—the Rohingya differentiate themselves for following the Prophet's Muhammad teachings.²⁸ The Rohingya allege to descend from Arab and Persian traders—the first Muslims who occupied northern Rakhine since the eighth century—they also speak Bengali—like their neighbors in Bangladesh—and they self-identified to be an ethnically distinct group.²⁹ The state of Rakhine is now located in what was formerly known as the coastal region of Arakan in Southeast Asia.³⁰

129, U.N. Doc. S/1994/674, annex (May 27, 1994); see also Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 354 (1998).

27. “Theravada is one of the three major forms of Buddhism and has traveled far beyond its traditional boundaries to make its presence felt in the spiritual life of millions of people around the globe.” ASANGA TILAKARANTE, *THERAVADA BUDDHISM: THE VIEW OF THE ELDERS* 18 (2012).

28. Bureau of Democracy, Human Rights, and Labor, *2008 Country Reports on Human Rights Practices: Burma*, U.S. DEP'T OF STATE (Feb. 25, 2009), <https://2009-2017.state.gov/j/drl/rls/hrrpt/2008/eap/119035.htm> [<https://perma.cc/D4FG-83GW>].

29. Zoltan Barany, *Where Myanmar Went Wrong: From Democratic Awakening to Ethnic Cleansing*, 97 FOREIGN AFF., 141, 142 (May 2018). However, some historians assert that “while no conclusive studies exist regarding how Rohingya culture arose, it is absolutely clear that in Muslim-majority townships . . . in northern most Arakan [Rakhine State], a distinctive but local Muslim culture has developed over the past two hundred years.” Katherine Southwick, *Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions*, 68 J. INT'L AFF., 137 n. 7, (2015) (citing Martin Smith, *The Muslim Rohinya of Burma*, at the Conference of Burma Centrum Netherlands 8 (Dec. 11, 1995) (transcript at <http://www.netipr.org/policy/downloads/19951211-Rohingyas-of-Burma-by-Martin-Smith.pdf>) [<https://perma.cc/B9PD-W4R6>]).

30.

An independent Arakanese kingdom was probably established as early as the 4th century CE and was led at various times by Muslim as well as Buddhist rulers. Modern Arakanese continue to follow distinctive traditions and to celebrate this part of their history . . . Eventually the Mongols, and later the Portuguese, invaded Arakan. In 1785 Burmese forces conquered the Arakanese kingdom . . . The Arakan region was ceded to the British in 1826 through the Treaty of Yandabo. When Myanmar became independent from British rule in 1948, the province in which the Arakanese are dominant was named Arakan. This name was changed to Rakhine in the 1990s. In the 2010s, Arakanese numbered approximately three million individuals, most of whom lived in Myanmar. Roughly two-thirds of the Arakanese are Buddhist; most of the remaining Arakanese follow Islam. The Muslim Arakanese are known as Rohingyas, a name based on the historical name of the region, Rohang.

There is no archeological evidence to support who the earliest inhabitants of Arakan were . . .

The Arakanese chronicles date the origins of the Arakan people to 3000 BCE . . . Given that the sources or inscriptions that were excavated were written in Sanskrit, suggest that the Arakan's founders were Indian, rather than Tibeto-Burman.³¹

So, until the arrival of the Mongolians in the 900 CE, it was an Indian land with a population similar to Bengal, which since the thirteenth century adopted the Islamic tradition and spread it through the Arakan area.³²

After challenging the Bengal Sultanate's hegemony in the fifteenth century, the Kingdom of Mrauk U was founded and reigned over the Arakan region until it was devastated and conquered by the Burmese Empire in 1784.³³ In 1826, after two years of war with the British Empire, the Burmese finally capitulated, ceding the Arakan area to the British Empire.³⁴ Then, during the colonial era under the British power, most of Arakan's Muslims came to Burma encouraged by the labor opportunities generated by landowners and merchants.³⁵ This situation was maintained until the Japanese forced the British to evacuate Burma during World War II.³⁶ During that period, the Rohingyas opposed those who sought Rakhine's independence, remaining loyal to the British who assured them an Islamic state in the northern area of the region. But, the British colonizers never delivered its promise.³⁷ Since Burma's independence in 1948, conflicts and atrocities against the Rohingya in Rakhine has been growing on grounds of these past political complexities.³⁸

Arakanese, ENCYCLOPEDIA BRITANICA, <https://www.britannica.com/topic/Arakanese> (last visited May 29, 2019) [<https://perma.cc/SD4M-XEH8>].

31. WILLIAM J. TOPICH & KEITH A. LEITCH, *THE HISTORY OF MYANMAR* 17 (2013).

32. *Id.* at 18, 20, 23-31.

33. *Id.* at 20-22.

34. On February 24, 1826 the Treaty of Yandabo formally ended the first Anglo-Burmese war. THANT MYINT-U, *THE MAKING OF MODERN BURMA* 20 (2001).

35. Barany, *supra* note 29, at 142.

36. MOSHE YEGAR, *THE MUSLIMS OF BURMA: A STUDY OF A MINORITY GROUP* 95-96 (1972), <http://www.netipr.org/policy/downloads/19720101-Muslims-Of-Burma-by-Moshe-Yegar.pdf> (last visited May 29, 2019) [<https://perma.cc/NF4Q-RLPF>].

37. *Id.*

38.

Prior to the military coup of 1962, the Rohingyas were Burmese citizens, and were elected to Burma's parliament, served in the government, and were officers in the military. After the coup, Burma's military leaders began a systematic policy of discrimination against the Rohingyas, and carried out military campaigns to drive the Rohingyas out of Burma.

The Rohingyas Crises in Bangladesh and Burma, CONG. RES. SERV. NO. R45016, at 5 (2017).

For decades, they have suffered discrimination, forced labor, and campaigns of violence—most notably between 1977-1978 and 1991-1992—largely inflicted by

III. MYANMAR'S LEGAL OBLIGATIONS AT THE INTERNATIONAL FORUM

Despite that the root causes of the Rohingya's situation are conceived within the State's territory—*i.e.* citizenship and discrimination—their effects have had direct implications both on the region—*i.e.* statelessness and forced displacement—and also across the globe—*i.e.* due diligence, prevent, ensure, and protect.

In this section, the study then will turn towards the international legal commitments assumed by the State. The objective is two-fold: to prove that Myanmar's international responsibility for the genocidal campaigns necessarily requires the intervention of the I.C.J.; and to demonstrate that individual criminal accountability for the genocidal campaigns demands that the U.N.S.C. acts under Chapter VII in order to compel Myanmar to pursue a national reconciliation process.

In order to corroborate the present hypothesis it becomes necessary first to confine the issues under discussion by describing the facts of the case. Then, to examine both the universal and regional human rights systems to determine Myanmar's international accountability. And finally, to design a transitional justice process by detailing the methodology for ensuring and achieving truth, the most suitable approach to redress the damages caused by the violations perpetrated, and the individual criminal responsibility for the abuses committed.

A. Facts of the Case

On August 25, 2017, the Arakan Rohingya Salvation Army (A.R.S.A.) members attacked thirty border outposts located in the northern area of Rakhine, killing twelve security personnel.³⁹ Myanmar's military forces, or Tatmadaw, supported by other ethnic minorities immediately began an extermination operation under the pretense of eliminating the "terrorist threat."⁴⁰ Two light infantry divisions were deployed into Rakhine State with the clear objective of targeting the entire Rohingya population. The outcome was the displacement of more than 725,000 Rohingya into Bangladesh, and the internal displacement of an unknown number of Rohingya and other minorities.⁴¹

The extermination operation was not improvised, on the contrary

[t]he nature, scale and organization of the operations suggest a level of

government security forces. Inter-communal violence among radical Buddhists in Rakhine State and Rohingya Muslims erupted in 2012 and 2013, resulting in more than 200 deaths and around 125,000 internally displaced persons.

Katherine Southwick, *Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions*, 68 J. INT'L AFF. 137, 139 (2015).

39. Human Right Council, *supra* note 23, ¶ 10; regarding more details on ARSA, see *id.* ¶¶ 55-57.

40. Human Rights Council, *supra* note 17, ¶¶ 751.

41. *Id.* ¶ 752.

preplanning and design on the part of the Tatmadaw leadership consistent with the vision of the Commander-in-Chief, Senior-General Min Aung Hlaing, who stated at the height of the operations, "The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem."⁴²

Further, Satellite images and first-hand accounts of those who survived have provided concrete evidence of the endemic discrimination against the members of the Rohingya Muslim community in Rakhine state. The widespread, systematic, and deliberate destruction of Rohingya-populated towns in that area included mass killings of civilian population, rapes and other forms of sexual violence towards women and young girls that were frequently killed, disappearances of men and young boys.⁴³ Bodies were transported in military vehicles, burned, and disposed of in mass graves.⁴⁴ There are also allegations of extrajudicial killings and arbitrary arrests and detentions.⁴⁵

B. Myanmar's International Accountability

Myanmar's international obligations flow from the Charter,⁴⁶ a restricted array of human rights treaties, and customary international law. At the universal level, the State is a party to the following instruments: the Genocide Convention;⁴⁷ the International Covenant on Economic, Social and Cultural Rights⁴⁸ ("ICESCR"); the Convention on the Elimination of All Forms of Discrimination against Women⁴⁹ ("CEDAW"); the Convention on the Rights of the Child⁵⁰ ("CRC"); the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography⁵¹ ("CRC-OPSC"). At the regional

42. *Id.* ¶ 753.

43. "One woman, gang raped with her sister, reported a member of the Tatmadaw saying, '[w]e are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country.'" *Id.* ¶ 932. Regarding the mass killings and disappearances, see *id.* ¶¶ 952-58.

44. Human Rights Council, *supra* note 17, ¶¶ 755-1067.

45. *Id.* ¶¶ 607-12, 1363-64.

46. Myanmar declared acceptance of the obligations contained in the Charter on April 19, 1948. 15 U.N.T.S. 3, G.A. Res. 188 (S-2).

47. Entered into force for Myanmar March 14, 1956. 230 U.N.T.S. 435, T.S. No. 1021.

48. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, T.S. No. 14531 (entered into force for Myanmar Oct. 06, 2017).

49. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 1984 U.N.T.S. 426 (entered into force for Myanmar July 22, 1997).

50. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 1745 U.N.T.S.480 (entered into force for Myanmar July 15, 1991).

51. Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, May 25, 2000, 2171 U.N.T.S. 227, 2805 U.N.T.S. 221 (entered into force for Myanmar Feb. 16, 2012).

level, the Republic became a member of the Association of Southeast Asian Nations⁵² (“ASEAN”) after signing the ASEAN Declaration on July 7, 1997. It has also ratified the ASEAN Charter⁵³ and adopted the ASEAN Human Rights Declaration⁵⁴ (“AHRD”).

1. Universal System

The aforementioned human rights abuses give rise to both State accountability and individual criminal responsibility particularly because *jus cogens* norms have been violated.⁵⁵ In this section, the analysis will exclusively focus on determining the feasible and most effective path to make Myanmar accountable for the extermination operations under the universal mechanisms of human rights protection.

It is a well-established norm that a State is responsible for all acts that are attributable to it and constitute a breach of an international obligation.⁵⁶ However, Myanmar is not a party to the main human rights treaties, demonstrating its unwillingness to become an abiding member of the international community.⁵⁷

52. ASEAN “was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand.” *Overview*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, <https://asean.org/asean/about-asean/overview/> (last visited May 29, 2019) [<https://perma.cc/7C4W-Z7JS>].

53. Charter of the Association of Southeast Asian Nations, Nov. 11, 2007, 2624 U.N.T.S. 223 (entered into force Dec. 15, 2008).

54. The ASEAN Human Rights Declaration was adopted by the ASEAN Member States at Phnom Penh, Cambodia November 18, 2012. *See ASEAN Human Rights Declaration*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, <https://asean.org/asean-human-rights-declaration/> (last visited May 29, 2019) [<https://perma.cc/HG6Q-PWEX>] This instrument of *soft-law* has been openly criticized. *See, e.g., Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration*, HUMAN RIGHTS WATCH (Nov. 19, 2012, 12:00AM EST), <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration> [<https://perma.cc/GNKG-YDR4>].

55. *See generally* JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1974); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2d ed. 1984); CHRISTOS ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* (1976).

56. G.A. Res. 56/83, art.1 (Jan. 28, 2002).

57. Myanmar has not yet signed nor ratified: the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force June 04, 1969); the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); the International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010); the International Convention on the Rights of all Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 01, 2003); the Optional Protocol to the Convention on the Elimination of

Accordingly, the actual possibilities to address the violations depicted above are confined to a restrictive set of instruments and to an ineffective protection mechanism. For instance, the abuses suffered by vulnerable groups, such as women and children, at the hands of the Tatmadaw and non-state actors could be submitted in the upcoming periodic reports of both the Committee on the Rights of the Child —under article 44 of the CRC—as well as the Committee on the Elimination of Discrimination Against Women —under article 18 of the CEDAW. However, this will not provide remedy nor bring justice to that situation.⁵⁸

First, similar issues have occurred in the past (most recently in 2012) and have been identified and included in by both Committees' lists of issues and questions posed to the State.⁵⁹ the Committee on the Rights of the Child requested the Republic to inform “the measures taken to combat discrimination against . . . Rohingya children . . . [and to indicate the] charges under which the children [were] being held, and what steps [were] taken to release them.”⁶⁰ the Committee on the Elimination of Discrimination Against Women inquired from Myanmar the “measures taken to ensure that Muslim women, including internally displaced

all Forms of Discrimination Against Women, Oct. 06, 1999, 2131 U.N.T.S. 83 (entered into force Dec. 22, 2000) on the acceptance of individual complaints procedure; the Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2518 U.N.T.S. 283 (entered into force May 03, 2008) on the acceptance of individual complaints procedure; the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954); the Convention relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960); the Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975); Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, (entered into force Oct. 4, 1967); the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 01, 2002); nor the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 10, 2008, T.S. 14531 (entered into force May 5, 2013).

58. “The right to remedy is a well-established norm of international law . . . encompasses three distinct rights: (1) the right to truth; (2) the right to justice [state duty to prosecute]; and (3) the right to reparations.” Int’l Human Rights Law Clinic of University of California-Berkeley Law, *Comparative Country Studies regarding Truth, Justice, and Reparations for Gross Human Rights Violations (Brazil, Chile, and Guatemala)* 2 (IHRLC Working Paper No. 2 Apr. 2014), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-2-India-Comparative-Country-Studies-151027.pdf> [<https://perma.cc/M9RJ-9MFL>].

59. See U.N. Secretary-General, *Situation of human rights in Myanmar*, ¶¶ 60-66, U.N. Doc. A/67/383 (Sept. 25, 2012).

The violent events of 2012, as well as those of 1978, 1992, 2001, and 2009, can be attributed to systemic discrimination against the Rohingya in Myanmar. That is, to a political, social, and economic system – manifested in law, policy, and practice-designed to discriminate against this ethnic and religious minority.

Benjamin Zawacki, *Defining Myanmar’s Rohingya Problem*, 20 HUM. RTS. BR., 18 (Aug. 2012).

60. Committee on the Rights of Children, *List of issues concerning the combined third and fourth periodic reports of Myanmar*, ¶¶ 6, 18, U.N. Doc. CRC/C/MMR/Q/3-4 (July 13, 2011).

women, in Rakhine State enjoy[ed] freedom of movement . . . [requesting] updated information on the investigations of the alleged acts of violence by the security forces against Muslim women in Rakhine State after 2012.”⁶¹

Second, and most important, both bodies have delivered recommendations and presented them before the United Nations General Assembly (U.N.G.A.). In 2012, the Committee on the Rights of the Child recommended Myanmar to adopt immediately the following measures in relation to Rohingya children: ensure their birth registration while providing the certificates and identity cards, and abrogate domestic laws that limited children number per family.⁶² In 2016 the Committee on the Elimination of Discrimination Against Women, after taking into consideration the information submitted by the State in the light of the shadow reports, recommended Myanmar to take the necessary legislative steps both to protect Rohingya women from forced displacement and to guarantee them citizenship as an indispensable condition to freely enjoy all human rights, praising the State to investigate, prosecute, and punish those responsible for gender-based abuses targeting Rohingya women and young girls.⁶³ These reports expose the fragility and inefficacy of such mechanisms to eradicate the systematic discriminatory practice perpetuated against the Rohingya since the enactment of the 1982 Citizenship Law.

The statelessness situation they have been enduring has worsened through the restrictions imposed by an arbitrary, travel authorization system.⁶⁴ These discriminatory policies have directly impacted on the life of the Rohingya by

61. Committee on the Elimination of Discrimination Against Women, *List of issues and questions in relation to the combined fourth and fifth periodic reports of Myanmar*, ¶ 17, U.N. Doc. CEDAW/C/MMR/Q/4-5 (Nov. 27, 2015).

62. Committee on the Rights of Children, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Myanmar*, ¶ 44(b), (c), U.N. Doc. CRC/C/MMR/CO/3-4 (March 14, 2012).

63. Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined fourth and fifth periodic reports of Myanmar*, ¶¶ 15(c), 33, 45(b), U.N. Doc. CEDAW/C/MMR/CO/4-5 (July 25, 2016).

64. “The more than 150,000 Rohingya who remain in northern Rakhine State face significant challenges, as continued movement restrictions imposed by the authorities combined with the deportation into Bangladesh of most of the Rohingya population have left them with scant work and other livelihood options.” *We Will Destroy Everything: Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar*, AMNESTY INT’L, at 1, 109, <https://www.amnesty.nl/content/uploads/2018/06/Amnesty-We-Will-Destroy-Everything-ASA1686302018.pdf?x65409> (last visited, May 29, 2019) [<https://perma.cc/L3EK-LMMG>].

denying them basic rights to food,⁶⁵ water,⁶⁶ education,⁶⁷ housing,⁶⁸ health,⁶⁹ and work.⁷⁰ According to articles 2 and 3 of the Committee on Economic, Social and Cultural Rights, Sovereign State parties have the obligation to guarantee the enjoyment of those rights to every single human being without discrimination.⁷¹ This obligation demands eliminating and removing formal and substantive inequitable obstacles that thwart the exercise of economic, social and cultural rights.⁷² The recommendations deliver by the Committee on Economic, Social

65. See Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (art. 11)*, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

66. See Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

67. See Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (art. 13 of the Covenant)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

68. See Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (art. 11.1 of the Covenant): Forced evictions*, U.N. Doc. E/C.12/1997/4 (May 20, 1997).

69. See Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

70. See Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The right to work (art. 6 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); see also Human Rights Council, *supra* note 17, ¶ 29, 30, 41, 50, 69.

71. The Human Rights Committee understands that “the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant [International Covenant on Civil and Political Rights], there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.” *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13 (May 26 2004.), ¶ 2.

72. On the matter, the Committee on Economic, Social and Cultural Rights has repeatedly noted that

discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment. In order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively: (a) Formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status; (b) Substantive discrimination: Merely

and Cultural Rights on Myanmar's report related to the implementation of the ICESCR in context of the systematic oppression and persecution installed against the Rohingya will be of particular interest. However, those will only be propositions that the State could easily disregard, as it has been doing with the rest of its international obligations.⁷³

Other instruments under the Human Rights Council ("HRC") are the Universal Periodic Review ("UPR") and the Special Procedures. The HRC has issued a number of reports on the basis of clear cut evidence obtained through fact-finding missions and different stakeholders.⁷⁴ Similar concerns were raised by the international community at Myanmar's session before the UPR in 2015, emphasizing on Myanmar's ethnic purification and discrimination practices against Rohingya.⁷⁵ In fact, States continue to make recommendations regarding the ongoing situation, aiming to engage Myanmar's position during the 2020 session.⁷⁶ However, the outcome will have a scarce, if not null effect to revert

addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

General Comment No. 20: Non-discrimination in economic, social and cultural rights (article 2, ¶ 2 of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 7-8, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

73. The State's due date for submitting the report under article 16 of the ICESCR is January 06, 2020. See United Nations Human Rights Office of the High Comm'r, *Treaty Body Countries: Reporting Status of Myanmar*, UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MMR&Lang=EN (last visited May 29, 2019) [<https://perma.cc/5YMN-KK62>].

74. See Human Rights Council, *supra* note 23.

75. "Respect the human rights of the Rohingya Muslims and other minorities in Myanmar in accordance with Human Rights Council resolution 22/95 of April 2015 (Costa Rica); Intensify its efforts to end discrimination and acts of violence suffered by members of ethnic and religious minorities, particularly the Rohingya (Argentina)" Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Myanmar* ¶¶ 145.44-45, U.N. Doc. A/HRC/31/13 (Dec. 23, 2015).

76. For an illustration on the recommendations done on the Rohingya crisis, see *Database for Recommendations: Myanmar*, UPR INFO https://www.upr-info.org/database/index.php?limit=0&f_SUR=119&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&

such widespread discriminatory policies. In addition, the Special Rapporteur on the situation of human rights in Myanmar has detailed the Rohingya crisis since 1992.⁷⁷ It has characterized the pattern of persecution targeting the Rohingya on account of their ethnic nature and/or religious beliefs.⁷⁸ Still, the burden of such reports have not achieved peace or held accountable those responsible for the crimes. All in all, the intensification of the crimes along past years, reaching its tipping point in August 2017 demonstrates the ineffectiveness of these mechanisms.

The Genocide Convention provides the only viable path to seek Myanmar's accountability for infringing the basic rights of the human person—or *erga omnes* obligations—during the events of August 25, 2017.⁷⁹ This treaty “chiefly provides for *criminal liability of individuals* for any of the acts of genocide enumerated in Article III.”⁸⁰ Nevertheless, its contractual nature obliges each contracting State to comply with its undertakings “to prevent and to punish” such a crime.⁸¹ Thus,

SMROrg=&pledges=RecoOnly (last visited May 29, 2019) [<https://perma.cc/S53N-ALHN>].

77. Created through Comm'n on Human Rights Res. 1992/58, ¶ 3 (Mar. 3, 1992), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Myan%20E%20CN4%20RES%201992%2058.pdf> [<https://perma.cc/2CS2-VUA6>].

78. Tomás Ojea Quintana, Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, ¶ 61, U.N. Doc. A/67/383 (Sept. 25, 2012).

79.

At the level of State responsibility it is now widely recognized that customary rules on genocide impose *erga omnes* obligations, that is, lay down obligations towards all other member States of the international community, and at the same time confer on any State the right to require that acts of genocide be discontinued . . . hose rules now form part of *jus cogens* or the body of peremptory norms, that is, they may not be derogated from by international agreement (not *a fortiori* by national legislation).

ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 98 (2003).

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations . . . The punishment of the crime of genocide is a matter of international concern.

UNGA, *The Crime of Genocide*, U.N. Doc. A/RES/96(I), at 188-89 (Dec. 11, 1946). “The crime of genocide exists to protect certain groups from extermination or attempted extermination.” *The Prosecutor v. Akayesu*, Judgment, 1998 I.C.T.R.-96-4-T, ¶ 469 (Sept. 02, 1998).

80. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 112 (2008).

81. “The 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 to punish.” Article 1, Genocide Convention.

The effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”; by agreeing to such a categorization, the State parties

it includes a provision compelling States to fulfill their obligation to avoid committing genocide, under the penalty of being sued by another State party.⁸² The Genocide Convention acknowledges genocide “as an international delinquency entailing the responsibility of the State whose authorities engage, or otherwise participate, in the commission of genocide (this international wrongful act may be the subject of an international dispute and in any case entails all the consequences of international wrongdoings).”⁸³ Hence, Myanmar’s responsibility is not of a criminal nature; instead it falls upon the breach of international law obligations because it has failed to take appropriate measures—*i.e.* exercise due diligence—to prevent, investigate, punish, and redress the harms caused to the Rohingya by the State’s agents as well as private persons during the extermination operations.⁸⁴

These acts demonstrate that Myanmar has engaged in attacking the Rohingya with the specific intent of destroying the group in whole or in part on the basis of their ethnicity and/or religious beliefs. Therefore, the Republic has not fulfilled its obligation to ensure the rights to life and personal integrity of the Rohingya embodied in the Genocide Convention.⁸⁵ Under the definition of genocide, the

must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission the commission of acts of genocide.

Mark Gibney, *State Responsibility and the Object and Purpose of the Genocide Convention*, 4 INT’L L.STUD. J. 141,145 (2007).

82. The I.C.J. understood that Article I of the Genocide Convention “does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 9, ¶ 165 (Feb. 26) [hereinafter, 2007 I.C.J. Judgment].

83. Antonio Cassese, *supra* note 80, at 96. Genocide is a crime that “shocks the conscience of mankind and results in great losses to humanity.” Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 12, 23 (May 28).

84. Under international law, the State incurs responsibility for acts committed by its organs or persons or entities exercising elements of governmental authority, and even non-state actors. G.A. Res. 56/83, *supra* note 56, art. 4, 5, 8, 11. Despite the fact that Myanmar is not a party to the ICCPR, it is worth mentioning the Human Rights Committee analysis on the States’ positive obligations, that is,

to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations . . . by its agents, but also against acts committed by private persons or entities . . . Violations [would occur] as a result of States Parties’ . . . failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

85.

In the view of the Court, taking into account the established purpose of the Convention,

Rohingya are a protected group.⁸⁶ In fact, their treatment by the Myanmar security forces during the genocidal campaigns included conduct amounting to four of the five defined prohibited acts: “(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) inflicting conditions of life calculated to bring about the physical destruction of the group in whole or in part; and (d) imposing measures intending to prevent births within the group.”⁸⁷ Furthermore, the genocidal intent—or *dolus specialis*⁸⁸—can be

the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described.

2007 I.C.J. Judgment, *supra* note 82, ¶ 166.

86.

The Rohingya can be seen as an ethnic (“members share a common language or culture”), racial (“based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”) or religious (“members share the same religion, denomination or mode of worship”) group, or a combination thereof. The Rohingya also consider themselves as a distinct group, as do the Myanmar authorities and security forces. The historic origins of the Rohingya in Myanmar, as well as their claim to “national race” status under Myanmar law, are disputed in Myanmar. However, this does not call into question that the Rohingya are a distinct group, nor does the fact that the Myanmar authorities do not officially recognize them as a “national race” or refer to them as “Bengali”. If anything, the differential treatment of the Rohingya, through the adoption of specific laws, policies and practices, supports the conclusion that they are a protected group as defined by the Genocide Convention.

United Nations Independent International Fact-Finding Mission on Myanmar, *supra* note 17, ¶ 1391.

87. *Cf.* Genocide Convention art. 2.

88.

The subjective element or *mens rea* is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) “the intent to destroy, in whole or in part” the group as such. This second intent is an aggravated criminal intention or *dolus specialis*: it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy in whole or in part, the group as such.

Report of the International Commission of Inquiry on Darfur to the Secretary-General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004, Annex to U.N. Doc. S/2005/60, 1 February 2005, ¶ 491 [hereinafter, Darfur Report].

It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law. The underlying crime or crimes must be characterized as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . . Two elements which may therefore be drawn from the special intent are: that

inferred from the following factors: “the broader oppressive context and hate rhetoric; [the] specific utterances of commanders and direct perpetrators; the exclusionary policies; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence committed.”⁸⁹

At the enforcement level, the Genocide Convention includes a dispute settlement provision relating to its “interpretation, application or fulfilment.”⁹⁰ Article IX specifically amounts to a compromissory clause, bestowing jurisdiction to the I.C.J. over such inter-State controversies regarding the State’s party responsibility for any of the acts enumerated in article III therein.⁹¹ In summary, the treaty includes a submission clause that provides appealing to the I.C.J. in case of a violation of any of its clauses by a State party.⁹² In the case under study arises the following question: who could then bring Myanmar’s failure to fulfill the Genocide Convention before the I.C.J.? The underlying rationale of article IX read in conjunction with articles I, II, and III is that the obligation not to commit (or prevent) and the duty to punish genocide is owed to every single State party to the treaty. Despite this possibility, there has been no case filed before the I.C.J. for a breach of the Genocide Convention obligations by a member State that did not consider itself or its citizens as victims of that international crime.

Accordingly, the People’s Republic of Bangladesh, a State party to both the I.C.J.’s Statute and the Genocide Convention,⁹³ could entertain the I.C.J.’s jurisdiction on three grounds: the extermination operations arises to the level of a dispute between them;⁹⁴ Myanmar’s extermination campaigns breached the

the victims belonged to an identified group; that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such.

The Prosecutor v. Goran Jelisic, IT-95-10-T, Judgment, ¶ 66 (Dec. 14, 1999).

89. *Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes - U.N. Report*, UNITED NATIONS HUMAN RIGHTS COUNCIL (Aug. 27, 2018) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475&LangID=E> [<https://perma.cc/3QFS-Y5CF>]. This has been quoted from the *United Nations Independent International Fact-Finding Mission on Myanmar*, *supra* note 17.

90. *Cf.* Genocide Convention art. 9.

91. 2007 I.C.J. Judgment, *supra* note 82, ¶ 114.

92. Myanmar has only posed reservations to articles VI and VIII of the Genocide Convention. *See Status of Treaties: Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (last visited May 29, 2019) [<https://perma.cc/N2NU-79VB>].

93. Bangladesh became a Member of the ICJ Statute on September 17, 1974. *See States Entitled to Appear Before the Court*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/states-entitled-to-appear> (last visited May 29, 2019) [<https://perma.cc/N2NU-79VB>]. It also acceded the Genocide Convention on Oct. 05, 1998; *see Status of Treaties: Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 92.

94. “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” *The Mavrommatis Palestine Concessions (Greece v. Britain)*,

fulfilment of the convention; and the State violated Bangladesh's rights as a Contracting Party that should have been protected under the Genocide Convention.⁹⁵

First, it is a well proven fact that the genocidal campaigns impact Bangladesh, which has absorbed almost one million Rohingya fleeing from the extermination campaigns conducted by Myanmar's military forces and other non-state actors.⁹⁶ Due to its limited resources, the government of Bangladesh has unsuccessfully urged Myanmar to comply with the repatriation arrangements previously concluded.⁹⁷

Second, Member States to the Genocide Convention are bound not to commit genocide through the actions of either their agencies or non-state actors.⁹⁸ Though the treaty does not contain a substantive obligation on States parties not to commit genocide, the I.C.J. understands that in accordance with

the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so

Judgment, 1924 P.C.I.J. 2, 11 (Aug. 30). The I.C.J. has defined "dispute" as the "situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations." *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, 1950 I.C.J. 8, 74 (Mar. 30).

95. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, 1996 I.C.J. 91, ¶ 6 (July 11) (Declaration of Judge Oda).

96. The United Nations Refugee Agency, *Rohingya Refugee Emergency at a Glance*, (Mar. 21, 2018), <https://unhcr.maps.arcgis.com/apps/Cascade/index.html?appid=5fdca0f47f1a46498002f39894fcd26f> (last visited, May 29, 2019) [<https://perma.cc/GT9W-RW6M>].

97. *Bangladesh 'disappointed' at lack of progress in alleviating plight of Rohingya, Prime Minister tells UN Assembly*, UN NEWS (Sept. 27, 2018), <https://news.un.org/en/story/2018/09/1021302> [<https://perma.cc/5SNK-STH9>].

98.

It follows from the expressly stated obligation [not to commit genocide] to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.

2007 I.C.J. Judgment, *supra* note 82, ¶ 166.

described.⁹⁹

Note that finding State's responsibility for breaching its obligations to prevent and to punish, does not require an individual being convicted of the actual commission of the crime. In other words, State responsibility does not require the prior establishment of the individual responsibility. However, the I.C.J. has the competence to examine if genocide has been committed when assessing a State's international responsibility for violating the Genocide Convention.¹⁰⁰ In the case under analysis, plenty of independent evidence—see notes 14 to 18—confirms that the transgressions committed by official agencies and private actors—had the intent to physically destroyed or removed the Rohingya from their territory—during the genocidal campaigns are attributable to Myanmar.

Third, to resolve whether there was a violation of the obligations not to commit genocide, to prevent it, and to punish it, the I.C.J. has recognized that

claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive . . . The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.¹⁰¹

This means that the I.C.J., in analyzing the genocidal campaigns, would have to verify a causal relationship between the violation, the extent of the damage caused, and the obligation to repair. In addition, the *dolus specialis* of genocide requires “a consistent pattern of conduct which could only point to the existence of such intent.”¹⁰² In other words, the *mens rea* of genocide requires the applicant party to prove the intent to destroy in whole or in part of the protected group at the hands of the Government of Myanmar. When assessing this element, the I.C.J. considered it necessary to determine two aspects. First, whether the amount of Rohingya in Rakhine state affected by the extermination campaigns constituted a *substantial part* of the Rohingya for the purposes of Article II.¹⁰³ Second, whether those acts constituted a *pattern of conduct* from which the *only reasonable inference* was to conclude that the perpetrators had the *intent to destroy in whole or in part* the Rohingya.¹⁰⁴ In this respect, the I.C.J. affirmed that “for a pattern of conduct to be accepted as evidence of its existence, it would have

99. 2007 I.C.J. Judgment, *supra* note 82, ¶ 166.

100. *Id.* ¶¶ 180-182.

101. *Id.* ¶ 209 (citation omitted).

102. *Id.* ¶ 376.

103. *Id.* ¶ 198. The ICJ has reaffirmed this interpretation in a subsequent case: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. 118, ¶ 142 (Feb. 03).

104. *Cf.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. 118, ¶ 404 (Feb. 03).

to be such that it could only point to the existence of such intent.”¹⁰⁵

Under this reasoning, it becomes unquestionable that the Rohingya from the Rakhine state represented a *substantial* part of the ethnic group. Further, it could identify a *pattern of conduct* in the acts perpetrated by the Tatmadaw forces and non-state actors that took place in August 2017 as constitutive of the *actus reus* of genocide under Article II.¹⁰⁶ The events of August 2017 amount to a continuing wrongful act. Indeed, the Rohingya have been enduring an illegal and harmful situation prolonged and perpetuated in time that continues today in Bangladesh.¹⁰⁷ They have been exposed to conditions of life intentionally reckoned to accomplish their physical destruction as a group, *e.g.* deprivation of basic resources, systematic expulsion from their hometowns, widespread sexual abuses, pillaging and burning of their properties.¹⁰⁸ In light of the only reasonable inference standard¹⁰⁹, the sole possible conclusion to draw from the pattern of conduct would be that there has been an intent to destroy the Rohingya as a protected group.¹¹⁰

It could also be inferred that Myanmar has failed to meet its obligation to “prevent and punish” acts within its territory contrary to the object and purpose of the Genocide Convention.¹¹¹ In order to fulfill such an obligation, the State is

105. 2007 I.C.J. Judgment, *supra* note 82, at ¶ 373; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015, I.C.J. 3, ¶ 145 (Feb.).

106. *See* Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, U.N. Doc. A/HRC/42/50 (Aug. 8, 2019).

107. G.A. Res. 56/83, *supra* note 56, § 14; “A crime is considered continuing if it continues after an initial illegal act has been consummated; a crime that involves ongoing elements [. . .] that continues over an extended period.” *Prosecutor v. Nahimana et al.*, I.C.T.R.-99-52-A, Judgement, ¶ 721 (Nov. 28, 2007).

108. *Prosecutor v. Kayishema*, I.C.T.R.-95—01-1088, Judgment, ¶ 115-16 (May 21, 1999); *Prosecutor v. Brdanin*, IT-99-36-T, Judgment ¶ 691 (Sept. 01, 2004).

109. This standard of proof required by the ICJ, *i.e.* the genocidal intent be the only—one—inferable intent from the conduct, was questioned by Croatia by quoting the more flexible position assumed by the ICTY in *Tolimir*. In the latter the ad-hoc Tribunal recognized “the possibility that more than one intent may be inferable from the conduct, but that to suffice as evidence of genocidal intent it had to be the ‘only reasonable inference.’” Hemi Mistry, *The International Court of Justice’s Judgment in the Final Balkans Genocide Convention Case*, 16 HUM. RTS. L. REV. 361, 357-69 (2016).

110. *See Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes - U.N. Report, supra* note 89.

111. “The head of the UN Independent International Fact-Finding Mission on Myanmar, Marzuki Darusman, told the General Assembly on Wednesday that Myanmar is failing in its obligations under the Genocide Convention to prevent, to investigate and to enact effective legislation criminalizing and punishing genocide.” Office of the High Comm’r, *Independent International Fact-Finding Mission on Myanmar calls on UN Member States to remain vigilant in the face of the continued threat of genocide*, (Oct. 23, 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E> (last visited, Dec. 18, 2019)

compelled to investigate, arrest, prosecute, and convict those individuals that, under the command, assist or acquiescence of the State, participated and committed acts contrary to the Genocide Convention. Myanmar's responsibility is openly drawn from the treaty's object and purpose, *i.e.* State parties are constrained to prevent and punish acts of genocide.¹¹² This means that the State should have taken the necessary measures to impede and eradicate genocidal policies. These are the responsibilities that each Member State has agreed and assumed to be bound by when they signed and ratified the treaty, and Myanmar has failed to assure during and after the genocidal campaigns.

The intervention of the I.C.J., in this respect, could have an immediate impact on the international community, in particular if provisional measures—*i.e.*, article 41.1 of its Statute—are requested and issued, ordering Myanmar to take the necessary actions to stop and prevent the commission of genocide against the Rohingya. Such a decision could draw immediate attention from the U.N.S.C., taking matters on the situation to a different level – as it occurred with the ethnic cleansing operations in Yugoslavia in 1993.¹¹³ In summary, the I.C.J could hold Myanmar accountable for not conforming the conduct of both state and non-state actors during the extermination campaigns to prevent and to punish those responsible for the genocidal operations against the Rohingya articles I *vis-à-vis* III(c) of the Genocide Convention.

2. Regional System

In the regional context, the scope of the State's international responsibility has to be analyzed through the ASEAN's human rights instruments and bodies. The ASEAN's overall impact on human rights issues is substantively and structurally limited, diverting its comprehensive goals to address economic, security, political, and social issues.¹¹⁴ Of particular interest is the AHRD. Though it presents itself as a decalogue of fundamental rights and freedoms, it is non-binding on the Member States because “[i]t takes a hybrid approach to regional protection of human rights.”¹¹⁵

Moreover, the Inter-governmental Commission on Human Rights (“AICHR”), created under article 14 of the ASEAN Charter, is composed of government representatives, instead of independent human rights experts.¹¹⁶ The

[<https://perma.cc/2RA8-W94U>].

112. *Cf.* Genocide Convention art. 1.

113. The U.N.S.C., based on numerous reports, created through Resolution 827 the International Criminal Tribunal for the former Yugoslavia as a response to systematic and grave violations of basic rights. S.C. Res. 827 (May 25, 1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (last visited, Dec. 18, 2019) [<https://perma.cc/WXS3-CYJ2>].

114. *Cf.* ASEAN Human Rights Declaration, *supra* note 54, at 7.

115. Basak Çali, *Regional Protection*, in INTERNATIONAL HUMANITARIAN RIGHTS LAW 418, 411-424 (Daniel Moeckli et al. eds., 2017).

116. *Cf.* ASEAN Charter art. 14 <https://asean.org/storage/images/archive/publications/>

most striking feature of this body is its lack of faculties to investigate human rights abuses across the region.¹¹⁷ Additionally, the AICHR guiding principle is “[n]on-interference in the internal affairs of ASEAN Member States.”¹¹⁸ The rationale of this position lies on the premise that “[w]ithin ASEAN, security has always been addressed through consultation and dialogue rather than through conventional collective security and formal mechanisms for setting disputes. This is the essence of the so-called ASEAN model.”¹¹⁹ In this respect, the AICHR’s action is confined to the principles of the State’s sovereignty and consensus in the decision making process, as well as the policy of no external intrusion in national affairs. As a general rule decisions are subject to Member States’ rejection.¹²⁰

During the 30th ASEAN Summit held on September 24th, 2017, the Chairman released a statement on “The Humanitarian Situation in Rakhine State”, urging “[a]ll the parties involved to avoid actions that will further worsen the situation on the ground.”¹²¹ It abstained from addressing the human rights abuses committed by the State, and even indicating the victims as members of the Rohingya community. All in all, the ASEAN human rights mechanism seems incapable of effectively dealing with the abuses perpetrated during the extermination campaigns, unless Myanmar yields its sovereignty and allows regional involvement in the Rohingya crisis.

C. Transitional Justice Process

Global experience demonstrates that the only path to achieve national

ASEAN-Charter.pdf (last visited, Dec.18, 2019) [<https://perma.cc/3GUC-QSDP>]. The Terms of Reference (2009) in art. 5 reads that “[t]he AICHR shall consist of the Member States of ASEAN. Each ASEAN Member State shall appoint a Representative to the AICHR who shall be accountable to the appointing Government.” *ASEAN Intergovernmental Commission on Human Rights Principle: Terms of Reference*, <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf> (last visited, Dec.18, 2019) [<https://perma.cc/2MSZ-9TXC>].

117. Despite that art. 1.1 of the Terms of Reference clearly state that the main purpose of the AICHR is “[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN”, neither the ASEAN Charter nor any other document provides the Commission with the necessary powers to offer such protection at regional level.

118. Cf. *ASEAN Intergovernmental Commission on Human Rights Principle: Terms of Reference* at 4, ¶ 2.1(b), <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf> (last visited, May 29, 2019) [perma.cc/VW2M-RMXX].

119. MICHAEL LEIFER, *THE ASEAN REGIONAL FORUM: EXTENDING ASEAN’S MODEL FOR REGIONAL SECURITY* 14 (1996).

120. Cf. Leonard Sebastian & Irman Lanti, *Perceiving Indonesian Approaches to International Relations Theory*, in *NON-WESTERN INTERNATIONAL RELATIONS THEORY: PERSPECTIVES ON AND BEYOND ASIA* 155 (Amitar Acharya et al., eds. 2010).

121. See *ASEAN Chairman’s Statement on the Humanitarian Situation in Rakhine State*, ASEAN <https://asean.org/asean-chairmans-statement-on-the-humanitarian-situation-in-rakininhinestate/?highlight=huminitarian%20problem%20in%20Rakhine> (last visited May 29, 2019) [perma.cc/B7WM-4JVB].

reconciliation, societal and individual healing, and peace after the abuses committed by Myanmar's military forces and non-state actors during the extermination operations is through a transitional justice process embedded in a restorative justice perspective.¹²² In this part, the study will be set on three directions: first, the right to truth from both its individual and collective dimensions; second, the right to reparations from a victim-centered perspective, including the guarantee of non-recurrence; and third, the individual criminal responsibility in search of justice.

1. Right to Truth

The analysis is diverted towards the State's duty to investigate the human rights abuses committed during the extermination campaign with the purpose to layout the most suitable path to guarantee the victims', next of kin's and society's right to truth.¹²³

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [hereafter, Basic Principles] enshrines the "[v]erification of the facts and full and public disclosure of the truth" as one of the methodologies to achieve satisfaction, and hence reparation for the wrongful acts.¹²⁴ The right to truth is inextricably linked with the freedom of expression, that is, the right to seek and impart information. The latter becomes instrumental to the realization of the former, however both are autonomous and independent rights.¹²⁵ The right to freedom of information, under

122. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 5 (2002).

. . . [R]econciliation is, at minimum, the condition under which individuals can trust one another as equal rights holders again or anew. That means that individuals under the jurisdiction of a given State are sufficiently committed to the norms and values that motivate their ruling institutions, that individuals are sufficiently confident that those who operate those institutions do so also on the basis of those norms and values – including the norms that turn individuals into rights holders – and sufficiently secure about other individuals' commitment to abide by and uphold these norms and values.

Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, ¶ 38, U.N. Doc. A/HRC/21/46 (Aug. 09, 2012).

123. The right to truth has been developed by the jurisprudence of international human rights courts and treaty monitoring bodies, as well as domestic courts, *see e.g.* Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C). No. 4 (July 25, 1988); Cyprus v. Turkey, App. No. 25781/94, Eur. H.R. Ct., Judgment (May 6, 2001); Aksoy v. Turkey, App. No. 21987/93, Eur. H.R. Ct., Judgment (Dec. 18, 1996); Amnesty International v. Sudan, No. 48/90, 50/91, 52/91, 89/93, Comm., African Commission on Human and Peoples' Rights (1999); Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, S. 1767. XXXVIII (S. Ct. 2005) (Argentina).

124. Rep. of the Third Committee (2006), *Resolution Adopted by the General Assembly on 16 December 2005*, ¶ 22(b), UN Doc. A/RES/60/147 (March 21, 2006).

125. Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Int-Am. Comm'n H.R., Report No. 136/99 (1999).

certain circumstances, can be restricted, whereas the inalienable character of the right to truth forbids any sort of limitation.¹²⁶ Thus, truth entitles the Rohingya to demand a full and complete recount of the events during the extermination operations, their specific circumstances, and the perpetrators' identity, including knowing the reasons for the violations and the context in which they took place.

The truth commissions previously set by the State in relation to path events, for a myriad of reasons, proved to be ineffective.¹²⁷ In order to establish what really happened during the genocidal campaigns, a hybrid truth commission should be instituted.¹²⁸ Indeed, this seems to be the only feasible avenue to obtain the necessary information to pursue the transitional justice process. The final aim will be communal reconciliation and for that the participation and involvement of different actors is needed, in particular because of the ongoing context of violations against the Rohingya.

This hybrid institution should be composed of the State's agents, international bodies' representatives, and civil society groups. Unless Myanmar is directly involved, truth will never be fully attained. This, of course, requires a reform operation of the legislative, administrative and judicial domestic policies in the beneficence of the Rohingya community. Furthermore, the mandate's duration has to be limited to achieving its scope. In this fashion, a more concise and narrow objective would allow a better understanding of the conflict and a subsequent path towards reconciliation. Once accomplished, further steps could be considered towards a long-term reconciliation process that encompasses the whole situation. Additionally, the truth commission's faculties should deal with identifying the victims of the events of August 25, 2017—*i.e.* fact-finding and victim tracing—describing the human rights abuses committed, explaining the reasons that motivated Myanmar's government to allow and encourage such vile acts against the Rakhine Rohingya. The overall objective ought to be avoiding the perpetuation of impunity. In this sense, the involvement of the international community on the matter is necessary, particularly after all the information that has been documented in relation to the transgressions perpetrated against the Rohingya.

126. *Tas v. Turkey*, App. No. 24396/94, Eur. Ct. H.R., Judgment (2000); *Cyprus v. Turkey*, App. No. 25781/94, Eur. H.R. Ct., Judgment (May 6, 2001).

127.

The Myanmar government should stop denying the truth and should work with the international community, and particularly the United Nations, to improve the horrific conditions facing the Rohingya and other ethnic minorities whose rights have been violated so brutally by the security forces, as documented by the Fact Finding Mission.

Myanmar: Creation of UN Mechanism a Step Toward Accountability, *supra* note 12.

128. Truth commissions “refers to official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years.” Diane Orentlicher, *Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

2. *Right to Reparations*

The right to reparations—or State's duty to redress and compensate—is a well-established norm in international human rights law.¹²⁹ Every state is under the international obligation to make full reparation for the injury caused, including restituting, compensating and satisfying for the material and/or moral damages.¹³⁰ Herein, the analysis is centered in the State's duty to redress the damages suffered by the Rohingya during the extermination operations. In doing so, not only the most effective ones for the victims should be considered, but also the relevant social interests, even at the expense of remedial effectiveness.¹³¹

The reparations approach should be victim-centered, so as to guarantee recognition to the victims, contribute to reconciliation, strengthen the rule of law, and foster trust in institutions.¹³² Indeed, the direct participation from the Rohingya appears crucial to achieve national reconciliation. That is, they should be granted space to express their voice, to make everyone understand the anguish and misery suffered, together with their particular necessities and desires.¹³³ Some difficulties, however, might be encountered in the process of specifying the redress program in favor of the Rohingya. For instance, the model for awarding reparations should be judicial or administrative, or both, the individuals entitled to reparations should or not include relatives non-directly affected by the extermination campaigns, the extent of the remedies should be individually or collectively assigned including monetary or non-monetary compensations, or a combination of them.

A full satisfactory answer to these queries cannot be provided due to the ongoing abuses that the Rohingya continually endure. Nevertheless, once Myanmar's government decides to embark on a reconciliation process, it could be asserted that the most suitable reparations scheme would have to include lineaments of the three approaches widely accepted, *i.e.* reparations as development, reparations as community-level acknowledgment and atonement, and reparations as preferential access.¹³⁴

In that scenario, further measures to prevent repetition from such events—that is, the guarantee of non-recurrence—would be fundamental to reach national reconciliation, *e.g.* undertake institutional, constitutional and legal reforms to eradicate cultural, ethnic, religious and other forms of discrimination

129. Rep. of the Third Committee (2006), *supra* note 124, § I.2(c).

130. G.A. Res. 56/83, *supra* note 56, §§ 30, 31, 34.

131. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L. J. 591, 585-681 (1983).

132. For a comparison between the victim-centered and the cost-centered approaches, see Thomas Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. OF INT'L L. 279-332 (2011).

133. Along this process, though, they should also receive expert advice on the extent of the remedies in comparison to the gravity of the abuses within the actual context in which they are immersed.

134. See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 186-200, 157-200 (2004).

as well as impunity for human rights violations, civilian control of military and security forces, legislative enactment to ensure the Rohingya full exercise of their basic rights, prohibit the enactment of amnesties laws, launch national awareness campaigns against discriminatory policies with special emphasis on the Rohingya crisis, remove those public servants that were involved on the extermination operations, and advance both criminal, civil and administrative proceedings for accountability matters.

In conclusion, the redress scheme could be delineated once the State decides to undergo a process of reconciliation. In other words, it would be hollowed to render a system of reparations for the victims without the State's willingness to participate. The path to pursue should be traced by both parties through negotiation in respect of international human rights standards.

3. *Individual Criminal Responsibility: Justice*

National reconciliation could never be conceived as a substitute for justice—*i.e.* State's duty to investigate, prosecute and punish.¹³⁵ Naturally, the violations and abuses will give rise to individual criminal responsibility, either under domestic criminal law or international criminal law.¹³⁶ Due to the current state of affairs, national criminal procedures will rarely occur.¹³⁷ If that were the case, such proceedings would most likely serve the purpose of shielding the Tatmadaw forces and non-state actors from true criminal liability, perpetuating the deeply entrenched impunity that characterizes Myanmar's political regime. Hence, the international response appears to be the sole possibility to procure individual criminal responsibility in relation to the large-scale abuses inflicted on the Rohingya last August 2017.

In this trend of analysis, the recent decisions adopted by the Pre-Trial Chamber I of the ICC enlightens the road to individual responsibility.¹³⁸ Beyond a thorough analysis on the merits of the judicial opinions, there is a calculable difficulty in bringing those accountable to the jurisdiction of the ICC. Without Myanmar's cooperation, there is no real possibility of a trial, and thus of securing individual criminal liability. The general picture displays the importance of diplomacy and politics, and the inability of both the universal as well as the regional systems to deter Myanmar from continuing its discriminatory actions and

135. Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, ¶ 37, UN Doc. A/HRC/21/46 (Aug. 9, 2012).

136. As stated in the Nuremberg judgment, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *France v. Göring*, 22 I.M.T. 2013, Judgment and Sentence, (1946-7).

137. *Myanmar: Creation of UN Mechanism a Step Toward Accountability*, *supra* note 12.

138. *Prosecutor v. People of Bangladesh*, Case No. ICC-RoC46(3)-01/18, Decision on the Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute (May 30, 2018); *Prosecutor v. People of Bangladesh*, Case No. ICC-RoC46(3)-01/18, Decision on the Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (Sept. 6, 2018).

bloodshed against the Rohingya.

Under these circumstances, the intervention of the UNSC could be justified under Chapter VII of the Charter.¹³⁹ This would require convergence among the five permanent members in taking the necessary actions to restore peace and security in the region. In this respect, China's position casts some doubts of achieving the required consensus;¹⁴⁰ however, the growing humanitarian crisis could impel a renewal standpoint on the matter. Moreover, as stated above, if the I.C.J. were to issue a provisional measure deterring the State from its current path, it would also propel the UNSC to intervene on the situation. The UNSC then seems to be the only international body capable of putting the significant political pressure on the State to build an agreement towards a reconciliation process, enhance legitimacy and acceptability of the international human rights standards. The Council should take the following approach to establish a Commission of Inquiry to delve into the verified violations, condemn them through resolutions reassuring the reestablishment of peace, and install a judicial mechanism to address such violations. This last step should include founding an internationalized tribunal with the sole purpose of adjudicating individuals bearing the greatest responsibility for the serious abuses committed during the genocidal campaigns.

In prior cases, instead of installing a new international ad-hoc tribunal, States supported by major Powers have preferred to resort to internationalized courts, or, tribunals that combine aspects of both international and national law in their composition, statutes and rules—*e.g.* Sierra Leone, East Timor, Cambodia, Kosovo, Lebanon, and Iraq.¹⁴¹ In fact, “[i]nternalizing human rights in Myanmar through domestic means is certainly the ideal situation, but its practicality remains questionable. But “interaction, interpretation, and internalization,” as opposed to external enforcement policies, might be the only possibility for long-term change in Myanmar.¹⁴² This hybrid tribunal then should be composed of both international and domestic judges, prosecutors, and administrative staff, including Rohingya in important decision making roles. Furthermore, the local population should be educated on the tribunal's objectives and procedures, so as to keep the organism tightly connected with the society in this healing path. There are, however, some foreseeable obstacles that could prevail a harmonious administration of this mixed judicial incursion. In fact, the Republic's lack of political commitment to follow a real peace process and the continuing emergency situation of the Rohingya, demands to carefully consider a constructive design of the tribunal, considering essential factors, like enforcement

139. According to articles 1(3) *vis-a-vis* 39 of the Charter, the UNSC can take the necessary measures to restore peace and security when facing human rights violations.

140. *China Says Rohingya Issue Should not be 'Internationalized'*, REUTERS (Sept. 27, 2018) <https://www.reuters.com/article/us-myanmar-rohingya-china/china-says-rohingya-issue-should-not-be-internationalized-idUSKCN1M8062> (last visited November 28, 2018) [perma.cc/5LVG-B7GD].

141. See MALCOM N. SHAW, INTERNATIONAL LAW 417-429 (Cambridge, 6th ed. 2008).

142. Audrey Tan, *Myanmar's Transitional Justice: Addressing a Country's Past in a Time of Change*, 85 S. CAL. L. REV. 1643, 1672 (2012).

and security, lack of cooperation and opposition from those who are in power, as well as the source for financial resources, particularly because it will not receive funds from the UN unless it decides to aid in the reconstruction of Myanmar's governmental regime.

In summary, the state of the situation shows that individual criminal justice regarding the extermination operations could only be accomplished under the following two conditions: first, the U.N.S.C. political strain over Myanmar and second, the (unlikely) change of the State's totalitarian regime to a true democracy. The reconciliation process could be forced through a UN executive branch resolution, including the constitution of an internationalized tribunal with a specific mandate to criminally adjudicate those individuals bearing responsibility for the human rights abuses. This, however, would demand the presence of the UN forces to secure the completion of the trajectory set towards the adjudication of those who have installed the repressive policies spread across the country against the Rohingya.

IV. CLOSING ARGUMENTS

The structural violence in the Rakhine state against the ethnic/religious Rohingya minority in autumn 2017 amount to serious human rights abuses under international law—*i.e.* persecution, genocide, crimes against humanity. As stated above, it is a well-established rule that primary responsibility to ensure and respect fundamental human rights rests with every State. The ingrained culture of impunity that reigns in Myanmar together with its political unwillingness to design a true transitional justice project to disrupt the patterns of oppression and systematic violence, demonstrate that it has no intention of complying with its due diligence obligation to prevent and protect (part of) its population from heinous crimes. The plight of the Rohingya calls for the international community's intervention in order to avoid repeating the same mistakes that guaranteed the Rwanda genocide. Thus, in accordance with the Genocide Convention, the international community has obligations to take a collective action that goes beyond the humanitarian assistance, diplomatic pressure, economic and arms embargos, and other peaceful means. In fact, it becomes necessary to effectively prosecute and punish the perpetrators; accountability can only be attained through a two-fold process: on the one hand, Myanmar's responsibility for the genocidal campaigns requires prompting the I.C.J.'s jurisdiction through article IX of the Genocide Convention; on the other, criminal liability of the main perpetrators and leaders demands political pressure from the UNSC to force the State into a transitional justice process and the creation of an internationalized tribunal because the solution must take part at the national level by enforcing principles of nondiscrimination and inclusion that would successfully enable the democratic process started in 2013.