

Fordham International Law Journal

Volume 42, Issue 1

Article 3

Transitional Justice for the Persecution of the Rohingya

Elliot Higgins*

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ESSAY

TRANSITIONAL JUSTICE FOR THE PERSECUTION
OF THE ROHINGYA

*Elliot Higgins**

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* Elliot Higgins is a law clerk for the U.S. District Court for the Eastern District of California. He received his Bachelor of Arts in Political Science and Anthropology from the University of Iowa in 2012 and his Juris Doctor from Stanford Law School in 2018. Mr. Higgins would like to thank his parents for their eternal support, Professor Zachary D. Kaufman for his expert guidance, and the editorial board of the *Fordham International Law Journal* for their hard work.

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I. INTRODUCTION

The Rohingyas are widely considered to be the most persecuted people in the world.¹ Though they have lived in what is now southwestern Myanmar for hundreds of years,² the Burmese government denied the Rohingyas citizenship at the country's independence from Britain.³ This statelessness, and the bigotry underlying it, has led to waves of violence, forced labor, rape, and murder.⁴ In August 2017, the persecution reached a fevered pitch. After a Rohingya separatist group—the Arakan Rohingya Salvation Army (“ARSA”)—killed twelve members of Myanmar's security forces, the military retaliated with disproportionate brutality—razing villages, raping women, and murdering thousands of innocent people.⁵ During this campaign, more than 725,000 of the 1.2 million Burmese Rohingyas fled across the border into Bangladesh.⁶ At least 6,700 Rohingyas, including at least 730 children under the age of five, were killed in the month after the violence broke out.⁷ The exact scale of the

1. See Krishnadev Calamur, *The Misunderstood Roots of Burma's Rohingya Crisis*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513> [<https://perma.cc/L6EL-285U>] (last visited Sept. 28, 2018).

2. MOSHE YEGAR, *THE MUSLIMS OF BURMA* 2 (1972); *Myanmar Rohingya: What You Need to Know About the Crisis*, BBC (Jan. 16, 2018), <http://www.bbc.com/news/world-asia-41566561> [<https://perma.cc/7NBW-9535>] (last visited Sept. 28, 2018).

3. AZEEM IBRAHIM, *THE ROHINGYAS: INSIDE MYANMAR'S HIDDEN GENOCIDE* 35-36 (2016); Adam Simpson, Ian Holliday & Nicholas Farrelly, *Myanmar Futures*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 433-34 (Simpson et al. eds., 2018).

4. Ibrahim *supra* note 3, at 51.

5. Nahal Toosi, *The Genocide the U.S. Didn't See Coming*, POLITICO (Mar./Apr. 2018), <https://www.politico.com/magazine/story/2018/03/04/obama-rohingya-genocide-myanmar-burma-muslim-syu-kii-217214> [<https://perma.cc/QF2M-ZP2J>] (last visited Sept. 28, 2018).

6. Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, ¶ 751 (Sept. 17, 2018); Syed S. Mahmood et al., *The Rohingya People of Myanmar: Health, Human Rights, and Identity* 389 LANCET 1841, 1844 (2017); see also *Rohingya Refugee Crisis*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., <https://www.unocha.org/rohingya-refugee-crisis> [<https://perma.cc/AEK5-QZQD>] (last visited Sept. 28, 2018).

7. *MSF: At Least 6,700 Rohingya Killed During Attacks in Myanmar*, DOCTORS WITHOUT BORDERS (Dec. 14, 2017), <https://www.doctorswithoutborders.org/article/msf-least-6700-rohingya-killed-during-attacks-myanmar> [<https://perma.cc/6XSF-TMQ2>] (last visited Sept. 28, 2018). Contrarily, the Myanmar government puts the number of dead at 400. *Myanmar*

violence remains unknown because Myanmar has limited access to the affected areas.⁸

The international community has condemned the Burmese military's brutal campaign against the Rohingyas. U.S. Secretary of State Rex Tillerson called it an "ethnic cleansing."⁹ Similarly, a top United Nations official said the action bears "the hallmarks of a genocide."¹⁰ But where the international community sees the Rohingyas as victims of abject persecution, the Burmese political authorities portray them as dangerous foreigners influenced by Islamist extremism who are intent on overtaking the homeland.¹¹ These competing narratives will make resolution of the conflict exceedingly difficult.

Whatever form reconciliation takes, if it is to be enduring, there must be justice and accountability for the violence unleashed by the Burmese military on Rohingya civilians. This Essay explores the means of justice and accountability available to relevant actors, namely the National League for Democracy ("NLD")-led government, the international community, and Myanmar's neighbors. It proceeds in five parts. Part I provides an overview of the political history of Myanmar. The first Section of this Part presents a general history of the nation-state, focusing on its periods of colonization, military junta control, and post-2008 transition to democracy. The second Section of this Part describes the Rohingya people, their history of persecution, and how their current condition became so precarious.

Drawing on contemporary journalism and non-government organization ("NGO") reports, Part II describes the current conflict, including its acute causes and immediate outlook. Part III provides an

Rohingya: What you need to know about the crisis, BBC (Jan. 16, 2018), <http://www.bbc.com/news/world-asia-41566561> [<https://perma.cc/7NBW-9535>] (last visited Sept. 28, 2018).

8. Toosi, *supra* note 5.

9. Arshad Mohammed & David Brunnstrom, *U.S. calls Myanmar moves against Rohingya 'ethnic cleansing'*, REUTERS (Nov. 22, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-usa/u-s-calls-myanmar-moves-against-rohingya-ethnic-cleansing-idUSKBN1DM1N3> [<https://perma.cc/Z8A4-DR95>] (last visited Sept. 28, 2018).

10. Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, U.N. Doc. A/HRC/37/70, ¶ 65 (Mar. 23, 2018).

11. Calamur, *supra* note 1. Notably, many critics of the Myanmar government argue that it is strategically and insincerely expressing this view as a pretext for oppression. See, e.g., Violet Cho, *Ethnicity and Identity*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 43, 43, 49-50 (Simpson et al. eds., 2018).

overview of transitional justice options that may be considered in this particular case, segmented by the actors who may pursue them. The first Section of this Part focuses on the two domestic authorities of Myanmar: Aung San Suu Kyi's civilian-led government and the military. It analyzes what interest each authority may have in transitional justice and surveys the available options that each may be disposed to employ. The second Section considers transitional justice options that may be undertaken by international actors, such as the International Criminal Court ("ICC"), the United Nations ("UN"), and third-party states. Finally, the third Section of this Part considers whether Myanmar's neighboring countries may intervene in the crisis.

Part IV concludes by summarizing this Essay's findings and calling for justice for the Rohingyas.

A. Political History of Myanmar

Myanmar is a Southeast Asian nation-state of more than 100 ethnic groups, bordering India, Bangladesh, China, Laos and Thailand.¹² Through the nineteenth century, various city-states rose and fell within the modern borders.¹³ In 1824, Britain began colonizing Burma, taking complete control of the country in 1886 and administering it as a part of its Indian Empire.¹⁴ British colonial rule ended in Myanmar on January 4, 1948, and democratically elected civilians governed the country for the subsequent fifteen years.¹⁵ In

12. Cho, *supra* note 11. *Ethnicity and Identity*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 43, 43 (Simpson et al. eds., 2018). Though the government recognizes 135 indigenous ethnic groups, seven groups comprise the majority of the population (i.e. Burman (Bamar) 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%). CIA, *Burma: People and Society*, in THE WORLD FACTBOOK, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> [<https://perma.cc/UVC9-7RVK>] (last visited Sept. 28, 2018).

13. CIA, *Burma: Introduction*, in THE WORLD FACTBOOK, at <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> [<https://perma.cc/533C-ED23>] (last visited Sept. 28, 2018).

14. *Id.* Contemporary ethnic politics in Myanmar are largely a legacy of British colonial policies, which involved the classification and enumeration of "racial" groups, in many instances leading to ethnic consciousness. Cho, *supra* note 11, at 43. In pre-colonial times, it appears that social categories other than race were of greater importance, such as class distinction and land possession. *Id.* Ever since Britain designated race as the primary category of social organization, "[t]he postcolonial state has invested significant resources into popularizing 'Burmese' as a panethnic category and in countering ethnic minority group-making projects that challenge the perceived interests of the state." *Id.*

15. Lee Jones, *Political Economy*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 181, 181 (Simpson et al. eds., 2018).

1962, General Ne Win successfully launched a military coup, which replaced the democratic governance model with a military-backed Leninist control apparatus.¹⁶ In turn, this regime collapsed during widespread civil unrest in 1988.¹⁷ Within months of Ne Win's downfall, the military—formally known as the Tatmadaw—crushed student-led protests, and a nineteen-member military junta took power.¹⁸ In 1990, the Tatmadaw-backed government administered multiparty legislative elections, which Aung San Suu Kyi's party—the NLD—won in a landslide victory.¹⁹ The totalitarian government rejected this outcome and placed Aung San Suu Kyi under house arrest from 1989 to 1995, 2000 to 2002, and from May 2003 to November 2010.²⁰

In late September 2007, the ruling junta once again brutally suppressed protests led by prodemocracy activists and Buddhist monks.²¹ Nonetheless, in late 2008, the junta administered a constitutional referendum, the first vote in Burma since 1990.²² While the referendum was deemed illegitimate by outside observers, a majority of voters approved the constitution,²³ which “reserves a quarter of legislative seats for serving military personnel, mandates direct military appointments to the executive, and allocates the Tatmadaw a key role in many aspects of national governance.”²⁴

In November 2010, the junta administered legislative elections where the military-backed Union Solidarity and Development Party captured over seventy-five percent of the contested seats.²⁵ Though the newly elected government was largely composed of former or current military officers, it initiated reforms in governance and trade that significantly opened Myanmar to the international community from a long period of isolation.²⁶ The reforms culminated in the 2015 election,

16. Ian Holliday & Su Mon Thazin Aung, *The Executive*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 227, 227 (Simpson et al. eds., 2018).

17. CIA, *supra* note 13.

18. Holliday & Aung, *supra* note 16.

19. CIA, *supra* note 13.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Burma: Election Fundamentally Flawed*, HUMAN RIGHTS WATCH (Nov. 4, 2015 12:00 AM EST), <https://www.hrw.org/news/2015/11/04/burma-election-fundamentally-flawed> [https://perma.cc/TKE9-ZXH6] (last visited Sept. 28, 2018).

24. Simpson et al., *supra* note 3, at 433-35.

25. CIA, *supra* note 13.

26. *Id.*

which was won, to the shock of many international observers, by the opposition party: Aung San Suu Kyi's NLD.²⁷ After more than five decades of military dictatorship, Burma's first credibly elected civilian government was sworn into office on March 30, 2016.²⁸

B. The Rohingya People

The Rohingyas are an ethnic Muslim community who practice a Sufi-inflected variation of Sunni Islam.²⁹ Before August 2017, the majority of the estimated 1.1 million Rohingya people resided in the Rakhine State of Myanmar, on the country's western coast facing the Bay of Bengal, where they accounted for nearly a third of the population.³⁰ The Rohingyas are a small minority in Myanmar,³¹ differing from the dominant Buddhist groups ethnically, linguistically, and religiously.³²

The ancestors of the Rohingyas were Arab and Persian traders who arrived in Lower Burma as early as in the ninth century.³³ By the twelfth century, Rohingya communities were well-established in what is now Rakhine State, then called Arakan.³⁴ For centuries, the Rohingya communities were governed by the Mrauk U or Mrohaung kingdom, which was independent of both the Burmese kingdoms in the Irrawaddy delta and central Burma, and the Bengal and Mogul empires in India.³⁵ In 1784, the Kingdom of Ava, located in central Burma, conquered Arakan and ruled the region with an iron fist, subjecting the Rohingyas to forced conscription and massacres.³⁶ Accordingly, when British colonial forces prepared to invade Burma in 1824, the Rohingyas allied with the British against their oppressor, the Burmese king.³⁷

27. Simpson et al., *supra* note 3, at 433.

28. CIA, *supra* note 13.

29. Eleanor Albert, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELATIONS (Feb. 9, 2018), <https://www.cfr.org/background/rohingya-crisis> [<https://perma.cc/V3MZ-HBFB>] (last visited Sept. 28, 2018).

30. Andrew Selth, *Burma's Muslims: Terrorists or Terrorised?* 7 (CANBERRA PAPERS ON STRATEGY & DEF. No. 150, 2003).

31. The total population is estimated to be 55,123,814. CIA, *supra* note 12.

32. Albert, *supra* note 29.

33. YEGAR, *supra* note 2, at 2.

34. *Id.*

35. KAZI FAHMIDA FARZANA, *MEMORIES OF BURMESE ROHINGYA REFUGEES: CONTESTED IDENTITY AND BELONGING* 42 (2017).

36. *Id.* at 43-44.

37. *Id.* at 44.

Myanmar became independent from Britain in 1948, and the new nation-state's borders were drawn in accordance with the boundaries of pre-colonial Myanmar circa 1824.³⁸ Thus, the newly independent Myanmar included the home of the Rohingyas—Arakan, renamed Rakhine State—which for most of human history had been independent, and sometimes even at war with, the Burmese kingdoms.³⁹

The new nation-state of Myanmar inherited a complex assortment of ethnic groups and religious beliefs, and the Burmese elite debated whether to create a Buddhist Burmese polity or an inclusive state that granted citizenship to all within its borders.⁴⁰ The debate remained unsettled until General Ne Win and the Tatmadaw took power in 1962.⁴¹ Given the absence of a homogeneous ethnic identity for the new nation-state, the Tatmadaw co-opted Buddhism, the majority religion, designating it as the “essential criterion for being a ‘true Burmese.’”⁴² To this end, during the 1970s and 1980s, the military “co-opted organised Buddhism as the state religion.”⁴³

In 1982, the Ne Win-controlled government passed the Citizenship Law, which delineated the various ethnicities of Myanmar into 135 “national races.”⁴⁴ The law did not deem the Rohingyas to be a “national race”; instead, it designated them as “non-nationals” and “foreign residents,” abolishing their rights.⁴⁵ This loss of legal status led to restrictions on movement, fewer educational opportunities, as well as insecure land tenure.⁴⁶ It ultimately culminated in waves of violence, forced labor, beatings, and rape.⁴⁷ This systematic persecution has caused intermittent waves of Rohingya migration

38. IBRAHIM, *supra* note 3, at 35.

39. *Id.*; MOHAMMED ASHRAF ALAM, A SHORT HISTORICAL BACKGROUND OF ARAKAN 26 (1999).

40. IBRAHIM, *supra* note 3, at 35-36. While many ethnic groups received automatic citizenship via the 1947 Constitution, the Rohingyas were a notable exception. *Id.* at 48.

41. *Id.* at 36-37.

42. *Id.*

43. *Id.*

44. Simpson et al., *supra* note 3, at 434.

45. CIA, *Burma: Transnational Issues*, in The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> [<https://perma.cc/533C-ED23>]. As of 2014, Myanmar state policy provides two options to Rohingyas instead of citizenship: they “must demonstrate their family has lived in Burma for at least 60 years to qualify for a lesser naturalized citizenship and the classification of Bengali or be put in detention camps and face deportation.” *Id.*

46. IBRAHIM, *supra* note 3, at 51.

47. *Id.* at 51-52.

within and out of Myanmar. Before the Tatmadaw's violent campaign in August 2017, the United Nations estimated that there were 120,000 internally displaced Rohingya and as many as 420,000 Rohingya refugees in Southeast Asia.⁴⁸ Since August 2017, an additional 725,000 Rohingyas have fled to Bangladesh.⁴⁹

Despite the persecution to which they have been subjected, the Rohingyas claim full Burmese citizenship as their natural right.⁵⁰ In contrast, Burmese government officials and a majority of the population say that the Rohingyas are "Bengali" foreigners who have never been a part of Myanmar's history.⁵¹

II. OVERVIEW OF THE CURRENT CRISIS

In August 2016, in response to increasing international pressure regarding the mistreatment of the Rohingyas, the newly elected NLD-led government appointed an international advisory commission, chaired by former UN Secretary General Kofi Annan, to put forward recommendations to surmount the political, socio-economic, and humanitarian challenges that faced Rakhine State.⁵² By early October 2016, the situation in Rakhine State was relatively stable, despite the ongoing incarceration of over 100,000 Rohingya in internally displaced peoples camps.⁵³ On October 9, 2016, however, the Arakan Rohingya Salvation Army launched coordinated armed attacks on three border posts in northern Rakhine State, killing nine Myanmar police officers.⁵⁴ As a result, the Tatmadaw significantly increased its presence in the region, which was soon followed by attendant allegations of abuse of

48. *Myanmar: Who are the Rohingya?*, AL JAZEERA (Apr. 18, 2018), <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html> [https://perma.cc/K6P3-DREH] (last visited Sept. 28, 2018).

49. Human Rights Council, *supra* note 6, ¶¶ 749-51.

50. FARZANA, *supra* note 35, at 2.

51. *Id.*; Hannah Beech, *Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html>.

52. *Myanmar names Kofi Annan to head panel on Rohingya Muslims*, AP NEWS (Aug. 24, 2016), <https://apnews.com/671961298f7d4f899898d0c063319ffa> [https://perma.cc/MWY6-3NBH].

53. Simpson et al., *supra* note 3, at 435.

54. Yee Ywal Myint, *Rakhine border raids kill nine police officers*, MYANMAR TIMES (Oct. 10, 2016), <https://www.mmmtimes.com/national-news/22992-rakhine-border-raids-kill-nine-police-officers.html> [https://perma.cc/TUD5-23HD] (last visited Sept. 28, 2018).

the Muslim community and an exodus of 70,000 Rohingyas to Bangladesh.⁵⁵

Nearly one year later, Annan's advisory commission delivered its final report, which included comprehensive recommendations on measures to achieve peace in Rakhine State.⁵⁶ The NLD government committed to implement the recommendations "to the fullest extent, and within the shortest timeframe possible."⁵⁷ One day after the report was released, ARSA militants attacked thirty police stations and an army barracks in northern Rakhine State,⁵⁸ eliciting a brutal military response which the UN High Commissioner for Human Rights labelled "a textbook example of ethnic cleansing."⁵⁹ At least 6,700 Rohingyas, including at least 730 children under the age of five, were killed in the month after the violence broke out, according to Doctors Without Borders.⁶⁰ Amnesty International reported that some Myanmar soldiers raped and abused Rohingya women and girls.⁶¹ Human Rights Watch reported that at least 288 villages were partially or totally destroyed by fire.⁶² Satellite imagery shows many areas where Rohingya villages were reduced to rubble, while nearby ethnic Rakhine villages were left intact.⁶³ Notably, most of the damage occurred between August 25 and September 25, 2017—with many villages destroyed after September 5,

55. Simpson et al., *supra* note 3, at 435.

56. See ADVISORY COMM'N ON RAKHINE STATE, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE (2017).

57. Simpson et al., *supra* note 3, at 435.

58. *Id.*; Human Rights Council, *supra* note 6, ¶¶ 749-51.

59. Zeid Ra'ad Al Hussein, United Nations High Comm'r for Human Rights, Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries (Sept. 11, 2017).

60. MSF: *At Least 6,700 Rohingya Killed During Attacks in Myanmar*, DOCTORS WITHOUT BORDERS (Dec. 14, 2017), <https://www.doctorswithoutborders.org/article/msf-least-6700-rohingya-killed-during-attacks-myanmar> [<https://perma.cc/3LT4-JSKW>] (last visited Sept. 28, 2018). Contrarily, the Myanmar government puts the number of dead at 400. *Myanmar Rohingya: What you need to know about the crisis*, BBC (Jan. 16, 2018), <http://www.bbc.com/news/world-asia-41566561> [<https://perma.cc/7WJG-2SKG>] (last visited Sept. 28, 2018).

61. *Myanmar: Crimes against humanity terrorize and drive Rohingya out*, AMNESTY INT'L (Oct. 18, 2017), <https://www.amnesty.org/en/latest/news/2017/10/myanmar-new-evidence-of-systematic-campaign-to-terrorize-and-drive-rohingya-out> [<https://perma.cc/V8AU-5JNZ>] (last visited Sept. 28, 2018).

62. *Burma: 40 Rohingya Villages Burned Since October*, HUM. RTS. WATCH (Dec. 17, 2017), <https://www.hrw.org/news/2017/12/17/burma-40-rohingya-villages-burned-october> [<https://perma.cc/27R7-EMPJ>] (last visited Sept. 28, 2018).

63. *Id.*

when Aung San Suu Kyi said security force operations had ended.⁶⁴ The Tatmadaw also allegedly opened fire on fleeing civilians and planted land mines near border crossings used by Rohingyas to flee to Bangladesh.⁶⁵

Despite the damning NGO reports, the Myanmar authorities have claimed total innocence. The Tatmadaw, which currently administers northern Rakhine State, has denied committing any abuses.⁶⁶ At the same time, the Tatmadaw has denied access to independent investigators and strictly limits access for aid agencies.⁶⁷ Likewise, Aung San Suu Kyi has been reluctant to discuss the matter at all. She has condemned “all human rights violations” in Rakhine⁶⁸ but has refused to denounce the indiscriminate use of force by troops or even mention the Rohingyas by name.⁶⁹

In November 2017, the governments of Myanmar and Bangladesh reached a deal to repatriate the Rohingya refugees.⁷⁰ By January, the governments finalized a framework, whereby Myanmar agreed to accept 1,500 Rohingyas each week, with a goal to increase the return flow over time, so that all 781,000 refugees would return to Myanmar within two years.⁷¹ Rohingya leaders and human rights advocates have criticized the agreement as unsafe and premature.⁷²

III. SURVEY OF TRANSITIONAL JUSTICE OPTIONS FOR CRIMES COMMITTED AGAINST THE ROHINGYA

This Part assesses the transitional justice options which may be undertaken with regard to the violence perpetrated against the Rohingyas from August 2017 until the present. The first Section of this Part focuses on the two domestic authorities of Myanmar: Aung San

64. *Id.*

65. Albert, *supra* note 29.

66. Wa Lone, *Myanmar military denies atrocities against Rohingya, replaces General*, REUTERS (Nov. 13, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-general/myanmar-military-denies-atrocities-against-rohingya-replaces-general-idUSKBN1DD18S> [<https://perma.cc/GZ2J-6YKN>].

67. BBC, *supra* note 60.

68. Saif Khalid, *Suu Kyi ‘burying head in sand’ over Rohingya crisis*, AL JAZEERA (Sept. 19, 2017), <https://www.aljazeera.com/news/2017/09/suu-kyi-burying-head-sand-rohingya-crisis-170919092338988.html> [<https://perma.cc/J8B7-7NDG>] (last visited Sept. 28, 2018).

69. AL JAZEERA, *supra* note 48.

70. BBC, *supra* note 60.

71. *Id.*

72. *Id.*

Suu Kyi's civilian-led government and the military. It analyzes what interest each authority may have in transitional justice and surveys the available options that could be employed. The second Section considers transitional justice options that may be undertaken by international actors, such as the ICC, the United Nations, and third-party states. Finally, the third Section of this Part considers whether Myanmar's neighboring countries may intervene in the crisis.

A. Transitional Justice Options that May Be Undertaken by the NLD-Led Government of Myanmar

The two key political authorities of Myanmar—the Tatmadaw and the NLD—do not seem keen on implementing transitional justice for the “ethnic cleansing” of the Rohingyas.⁷³ The Tatmadaw—the alleged perpetrators of the crimes—are the strongest opponents of such an approach.⁷⁴ In their view, presumably, the suppression of the Rohingyas, especially ARSA, has been just, because they are foreigners and terrorists.⁷⁵ Whether they whole-heartedly believe this or are simply attempting to justify their atrocities remains unclear.

The second power center of the government—Aung San Suu Kyi's NLD party—also appears to be averse to transitional justice.⁷⁶ Not only does Suu Kyi refuse to identify the Rohingyas by name, shortly after the latest round of violence came to light, her primary comment was to say that a “huge iceberg of misinformation” about the

73. Hannah Beech, *Year After Rohingya Massacres, Top Generals Unrepentant and Unpunished*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2018/08/25/world/asia/rohingya-myanmar-ethnic-cleansing-anniversary.html> (last visited Sept. 28, 2018); Azeem Ibrahim, Opinion, *Democracy's False Dawn in Myanmar*, WASHINGTON POST (Aug. 7, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/08/07/democracys-false-dawn-in-myanmar/?utm_term=.316090f21ee8 [<https://perma.cc/WKG6-SGZL>] (last visited Sept. 28, 2018).

74. See Beech, *supra* note 73; see also Richard C. Paddock, *For Myanmar's Army, Ethnic Bloodletting Is Key to Power and Riches*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/world/asia/myanmar-military-ethnic-cleansing.html> (last visited Sept. 28, 2018).

75. See Ben Westcott, *Myanmar's military clears itself over reported Rohingya atrocities*, CNN (Nov. 14, 2017, 3:27 AM), <https://www.cnn.com/2017/11/13/asia/myanmar-military-rohingya/index.html> [<https://perma.cc/UH9U-HQ3G>] (last visited Sept. 28, 2018).

76. Suu Kyi has been sharply criticized for her inaction. See, e.g., Zachary D. Kaufman, *Give the Nobel Peace Prize Posthumously*, FOREIGN POL'Y (Oct. 5, 2017, 7:00 AM), <http://foreignpolicy.com/2017/10/05/give-the-nobel-peace-prize-posthumously> [<https://perma.cc/3FGU-EH4W>] (last visited Sept. 28, 2018).

Rohingya crisis was being distributed to benefit “terrorists.”⁷⁷ The rationale underlying the NLD’s silence and implicit support of the “ethnic cleansing” can only be hypothesized, but four potential reasons stand out. First, they may fear the Tatmadaw. After all, the military has successfully toppled numerous civilian-led governments and has even imprisoned the NLD leadership, including Suu Kyi.⁷⁸ Second, the NLD may actually believe the anti-Rohingya rhetoric. Tensions between the ethnic Burmese Buddhists and the Rohingya Muslims have existed for hundreds of years,⁷⁹ were further fomented by the British throughout the colonial era,⁸⁰ and have been formalized and given the force of law by the Tatmadaw.⁸¹ Thus, it is entirely possible that the NLD expressly supports the military’s actions. Third, the NLD may oppose the mistreatment of the Rohingyas,⁸² but they may be reluctant to change government policy for fear of electoral backlash. The majority of the populace, after all, harbors anti-Rohingya sentiments.⁸³ Finally, even if the civilian government wanted to hold the military accountable for its crimes, it has no power to do so given the structure of the constitution.

Accordingly, the most likely scenario would be for the government of Myanmar to do nothing at all to address the crimes against the Rohingyas. Sometimes called *de facto* amnesty, not doing anything is arguably in the best interest of both of the two key political authorities of Myanmar. For the military, not acting is the obvious choice because they are the ones who would likely be held primarily accountable for the crimes.⁸⁴ For the NLD, not acting offers three benefits: (1) ensuring that its leadership would not be held liable for an

77. *Rohingya Crisis: Suu Kyi says ‘fake news helping terrorists,’* BBC (Sept. 6, 2017), <http://www.bbc.com/news/world-asia-41170570> [<https://perma.cc/QT9D-82MQ>] (last visited Sept. 28, 2018).

78. CIA, *supra* note 13.

79. FARZANA, *supra* note 35, at 43; Beech, *supra* note 51.

80. Cho, *supra* note 11.

81. Simpson et al., *supra* note 3, at 433-35.

82. *See id.* When the NLD was originally elected in 2016, the party pursued conciliatory policies with regard to the Rohingya. In particular, they made efforts to promote what they consider neutral language to refer to the group. *Id.* In state-owned publications, the NLD-led government referred to the Rohingya as the “Muslim community in Rakhine State,” whereas the previous military-backed government referred to the Rohingyas as “Bengalis,” a pejorative and ethnologically suspect term. *Id.*

83. *See* Calamur, *supra* note 1.

84. *See* Human Rights Council, *supra* note 6, ¶ 1521; Beech, *supra* note 73. Indeed, the United States, Canada, and the European Union have already placed targeted sanctions on certain Tatmadaw leaders who are thought to be responsible for the violence. Beech, *supra* note 73.

implicit endorsement of the crimes; (2) warding off a coup from an angry military; and (3) avoiding political backlash from an anti-Rohingya electorate.

Unlike the Tatmadaw, however, the NLD does have three strong, countervailing pressures that militate toward affirmatively pursuing transitional justice. First, there has been significant, continuous international condemnation of the crimes against the Rohingyas.⁸⁵ This is harmful to the country's international reputation, which could have wide-ranging ramifications for its international affairs, including trade, investment, and development assistance. Second, if the NLD could successfully put the blame on the Tatmadaw for the killings, it could reap a greater share of the power in governance. Third, taking action to address the killings is simply the right thing to do. The NLD itself was persecuted for decades by the Tatmadaw. Perhaps fresh memories of their own mistreatment could push the civilian-led government to pursue some kind of transitional justice. What follows is a discussion of the various actions that the NLD-led government might take, in order from most to least likely.

1. Truth and Reconciliation Commission

The most likely transitional justice option that the NLD-led government could employ would be a truth and reconciliation commission ("TRC"). While these commissions take many forms, at their base, truth commissions are "victim-centered, non-judicial inquiries, established by governments in the aftermath of conflict and war, to ascertain the facts and evidence of human rights violations."⁸⁶ TRCs are an alternative to formal criminal trials as they allow for amnesty for perpetrators and victim reparations.⁸⁷

A TRC would be attractive to the NLD-led government for several reasons. First, it is potentially politically feasible. A TRC, if it was constituted without the power to punish, is perhaps the only accountability measure that the Tatmadaw—who exercise significant control over the government—may be willing to tolerate. Second, a

85. See, e.g., *Myanmar faces international condemnation over Rohingya*, AL JAZEERA (Sept. 4, 2017), <https://www.aljazeera.com/news/2017/09/myanmar-faces-international-condemnation-rohingya-170904195521296.html> [<https://perma.cc/5Y4G-49LS>].

86. Penelope Andrews, *Justice, Reconciliation, and the Masculinist Way: What Role for Women in Truth and Reconciliation Commissions?*, 60 N.Y.L. SCH. L. REV. 199, 201 (2015-16).

87. *Id.*

TRC is inherently flexible, much more so than formal prosecution. In determining its mission, the NLD-led government could set a commission's focus on any number of subjects for any length of time. At its most limited, the TRC might investigate the violence that transpired from August 2017 to the present in Rakhine State. Alternatively, the TRC could perform a much broader assessment: Are the Rohingyas entitled to citizenship? How long have their forebears been living within the modern-day borders of Myanmar? What are all the injustices that have been perpetrated against them since independence? Who bears responsibility for these injustices?

From a retributive perspective, there would be drawbacks to the TRC approach. It would almost certainly ensure that those who were primarily responsible for the "ethnic cleansing" would escape punitive measures. It is true that a TRC could condition amnesty on truthful and forthright testimony, as was done for South Africa's famous truth commission.⁸⁸ But assuming perpetrators fully cooperated, the only "punishment" they would be subjected to would be public embarrassment, which is a far cry from jail time. Furthermore, the NLD might simply use this mechanism as a ploy to placate international criticism—giving the TRC a very narrow focus, limited budget, and implicit instructions not to hold powerful people accountable. Indeed, this very critique was leveled at the Myanmar government-endorsed international advisory commission led by Kofi Annan.⁸⁹

2. Exile

The NLD-led government could also take action to address the atrocities against the Rohingyas by exiling the perpetrators. Exile—a period of absence from one's home⁹⁰—can be voluntary or involuntary.⁹¹ Either way, it can facilitate a transition to peace.⁹²

If it becomes clear that a discrete individual or group was responsible for the latest atrocity against the Rohingyas, then exile

88. ZACHARY D. KAUFMAN, *UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS* 28 (2016).

89. *AL JAZEERA*, *supra* note 48. Azeem Ibrahim, a senior fellow at the Center for Global Policy, argued Annan's commission was just a way for Aung San Suu Kyi to "pacify the global public opinion and try to demonstrate to the international community that she is doing what she can to resolve the issue." *Id.*

90. *Exile*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/exile> [<https://perma.cc/EX7R-LVKA>] (last visited Sept. 29, 2018).

91. KAUFMAN, *supra* note 88, at 31.

92. *Id.* at 30.

could be a particularly good option for this context. It could appeal to the military, including the perpetrators, because it would allow them to continue to deny wrongdoing and to avoid jail time or reparations. It similarly could be palatable for the NLD and the Rohingyas, because it could be a significant step toward a safer Rakhine State. Nonetheless, exile does not seem likely in the short term, given the military's strong position in Myanmar and the support of the public.

3. Lustration

A third option of the NLD-led government taking action to address the atrocities against the Rohingyas would be to lustrate the perpetrators. Lustration has been defined as the non-criminal sanction of "purging from the public sector those who served the repressive regime."⁹³ This transitional justice approach has typically been undertaken in settings where a repressive government has collapsed and been replaced by an entirely new, reform-minded government, such as post-World War II France and Germany.⁹⁴

Modern-day Myanmar does not comport well with the traditional circumstances in which lustration has been deployed.⁹⁵ The Tatmadaw is not a former, collapsed power, but rather a current, constitutionally-mandated part of the government.⁹⁶ As such, it is unlikely that it would abide by any type of lustration program, whether focused on high-level perpetrators or low-level soldiers. Furthermore, lustration in this context would pose practical challenges. If it were undertaken without differentiating levels of culpability, as is often the case and for which the practice is criticized,⁹⁷ then entire divisions of the army might be lustrated, which would open the country to significant public safety and

93. *Id.* at 29 (citing Neil Kritz, *The Dilemmas of Transitional Justice*, in 1 *TRANSITIONAL JUSTICE* xix, xxiv (1995)).

94. *Id.*

95. An army general who allegedly oversaw the campaign against the Rohingyas was removed from his position, Lone, *supra* note 66, but a single transferred general does not constitute lustration."

It is true that an army general who allegedly oversaw the campaign against the Rohingyas was removed from his position. But a single termination does not constitute lustration. Lone, *supra* note 66.

96. Simpson et al., *supra* note 3, at 433.

97. A basic premise of lustration—the notion of collective rather than individual "guilt"—means that persons may be punished even without committing immoral acts. See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transnational Justice*, 37 *COLUM. J. TRANSNAT'L L.* 357, 378 (1999).

security problems. Ultimately, lustration is a poor fit in this circumstance from both justice and practicality standpoints.

4. Domestic Prosecution

If the NLD-led government elects to take action to address the latest round of violence against the Rohingyas, a fourth option would be to pursue domestic prosecutions. Proponents of this transitional justice approach argue that it “promotes stability, the rule of law, and accountability, as well as contributes to deterring future atrocities.”⁹⁸ The downsides are that it is slow, expensive, and politically risky.⁹⁹ Here, if the NLD sought to pursue good-faith prosecutions of high-level perpetrators, the latter consideration—political risk—would guarantee the party’s downfall. The Tatmadaw would simply not tolerate vigorous prosecution of its own leadership.

While domestic prosecution could conceivably take place for the violence in Rakhine State, it would presumably take one of two forms. First, the Myanmar government might seek a one-sided accounting of the conflict, prosecuting¹⁰⁰ only members of ARSA.¹⁰¹ This is improbable because Myanmar has labelled this group “terrorists,”¹⁰² so lethal force is more likely than prosecution. Second, the Myanmar government could establish a sham military tribunal to try Tatmadaw perpetrators of violence against the Rohingyas.¹⁰³ This approach would be, by definition, woefully inadequate to achieve real justice.¹⁰⁴ Aside from these two possibilities, domestic prosecution is nearly unimaginable as it would directly contradict the Tatmadaw’s narrative of the conflict.¹⁰⁵

98. KAUFMAN, *supra* note 88, at 36.

99. *Id.*

100. This prosecution could be administered either by a civilian court or a military tribunal.

101. See Yee Ywal Myint, *supra* note 54.

102. AL JAZEERA, *supra* note 48.

103. Domestic courts have never adjudicated war crimes charges against Burmese soldiers, and trials for human rights violations are rare. *UN Security Council: Refer Burma to the ICC*, HUM. RTS. WATCH (Nov. 3, 2017), <https://www.hrw.org/news/2017/11/03/un-security-council-refer-burma-icc> [<https://perma.cc/RUV8-5UGD>] (last visited Sept. 28, 2018). Furthermore, Burmese soldiers are rarely tried in civilian courts for criminal offenses. *Id.*

104. Sham military tribunals are not without precedent. Some observers point to the 1968 American massacre of civilians in the village of My Lai, Vietnam as one such example. KAUFMAN, *supra* note 88, at 37. There, only a single U.S. soldier was court-martialed to account for the crimes. *Id.*

105. The military has preemptively cleared itself of all wrongdoing. *Myanmar military exonerates itself in report on atrocities against Rohingya*, GUARDIAN (Nov. 13, 2017),

5. Hybrid Tribunal

The NLD-led government could seek to establish a hybrid, mixed, or internationalized criminal tribunal. Such tribunals are highly variable, but each tends to “apply a mix of national and international law (both procedural and substantive) and feature a blend of international and national elements, such as international and national judges and personnel.”¹⁰⁶ This option is improbable, as the NLD-led government has been uncooperative with UN entities since the start of the latest violence.¹⁰⁷ Indeed, the government has refused to grant visas to the UN Special Rapporteur on the situation of human rights in Myanmar.¹⁰⁸

However, given that the perpetrators are not the NLD-led government, but the Tatmadaw, it is conceivable that Aung San Suu Kyi could write a letter to the United Nations requesting a tribunal in this matter. This is a faint possibility though, because the NLD could face violence and political backlash for such a move. Additionally, the international community might be skeptical of commencing this expensive, arduous process unless there was strong buy-in domestically,¹⁰⁹ which is not the case here.

6. Indefinite detention

A sixth option of the NLD-led government taking action to address the atrocities against the Rohingyas would be to indefinitely detain perpetrators. This transitional justice option involves “incarceration of an unspecified period of time without trial or even a formal charge.”¹¹⁰ This approach would be uniquely ill-suited for this situation, displeasing both the Tatmadaw and the Rohingyas. As a practical matter, civilians in the government would be unable to detain the generals, at least not without significant bloodshed or even civil

<https://www.theguardian.com/world/2017/nov/14/myanmar-military-exonerates-itself-in-report-on-atrocities-against-rohingya> [<https://perma.cc/B6R5-GTKQ>] (last visited Sept. 28, 2018).

106. Sarah Williams, *Hybrid International Criminal Tribunals*, OXFORD BIBLIOGRAPHIES (Apr. 28, 2014), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml> [<https://perma.cc/2ETE-P63C>] (last visited Sept. 28, 2018).

107. Human Rights Council, *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, at 2, U.N. Doc. A/HRC/37/70 (Feb. 26 – Mar. 23 2018).

108. *Id.*

109. See Sarah Williams, *Hybrid Tribunals: A Time for Reflection*, 10 INT’L J. OF TRANSITIONAL JUSTICE 538, 541-42 (2016).

110. KAUFMAN, *supra* note 88, at 38.

war. Indefinite detention would also not serve the aims of placating the Rohingyas or the international community, because it is usually done discreetly, with as little publicity as possible. Accordingly, indefinite detention of Tatmadaw perpetrators¹¹¹ is extremely unlikely.

7. Lethal force

A seventh and final option that the NLD-led government could consider would be using lethal force against perpetrators of crimes against humanity. In the transitional justice context, lethal force is the “act of state-sponsored, pre-meditated, deliberate, extrajudicial, targeted killing.”¹¹² This option, like that of indefinite detention, would not be seriously considered by the NLD-led government. Presumably, these political leaders do not have the capacity to orchestrate an assassination of their own generals.¹¹³

B. Transitional Justice Options that May Be Undertaken by the International Community

Even if Myanmar is reluctant to pursue transitional justice for crimes against the Rohingyas, the international community may pursue it for them. What follows are transitional justice options that may be undertaken by the international community, from most to least likely.

1. International Criminal Court

It is becoming increasingly likely that the perpetrators of crimes committed against the Rohingyas will be prosecuted by the International Criminal Court. There is sufficient evidence for the Prosecutor to indict members of the Tatmadaw for violating Article 7(1)(d) of the Rome Statute, which prohibits “[d]eportation or forcible transfer of the population” as a crime against humanity.¹¹⁴ There is also evidence that the Tatmadaw forces have committed genocide in

111. Notably, the government might hold Rohingyas suspected of violence in indefinite detention. See Human Rights Council, *supra* note 6, ¶¶ 1468-70.

112. KAUFMAN, *supra* note 88, at 32.

113. Notably, the Tatmadaw has already employed lethal force against the Rohingya community. See Human Rights Council, *supra* note 6, ¶¶ 1362-70, 1394-95.

114. Rome Statute of the International Criminal Court art. 7, July 1, 2002, 2187 U.N.T.S. 90.

violation in Article 6, by “killing members of the” Rohingya community “with intent to destroy [them], in whole or in part.”¹¹⁵

As is often the case with the ICC, there is a jurisdictional obstacle. The Rome Statute provides jurisdiction in three circumstances: crimes committed in the territory of a state party,¹¹⁶ crimes committed by a national of a state party,¹¹⁷ and crimes in a jurisdiction that has been specifically authorized by the UN Security Council.¹¹⁸

The ICC cannot assert personal jurisdiction over members of the Tatmadaw because Myanmar is not a party to the Rome Statute. It is also extremely unlikely that the UN Security Council will refer this situation to the ICC, because China, supported by Russia, would veto any referral.¹¹⁹ China has long been a staunch ally of Myanmar, providing weapons and training to the Tatmadaw for decades.¹²⁰ In response to the Rohingya crisis, China urged that the international community “should support the efforts of Myanmar in safeguarding the stability of its national development.”¹²¹

This leaves territorial jurisdiction. Under a traditional, conservative reading of the Rome Statute, the ICC could not assert territorial jurisdiction over the crimes against the Rohingyas because these crimes occurred within the territory of Myanmar, which is not a party to the ICC.¹²² Geoff Curfman, however, contends that the ICC could assert territorial jurisdiction over the crime of deportation because it necessarily takes place in at least two states, and here, one

115. *Id.* at art. 6.

116. *Id.* at art. 12(2)(a).

117. *Id.* at art. 12(2)(b).

118. *Id.* at art. 13(b).

119. See Michelle Nichols, *China, Russia block U.N. council concern about Myanmar violence*, REUTERS (Mar. 17, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-un/china-russia-block-u-n-council-concern-about-myanmar-violence-idUSKBN16O2J6> [<https://perma.cc/T74H-YDBU>] (last visited Oct. 11, 2018). I assume China and Russia would also block other UN Security Council-based mechanisms of international justice, such as ad hoc tribunals through its chapter VI or chapter VII powers.

120. David I. Steinberg, *The World*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 291, 296 (Simpson et al. eds., 2018).

121. BBC, *supra* note 60.

122. See Hans-Peter Kaul, *International Criminal Court (ICC)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 58, <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e42?prd=EPIL> [<https://perma.cc/24AA-XFDY>] (last visited Sept. 28, 2018).

of those states is a state party to the Rome Statute—Bangladesh.¹²³ As the argument goes, since one of the elements of the crime occurred within the territory of a state party, the ICC can assert jurisdiction for the entire crime.¹²⁴ While no ICC case has squarely addressed the issue, Curfman argues that asserting this form of territorial jurisdiction would be consistent with the meaning of the Rome Statute and would advance the Court's purpose of preventing impunity for grave international crimes.¹²⁵

Fatou Bensouda, the ICC's chief prosecutor, seems to agree. On April 9, 2018, the Prosecutor requested a ruling from the ICC's Pre-Trial Chamber on whether the Court may exercise jurisdiction over the alleged deportation Rohingyas from Myanmar into Bangladesh.¹²⁶ In response, the Court invited the Myanmar government to submit arguments on whether it deemed jurisdiction to be appropriate.¹²⁷ Though Myanmar declined to formally respond to the Court,¹²⁸ the country issued a five-page statement lambasting the ICC for even considering the question.¹²⁹ Myanmar stated that "the Court has no jurisdiction on Myanmar whatsoever" and argued that the Prosecutor was pursuing this case in "[b]ad [f]aith" with a "[l]ack of [t]ransparency."¹³⁰

On September 6, 2018, the Court endorsed Curfman's argument and held that "the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required

123. Geoff Curfman, *ICC Jurisdiction and the Rohingya Crisis in Myanmar*, JUST SECURITY (Jan. 9, 2018), <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar> [<https://perma.cc/5Z63-CMQ5>] (last visited Sept. 28, 2018).

124. *Id.*

125. *Id.*

126. Fatou Bensouda, *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, INT'L CRIM. CT. (Apr. 9, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf [<https://perma.cc/E68A-93S4>] (last visited Oct. 11, 2018).

127. Case No. ICC-RoC46(3)-01/18, Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," (Int'l Crim. Ct. June 21, 2018).

128. Fatou Bensouda, *Notice of the Public Statement Issued by the Government of Myanmar* ¶ 1, INT'L CRIM. CT. (Aug. 17, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04048.PDF [<https://perma.cc/37U2-9ANU>] (last visited Oct. 12, 2018).

129. *Press Release, Ministry of the Office of the State Counsellor, REPUBLIC OF MYANMAR* (Aug. 9, 2018), <http://www.statecounsellor.gov.mm/en/node/2084> (last visited Sept. 28, 2018).

130. *Id.* at Background, § C.

threshold.”¹³¹ The 2-1 decision did not stop there.¹³² If the Prosecutor could meet the required threshold and establish jurisdiction pursuant to Article 12(2)(a), the Court observed, she may be able to prosecute related crimes such as persecution and inhumane acts.¹³³

The decision recognizing jurisdiction and greenlighting the investigation was lauded by human rights advocates and legal scholars as a significant step toward justice.¹³⁴ Whether an ICC prosecution will go forward is an open question, but it may be the Rohingyas’ best chance for justice.

2. UNGA-Created Tribunal

Given the impasse in the UN Security Council due to the guaranteed vetoes of Russia and China, it may be possible for the UN General Assembly (“UNGA”) to establish an international criminal tribunal for Myanmar. Since there could be no veto, UNGA would be able to establish a tribunal as long as there was popular support in the chamber.¹³⁵ There are questions, however, about the legality of such a mechanism.

According to Derek Jinks, proponents of an UNGA-established tribunal would have to rely on Article 22 of the Charter,¹³⁶ which reads, “The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.”¹³⁷ Jinks argues that such a broad reading of Article 22 is suspect in view of the limited

131. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” ¶ 73 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF (last visited Oct. 11, 2018); Marlise Simons, *International Criminal Court Opens Door to a Rohingya Inquiry*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/world/asia/rohingya-myanmar-international-criminal-court.html> (last visited Sept. 28, 2018).

132. Simons, *supra* note 131.

133. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” ¶¶ 74-78 (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF [<https://perma.cc/49JV-2YZ6>] (last visited Oct. 11, 2018).

134. Simons, *supra* note 131.

135. A two-thirds majority is required for “important questions” including matters concerning the maintenance of international peace and security. U.N. Charter art. 18 ¶ 2.

136. Derek Jinks, *Does the U.N. General Assembly have the authority to establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/> [<https://perma.cc/25QQ-MUFL>] (last visited Sept. 28, 2018).

137. U.N. Charter art. 22.

powers otherwise accorded UNGA in the Charter.¹³⁸ This reading has been confirmed by an early advisory opinion of the International Court of Justice and embraced by other international law scholars.¹³⁹ Accordingly, even if there was popular support for this mechanism, its establishment might constitute an *ultra vires* exercise of power.

3. Unilateral Prosecution in Third-Party State via Universal Jurisdiction

The final transitional justice option that may be undertaken by the international community would be unilateral prosecution via a third-party state asserting universal jurisdiction. Though far-fetched, this scenario is not wholly without precedent: For example, the former Chilean dictator, Augusto Pinochet, was arrested in London under universal jurisdiction.¹⁴⁰

In March 2018, lawyers in Melbourne, Australia filed a private prosecution application against Aung San Suu Kyi, who was in Australia at the time, on charges of crimes against humanity.¹⁴¹ While a universal jurisdiction prosecution is possible in Australia, it requires the consent of the attorney general.¹⁴² This approval was not given, presumably on the grounds of diplomatic immunity or because the government considered it bad form to invite a foreign dignitary to Australia and then proceed to arrest her.¹⁴³ In sum, it is unlikely that perpetrators will be unilaterally prosecuted by a third-party state asserting universal jurisdiction.

C. *Transitional Justice Options that May Be Undertaken by Myanmar's Neighboring States*

A final possibility to address the Rohingya crisis is the intervention of Myanmar's neighboring states. Contemporary scholars

138. Jinks, *supra* note 136.

139. *Id.*

140. Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept.-Oct. 2001, at 153, <https://www.foreignaffairs.com/articles/2001-09-01/case-universal-jurisdiction> [<https://perma.cc/L3F5-CXZT>] (last visited Oct. 11, 2018).

141. Ben Doherty, *Aung San Suu Kyi: lawyers seek prosecution for crimes against humanity*, GUARDIAN (Mar. 16, 2018), https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-faces-prosecution-for-crimes-against-humanity?CMP=twl_gu [<https://perma.cc/76C3-URLJ>] (last visited Sept. 28, 2018).

142. *Id.*

143. *Id.*

point to eight instances of humanitarian intervention outside the UN Charter regime,¹⁴⁴ all of which feature two criteria: “(1) The intervening state asserted humanitarian purposes (often in conjunction with other justifications such as self-defense, regional security, or the consent of an opposition group within the state), and (2) the Security Council either refused to authorize the intervention under Chapter VII or was simply not consulted.”¹⁴⁵

The first, and arguably most prominent, example of humanitarian intervention occurred within the same region of Asia as the present-day Rohingya conflict. In 1971, as East Pakistan attempted to secede from the government of Pakistan, the Pakistani military violently suppressed the insurrection, allegedly massacring hundreds of thousands of the Bengali population of East Pakistan.¹⁴⁶ An estimated 10 million refugees poured over the Indian border.¹⁴⁷ Citing, *inter alia*, self-defense and humanitarian intervention, India invaded East Pakistan; West Pakistani forces surrendered thirteen days later, leading to independence for Bangladesh.¹⁴⁸

In the present conflict, non-UN-sanctioned intervention by a third-party state, for humanitarian purposes or otherwise, is becoming increasingly unlikely. Most of Myanmar’s immediate neighbors and fellow Association of Southeast Asian Nations (“ASEAN”) members have either been silent regarding the Rohingya crisis or outright supportive of the Myanmar government. Two months after the height of the “ethnic cleansing,” a statement issued in conjunction with an ASEAN summit was silent as to the exodus of Rohingya Muslims from Myanmar’s Rakhine State.¹⁴⁹ China, with its long ties to the Tatmadaw

144. The eight instances are “India’s 1971 intervention in East Pakistan; Vietnam’s 1978 intervention in Cambodia; Tanzania’s 1978-79 intervention in Uganda; France’s 1979 intervention into the Central African Republic; the Economic Community of West African States’ (ECOWAS) 1990 intervention in Liberia; the United States, the United Kingdom, the Netherlands, France, and nine other countries’ 1991 intervention in Northern Iraq; ECOWAS’s 1997-99 interventions in Sierra Leone; and NATO’s 1999 intervention in the Kosovo province of the Federal Republic of Yugoslavia.” Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL INT’L L.J. 499, 510 (2013).

145. *Id.* at 510-11.

146. Gary J. Bass, *The Indian Way of Humanitarian Intervention*, 40 YALE J. OF INT’L L. 227, 228 (2015).

147. *Id.*

148. Hathaway, *supra* note 144, at 513.

149. John Chalmers, *Southeast Asia summit draft statement skips over Rohingya crisis*, REUTERS (Nov. 17, 2017), <https://www.reuters.com/article/us-asean-summit-myanmar/>

and substantial economic interests in the country, has been a steadfast supporter of Myanmar,¹⁵⁰ and Thailand has even recently awarded Myanmar's army chief a royal decoration.¹⁵¹

The most likely candidate to intervene in the Rohingya conflict is Bangladesh—the very state that itself benefited from humanitarian intervention in 1971. Before the most recent crisis began, Bangladesh was already hosting a verified population of well over 200,000 Rohingya from Myanmar.¹⁵² As of January 27, 2018, 688,000 new arrivals had been registered since the latest violence.¹⁵³ The extraordinary number of refugees is taxing the resources and patience of Bangladesh—a geographically small, vastly overcrowded, and under-resourced nation—and leading to desperate conditions in its refugee camps.¹⁵⁴

In September 2017, the Bangladeshi foreign minister made his country's position on the Rohingya crisis clear: “The international community is saying it is a genocide. We also say it is a genocide.”¹⁵⁵ Similarly, the chair of Bangladesh's National Commission for Human Rights said that the Commission might press for an international tribunal to hold leading figures in Myanmar accountable for “genocide.”¹⁵⁶ However, the Bangladeshi foreign minister added that Dhaka was seeking a peaceful solution, not a “war” against Myanmar.¹⁵⁷

Since the Bangladeshi government's more heated rhetoric in September, the bilateral relationship seems to have improved. In

southeast-asia-summit-draft-statement-skips-over-rohingya-crisis-idUSKBN1DD0CP (last visited Sept. 28, 2018).

150. Steinberg, *supra* note 120, at 296.

151. Panarat Thepgumpanat et al., *Thailand decorates Myanmar's army chief amid Rohingya crisis*, REUTERS (Feb. 16, 2018), <https://www.reuters.com/article/us-thailand-myanmar/thailand-decorates-myanmars-army-chief-amid-rohingya-crisis-idUSKCN1G01D1> [<https://perma.cc/5Y8N-658D>] (last visited Sept. 28, 2018).

152. UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFF., *supra* note 6.

153. *Id.*

154. Mayesha Alam, *How the Rohingya crisis is affecting Bangladesh — and why it matters*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/12/how-the-rohingya-crisis-is-affecting-bangladesh-and-why-it-matters/?utm_term=.edbb772f38fd [<https://perma.cc/T7JQ-SJ8W>] (last visited Sept. 28, 2018).

155. *Bangladesh FM: Violence against Rohingya 'is genocide'*, AL JAZEERA (Sept. 10, 2017), <https://www.aljazeera.com/news/2017/09/bangladesh-fm-violence-rohingya-genocide-170911023429604.html> [<https://perma.cc/URF7-JCHK>] (last visited Sept. 28, 2018).

156. *Id.*

157. *Id.*

November 2017, Bangladesh and Myanmar agreed to a deal for the repatriation of Rohingya refugees to their homeland.¹⁵⁸ Following this initial arrangement, in December, the two countries formed a Joint Working Group to start the process by January 2018¹⁵⁹—a process Bangladesh initially demanded be completed within two years.¹⁶⁰ Notably, the Rohingyas and international human rights organizations were not consulted during the negotiations,¹⁶¹ and many refugees are reluctant to consent to forced, ill-conceived repatriation.¹⁶² In sum, the current negotiations between Bangladesh and Myanmar would seem to foreclose the possibility of humanitarian intervention by a neighboring state at this time.

IV. CONCLUSION

Despite the strong condemnation from the international community immediately after the genocide, the possibility that the Tatmadaw will be made to account for their crimes is remote. By making their seat at the table of government in Myanmar constitutionally mandated in 2008, the Tatmadaw has ensured that they may act with impunity. Even if the NLD-led government wanted to seek justice for the Rohingyas—which is doubtful—it could not do so without triggering the all-too-real possibility of a coup. And the most vigorous transitional justice mechanism conceivable in the domestic context is a toothless TRC. Accordingly, the Rohingyas' salvation must come from outside the country.

Unfortunately, transitional justice imposed from the outside seems almost as unlikely as justice coming from within. The UN Security Council is paralyzed, once again, by the intransigence of certain Power Five members. The next best option—the ICC Prosecutor indicting leaders of the Tatmadaw *proprio motu*—is tenuous due to jurisdictional problems. The final chance for justice for the Rohingyas—intervention by Bangladesh—is also extremely unlikely. Instead of moving to safeguard the refugees, Bangladesh seeks to get

158. Faisal Mahmud, Bangladesh, *Myanmar Form Joint Working Group on Rohingya Repatriation; Experts Sceptical*, WIRE (Dec. 21, 2017), <https://thewire.in/external-affairs/bangladesh-myanmar-form-joint-working-group-on-rohingya-repatriation-experts-sceptical> [<https://perma.cc/6QJS-BUCL>] (last visited Sept. 28 2018).

159. *Id.*

160. *Id.*

161. Alam, *supra* note 39.

162. *Id.*

rid of them as soon as possible. Ultimately, at least for the foreseeable future, it would seem that the Rohingyas will have to face one more injustice—impunity for their oppressors.

I close by echoing the words of Nobel Peace Prize laureate, Muhammad Yunus:

“I humbly add my voice to the simple demand of the Rohingya people: that their rights as our fellow human beings be respected, that they be granted the right to live peacefully and without fear in the land of their parents, and without persecution on grounds of their ethnicity or their form of worship.”¹⁶³

163. Muhammad Yunus, *Foreword* to AZEEM IBRAHIM, *THE ROHINGYAS: INSIDE MYANMAR’S HIDDEN GENOCIDE*, at xiii (2016).