

# Myanmar's Transition without Justice

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## Abstract

Myanmar's transition towards a limited form of constitutional democracy is taking place in the absence of national measures to deal with the legacy of massive human rights abuses: without criminal prosecutions for historical crimes; without the establishment of institutions for truth-telling; without reparations. This article considers the escalation of violence against ethnic minorities during the early period of Myanmar's democratic transition in the context of the claim that transitional justice has the potential to deter future atrocities. First, the article explains why the military, the democratic opposition, Western states, and the United Nations (UN), all accepted that Myanmar's democratisation should proceed without the establishment of institutions and processes of transitional justice. Second, the article shows how, in the absence of transitional justice, the transitional government attempted to bolster the rule of law by conducting its own investigations into allegations of misconduct by the military and through low-level prosecutions of individual military officers, and explains why this strategy failed. Finally, the article considers the potential impact of recent efforts at the international level to establish accountability, such as the UN Human Rights Council's establishment of an Independent Investigative Mechanism for Myanmar, the International Criminal Court (ICC) proceedings related to the crime against humanity of deportation, and the case brought by Gambia in the International Court of Justice (ICJ) for Myanmar's violation of the Genocide Convention.

## Keywords

democratisation, transitional justice, Myanmar

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Myanmar's transition towards a limited form of constitutional democracy is taking place in the absence of national measures to deal with the legacy of massive human rights abuses: without criminal prosecutions for historical crimes; without the establishment of institutions for truth-telling; without reparations. The reasons for this are practical political ones. First, the military is in control of transition and there is a strong belief that prosecutions would jeopardise democratic consolidation. Second, Myanmar's legal system is overburdened and its judges are ill-equipped to dispense even ordinary justice. Third, in many parts of the country, civil war and accompanying human rights violations continue, making the collection of evidence problematic.

This article considers the escalation of violence against ethnic minorities during the early period of Myanmar's democratic transition in the context of the claim that transitional justice has the potential to deter future atrocities. First, the article explains why the military, the democratic opposition, Western states, and the United Nations (UN), all accepted that Myanmar's democratisation should proceed without the establishment of institutions and processes of transitional justice. Second, the article shows how, in the absence of transitional justice, the transitional government attempted to bolster the rule of law by conducting its own investigations into allegations of misconduct by the military and through low-level prosecutions of individual military officers. Finally, the article considers the potential impact of recent efforts at the international level to establish accountability, such as the UN Human Rights Council's establishment of an Independent Investigative Mechanism for Myanmar, the International Criminal Court (ICC) proceedings related to the crime against humanity of deportation, and the case brought by Gambia in the International Court of Justice (ICJ) for Myanmar's violation of the Genocide Convention.

## **I. More Murder in the Middle and Myanmar's Transition towards Democracy**

In October 2016, the government of Myanmar announced that the military was commencing what it called a "clearance operation" in northern Rakhine state, home to Myanmar's population of Rohingya Muslims, in response to an attack by armed insurgents on three border guard posts (President's Office, 2017; Slodkowski et al., 2017). The area was sealed off, movement within the area was restricted and humanitarian agencies were denied access. The operation lasted from 9 October 2016 until 9 February 2017. During that period, according to a report by the Office of the High Commissioner for Human Rights, government forces carried out a series of atrocities against local Muslim populations (High Commissioner for Human Rights, 2017). These included the burning and looting of Rohingya villages; the murder of Rohingya men, women, and children; summary execution of imams, religious scholars, and community leaders; rape and torture. The military used helicopters to fire bullets and drop grenades on villagers as they were working on their farms, shopping in markets, or fishing. Tens of thousands of villagers fled across the border to Bangladesh. "Now is the worst it has ever been," said one Rohingya villager. "We have heard from our grandparents that there were bad things happening in the past too, but never like this" (High Commissioner for Human Rights,

2017: 42). In August 2017, following further attacks by Muslim militants, Myanmar's military unleashed a wave of violence that caused some 700,000 Rohingya villagers to flee across the border. The Fact-Finding Mission established by the UN Human Rights Council to investigate the events found that, if proven, the military's acts would amount to the international crime of genocide (Fact-Finding Mission on Myanmar, 2018).

Why was 2017 "*the worst it has ever been*" for the Rohingya? In the period 1987–2016, the Rohingya – and other ethnic minorities in Myanmar – were subjected to serious persecution and discrimination. Successive regimes violated their right to life (by murder and extrajudicial killing); their right to personal inviolability (by torture, rape, enforced disappearances); their right to own their own labour (by slavery, forced labour); their right to freedom of movement (by segregation and apartheid). Throughout that period, during which the country was under single-party socialist rule or military dictatorship, Freedom House consistently ranked Myanmar as "unfree." Then in 2017, for the first time, Freedom House awarded Myanmar a ranking of "partly free," following a series of political reforms and two successful general elections (Freedom House, 2017). On broadly accepted measures of political freedom, Myanmar was more democratic in 2017 than it had been at any time in the previous half-century. In theory, the expectation is that the closer states get to the ideal of liberal democracy, the better able and more willing they are to protect fundamental human rights (Donnelly, 1999). So why would genocide – the "crime of crimes" – take place *after* the beginning of Myanmar's transition to democracy?

The puzzle of why increasing levels of democracy are matched by more severe violations of human rights has been hypothesised by Helen Fein as the "More Murder in the Middle" thesis (Fein, 1995). Fein argues that there is an inverse relationship between the expansion of democracy and states' respect for life-integrity rights. That is, as states become more democratic, there is no correlating increase in their propensity to protect the most fundamental human rights. In fact, the converse is true. Increasing levels of democracy increase the chance of mass political violence: partly free states are more dangerous than unfree states (Gastil, 1988). Thus, at extreme ends of the political spectrum – in authoritarian states and dictatorships, and in established liberal democracies – there is the lowest possibility for mass killing by the state. But in partly free states – that exist somewhere on the continuum between absolutism and liberal democracy – the risk of states committing wide-scale atrocity is at its highest. One reason for this is that the increase in the degree of political freedom in a previously authoritarian state creates new opportunities for political opposition, provoking state repression and leading to more intense and wide-ranging violations, such as calculated murders and massacres. In circumstances of underlying ethnic discrimination, underdevelopment, inequality, and internal conflict, the danger of the severe violations is particularly high. Fein's analysis also shows that the most dangerous circumstances arise when political rights (voting and participation) are extended but civil liberties (rights of freedom of expression and association) are not.

The Rohingya were not the only ethnic minority group to experience an increased level of human rights violations since the commencement of democratic transition. In the North of the country, a fourteen-year ceasefire with the Kachin Independence Army

came to an end in 2011. Renewed conflict saw escalating levels of violence against civilians and severe levels of human rights violations. For a number of reasons, however, the vulnerability of the Rohingya was made particularly acute by the dynamics of Myanmar's transition. First, the degree of political reform in Myanmar was structurally constrained by a constitutionally guaranteed role for the military in the governance of the state. Myanmar's political transition was partial, its architects were the military themselves and the military remained deeply committed to maintaining, by violent force if necessary, the constitutionally mandated priorities of non-disintegration of the Union, non-disintegration of national solidarity, and perpetuation of sovereignty. Second, although political rights of voting and participation had been extended to many citizens, there was no successful corresponding institutionalisation of the protection of civil liberties. Protection of freedom of speech, association, and movement under the transitional 2008 Constitution remained subject to "existing laws," many of which were oppressive and discriminatory in relation to the Rohingya. In terms of enforcement, the judiciary struggled to establish independence after decades of being subservient to the military and new institutions such as the national Human Rights Commission failed to fulfil its mandate to promote and protect human rights. Third, the Rohingya have historically been discriminated against. They are racially and religiously distinct from the majority Burmese Buddhists and their presence in Myanmar is deeply contested (Renshaw, forthcoming; Ullah, 2016). Finally, Rakhine state, home to the majority of Rohingya, is acutely underdeveloped. Rakhine's poverty rate is almost double the national rate; child mortality is among the highest in the country; ongoing civil conflict between Rakhine Buddhists and the central Bamar government has exacerbated poverty and discouraged investment, leading to further conflict over scarcity (Advisory Commission on Rakhine State, 2017).

Against this backdrop, it is possible to see how the circumstances of Myanmar's transition led to what Osiel (1995) calls "administrative massacre." On 24 August 2017, Kofi Annan, former Secretary-General of the UN, released a report that recommended, in part, that the Rohingya be afforded citizenship: the most basic right of political participation. Some eight hours later, a militant Rohingya organisation, the Arakan Rohingya Salvation Army, committed terrorist acts against a number of border force officers. The following day, the military responded with severe violence, carrying out a systematic campaign of arson, rape, and extrajudicial killings, driving some 700,000 Rohingya across the border into neighbouring Bangladesh and leading to allegations of genocide.

The aim of this article is to consider the extent to which the atrocities that took place during the first ten years of the transitional period can be attributed to the absence of formal institutions and processes of transitional justice. *Transitional justice* refers to the formal attempt by post-authoritarian societies to address past wrongdoing in their efforts to democratise (Murphy, 2017: 1). The range of measures that societies have implemented to confront the legacies of violence and build the rule of law include criminal trials, truth commissions, vetting processes ("lustrations"), reparations, and apologies (Bell, 2009). The long-term transitional justice goal, which is often only realised with the rise of a new generation, is a society that has reconciled itself to its history and is

inclusive, just and stable. But in the scholarship on transitional justice, there is no settled answer to the question of precisely how transitional justice measures effect democratic consolidation, protect human rights, or contribute to rebuilding the rule of law in different societies (Fletcher and Weinstein, 2002; Gibson and Macdonald, 2001; Kelsall, 2005; Mendeloff, 2004; Olsen et al., 2010; Shaw, 2005; Snyder and Vinjamuri, 2003). Nor is there a clear answer to which institutions or processes, or combination of institutions and processes, will be most effective in different circumstances. The research is contradictory and points to different policy prescriptions (Thomas et al., 2008). Recent scholarship has made the point that acknowledging past wrongs might not be the priority for populations struggling with present-day scarcity and conflict (Hayner, 2011: 60, 187; Rotondi and Eiskovits, 2015; Shaw, 2005). There is no rule that a violent past must be addressed in any process of transition. In the immediate post-conflict or post-authoritarian period (the first five years), when members of the old regime still hold power to cause disruption and mobilise security forces and media networks loyal to them, there is a plausible argument that the hasty implementation of trials and truth commissions may have negative effects on democratic consolidation (Greedy and Robins, 2017; Macdonald, 2015; Posner, 2004a, 2004b; Sharp, 2013a, 2013b).

Myanmar faced a problem familiar to many new democracies: “to repair historical injustice and thereby risk social dissent, destabilization, and return of violence; or to aim at a democratic and peaceful present and future to the ‘disadvantage’ of the victims of a grim past?” (Bevernage, 2013: 21). The conclusion was that focusing on retribution – or even calling for recognition of the crimes committed by the former military regime through the establishment of a truth commission – would destabilise the political situation and undermine prospects for democratic consolidation and peace (Tin Maung Maung Than, 2012). The implication was that those who were genuinely interested in protecting human rights should support peace and political stability at all costs. If justice (in the sense of accountability for past acts of the military) stood in the way of peace, then justice should be deferred or sacrificed.

This article considers the escalation of violence against ethnic minorities during the early period of Myanmar’s democratic transition in the context of the claim that transitional justice deters future atrocities. First, the article explains why the military, the democratic opposition, Western states, and the UN, all accepted that Myanmar’s democratisation should proceed without the establishment of institutions and processes of transitional justice. The article also shows that this view was not uniform: within civil society and among ethnic minority groups, many believed that lasting peace was not possible without justice. Second, the article shows how, in the absence of transitional justice, the government attempted to bolster the rule of law by conducting its own investigations into allegations of misconduct by the military and through low-level prosecutions of individual military officers, and explains why this strategy failed. Finally, the article considers the potential impact of recent efforts at the international level to establish accountability, such as the UN Human Rights Council’s establishment of an Independent Investigative Mechanism for Myanmar, to collect evidence which might be used in future prosecutions (IIM); the decision of the ICC to open an investigation into whether Myanmar had carried out the crime against humanity of

deportation; and the case brought by Gambia in the ICJ for Myanmar's violation of the Genocide Convention. The article argues that considering (1) the historical response of Myanmar's military to the threat of international prosecution and (2) evidence of the way other groups in comparable political situations have responded to international prosecutions in the aftermath of atrocity, there is reason to be sceptical about the deterrence effect of international law interventions to protect groups such as Myanmar's Rohingya population.

## **2. Transitional Justice in the Context of Myanmar**

Transitional justice is not a feature of Myanmar's democratisation process. The primary reason for this is that the military is in control of transition. In 1991, Samuel Huntington set out the consideration which new democratic regimes must take into account in deciding how to address crimes committed by officials of the predecessor regime (Huntington, 1991). In Huntington's view, the decision to prosecute and punish, or forgive and forget, does not turn on moral or legal arguments about societal obligations to truth, justice, and the rule of law. Instead, the decision is determined by the nature of the democratisation process and the distribution of political power during and after transition. Huntington argues that in circumstances where democratic transformations are initiated and guided by leaders of the existing authoritarian regime, then assurances regarding non-prosecution – or amnesties – are essential to prospects of democratic consolidation. Put simply, no authoritarian leader will enable transition if they anticipate being prosecuted as a result. A guarantee of non-prosecution is the price of peaceful transformation.

This logic was well understood by the key actors in Myanmar's democratic transition. The National League for Democracy (NLD) and its leader Aung San Suu Kyi accepted that the success of transition depended on not prosecuting military officers for crimes they committed while they were in power. The guarantee of immunity for Myanmar's former military rulers is written into Article 445 of the 2008 Constitution of the Union of Myanmar. At various points during the first decade of transition, the NLD proposed amendments to key constitutional provisions, such as Article 59f, which prevents Aung San Suu Kyi from becoming president. But the NLD did not seek to remove or amend Article 445. The Nationwide Ceasefire Agreement, signed in 2015 by the government and representatives of some ethnic insurgent groups, does not include provisions for the establishment of criminal proceedings in relation to crimes committed by the military in ethnic states (or crimes committed by ethnic armies), nor does it refer to the establishment of truth commissions. It does, however, refer to efforts to improve the health, education, and socio-economic development of civilians, and maintaining the rule of law (*Myanmar Times*, 2015).

In short, it was understood by key actors such as the NLD and the military that successful transition required the protection of military interests and one of the key military interests was impunity. In the words of Tin Maung Maung Than: "There are certain red lines in Myanmar for the military. Transitional justice is one of the red lines" (Tin Maung Maung Than, 2012). Within Myanmar, in the view of many people, there

was a clear historical precedent for what might happen if the democratic opposition crossed the red line. In general elections held in 1990, the NLD, led by Aung San Suu Kyi, won a sweeping victory, securing more than 50 per cent of the popular vote. The military, however, refused to transfer power to the NLD. It is popularly believed that one of the reasons for this was an offhand comment from U Kyi Maung, chairman of the NLD, who in a post-election press conference referred to “Nuremberg-style tribunals” while explaining to a foreign journalist that the NLD did *not* intend to seek accountability for what the army had done to the people during its period of rule. “Here in Myanmar,” said Kyi Maung, “we do not need any Nuremberg-style tribunals” (Kaung, 2007). There is a widely held belief that one of the primary reasons why the Burmese military refused to relinquish power after the 1990 elections was because the generals feared they would be tried for crimes committed during the period of dictatorship (Mitton, 2015). The NLD was determined to ensure that history would not repeat itself and that the generals would not once again be frightened into retreating from reform by the prospect of retribution.

In the period 2010–2018, Aung San Suu Kyi went to significant lengths to reassure the military that the NLD had no interest in retribution. Through public statements and gestures of support for the *Tatmadaw*, Aung San Suu Kyi continually affirmed that the NLD would not seek accountability for acts committed during the years of military rule. After 2012, Suu Kyi pointedly embraced the *Tatmadaw* as “her father’s army” and declared that she was “very fond” of the army (Young, 2013). When she discussed transitional justice, which was rarely and reluctantly, it was in the form of a truth and reconciliation commission, similar to the South African commission, which might be established at some distant point in the future (Naing, 2012). Suu Kyi said that she followed in the footsteps of leaders such as Desmond Tutu, who preached forgiveness and reconciliation rather than vengeance and retribution (Aung San Suu Kyi, 2008: 29). Suu Kyi asked the people to reconcile with the military and move forward “hand-in-hand”.

In Myanmar, among different communities, there was a range of responses to the question of how to deal with the past (Holliday, 2012; Holliday, 2014; David and Holliday 2018). This reflected the variegated experience of abuse, degradation, and oppression, and different religious and cultural understandings about suffering and redress. Among many in the Buddhist-majority country, Aung San Suu Kyi’s approach to transitional justice resonated because it was underpinned by Buddhist concepts about the nature of suffering and the temporality of existence (Aung San Suu Kyi, 1991; McGowan, 2012; Sagar, 2009; Spiro, 1992). In Buddhism, suffering is a spiritual phenomenon, an inevitable part of an individual’s daily existence and ultimately the key to obtaining enlightenment. Buddhism stresses impermanence and the inevitable changes that all things must undergo, including the self (Burton, 2002). In Buddhist philosophy, the self, as a stable, localisable, and autonomous instance of control governing our decisions, is illusory. The false idea of a permanent state of self is one of the primary causes of suffering (Dorrell and Berguno, 2004). In Buddhism, existence is a momentary coalescence of constitutive elements, impermanent and fleeting. Each moment of coalescence is conditioned by what preceded it and our being is constituted and reconstituted

in a cyclical fashion. This notion is reflected in the doctrine of *karma*. At a very basic level, *karma* holds that those who do good deeds will receive good; those who do bad deeds will inevitably suffer the consequences (Groves and Farmer, 1994; Holder, 2007). For Suu Kyi, the law of *karma* was an appropriate response to the suffering of Myanmar's people during the years of dictatorship. In *The Voice of Hope*, Suu Kyi said that Myanmar's military dictators might be able to avoid the repercussions of breaking human laws, but that:

they are not above the law of karma, because the law of karma is actually very scientific. There is always a connection between cause and effect. It's like the light of a star isn't it? The light that we see now was initiated so many light years ago, but there it is. In science too there can be a seemingly long gap between cause and effect. But there's always the connection between them. (Aung San Suu Kyi, 2008: 87)

For many in Myanmar, responses to the past and views about the appropriate means of addressing it were shaped and conditioned by Buddhist understandings about the nature of time, impermanence, and suffering. For some victims, belief in karma led them to blame themselves for abuses they had suffered under military rule (ND-Burma, 2018: 20). Others questioned whether the apparent cathartic effect of reliving the past through trials and truth commissions would accord with Buddhist understandings of the place of suffering and the paths to its alleviation (Biggar, 2003; Hayner, 2011; Mani, 2002; Seils, 2002, Wilson, 2001). The essentially individualistic focus of Western legal theory (Simpson, 2009), where individuals are central as perpetrators and victims, sits uneasily with the very different Buddhist conception of the self. For many people in Myanmar, the whole idea of looking back past into the past was foreign. In Western thought, the past is important because it provides lessons for the future; the future is a major preoccupation because it is the better age that lies ahead (Loy, 2000). Retributive justice extends this conceptualisation of time by focusing on the past (establishing guilt) and the future (promoting deterrence). Buddhism, however, follows an understanding of time that is profoundly at odds with this linear conception of time.

While Buddhism does not countenance retribution, there is a role for truth. In Suu Kyi's view, "truth and reconciliation go together. Once the truth has been admitted, forgiveness is far more possible. Denying the truth will not bring about forgiveness neither will it dissipate the anger in those who have suffered" (Clements, 1997). Suu Kyi said that suffering had to be acknowledged:

You can't just wipe away the past. If you try, there will always be this ocean of festering resentment within those who have truly suffered. They will feel that their sufferings have been pushed aside, as though they've suffered for nothing; as though they've undergone torture for nothing; as though their sons and fathers had died for nothing. (Clements, 1997)

A decade before transition began, Suu Kyi was asked specifically about a Truth and Reconciliation Council in Burma. She said:

I think in every country which has undergone the kind of traumatic experience that we have had in Burma, there will be a need for truth and reconciliation. I don't think that people will



really thirst for vengeance once they have been given access to the truth. But the fact that they are denied access to truth simply stokes the anger and hatred. That their suffering is not been acknowledged makes people angry. That is one of the great differences between SLORC and ourselves – we do not think that there is anything wrong with saying we made a mistake and we are sorry. (Aung San Suu Kyi, 2008)

Research carried out by David and Holliday (2018) confirms the desire of many people in Myanmar for the establishment of an official process to uncover and acknowledge the truth about human rights violations and crimes that occurred during the years of dictatorship. Domestic human rights organisations also report that truth – rather than retribution – is the primary concern of victims (ND-Burma, 2018). Truth-seeking crosses religious divides and is a focus for Buddhists as well as Christians and other religious minority groups. Yet once transition was underway, Suu Kyi's language and actions betrayed profound unease at the prospect of any sustained process of official truth-telling – of remembering, mourning, or acknowledging the traumas of the past. Ultimately, Suu Kyi did not make it a condition of her co-operation in the transition that Myanmar's military rulers acknowledge or apologise for the years of terror endured by the people. Instead, Suu Kyi joined the military in constructing a political process of forgetting rather than remembering (Graham, 2007). Political leader and former political prisoner Cho Cho Kyaw Nyein said: “[w]hen I talk to Aung San Suu Kyi, she says, ‘Forget the past’. If she says that, that is what we must do” (Myers, 2011).

Recent literature on transitional justice has been attentive to the fact that there are important cultural dimensions to determining appropriate responses to mass atrocity (Shaw, 2005; Shaw et al., 2012). In 2004, the Secretary-General of the UN produced a report on rule of law and transitional justice, urging that we “eschew one-size fits all formulas and the importation of foreign models, and instead, base our support on national assessments, national participation and national needs and aspirations” (UN Security Council, 2004). In complex societies, determining what the national needs and aspirations are is a difficult and contentious task (Fletcher and Weinstein, 2002). There is a strong argument that in transitional conditions where former oppressors still hold a significant degree of power, it is not only pragmatic to delay or defer the establishment of institutions and processes to address historical wrongs because they might threaten the interests of transitional elites, it is also the correct moral response. This is because societies need a period of time to adjust to new circumstances of freedom from oppression, conflict, and terror; only after a period of adjustment are they able to articulate how they would like to respond to the past. In circumstances where trusted elites such as Aung San Suu Kyi were saying that historical justice was not a priority, that the time was not right for official truth-telling processes, and that even discussion about transitional justice could imperil democratic consolidation, many people in Myanmar were prepared to agree.

Nonetheless, “transition without justice” presented several significant problems for Myanmar's transitional leaders. One of these centred on the question of trust. Transitional justice processes and institutions have, in theory at least, the potential to build trust between the new regime and the people, by signalling a break with the past; by removing

offenders from positions of power; by illuminating systemic problems such as corruption and discrimination. In the absence of transitional justice, Myanmar's leaders needed other ways to convince the traumatised population that they should have confidence in the transitional path mapped out by their former oppressors. One way to do this was by establishing new institutions, such as the Myanmar National Human Rights Commission and the Committee for the Rule of Law and Tranquillity (chaired by Aung San Suu Kyi). Another was to increase the number and visibility of prosecutions of officers who did not follow correct procedures, thereby demonstrating that the rule of law now applied to the military and the police, as well as to ordinary people. In the period 2015–2020, there were unprecedented prosecutions of members of the military for abuse of civilians. For example, in September 2016, seven Burmese soldiers were brought before a military court, charged with the murder of five men from the village of Mong Yaw in Northern Shan state, convicted and sentenced to seven years in jail with hard labour (Weng, 2015). The families of the victims were offered compensation. In April 2018, seven *Tatmadaw* soldiers were convicted of the murders of ten Rohingya men, whose bodies had been found in a village in north-western Rakhine state. The men had been hacked to death or shot.

Yet in relation to the campaign of atrocities perpetrated against the Rohingya in 2016 and 2017, none of the four separate investigations established by state and federal parliaments and by the military and police made findings that accorded with UN investigations or reports from credible human rights non-governmental organisations. Some of the conclusions of domestic investigations were patently absurd. The military investigation into the first wave of violence in Rakhine, for example, found that there had been only two cases of abuse of civilians by military personnel in the period October 2016–February 2017. One of these involved the theft of a motorbike; the other involved military personnel beating villagers who were tardy in helping to extinguish a fire.

The conclusion is that the transitional strategy of ending impunity and embedding the rule of law through the low-level prosecution of members of the military, and through the establishment of new independent institutions to promote accountability, was a failure. This is because the military's methods of achieving desired political outcomes remained the same after transition as before. In relation to the Rohingya, the military have long pursued their removal from Rakhine state. In 1962, General Ne Win militarised the state under a nationalist ideology of "one blood, one voice, one command" (Smith, 2002). From that time, the overarching strategy was to degrade life for the Rohingya to the point where it could no longer be endured: to deny food, work, the ability to marry within the law and register the birth of children. The aim was to force the Rohingya into ghettos to die of disease and hunger, or to leave the country by fleeing into Bangladesh, Thailand, or Malaysia (Renshaw, 2016a, 2016b; Zarni and Cowley, 2014). The methods included operations so brutal and terrorising – particularly in 1978, and in 1991–1992 – that the Rohingya historically fled.

### **3. Transitional Justice from the Outside?**

In 2019, the government of Myanmar faced three different international legal procedures aimed at deterring it from committing further atrocities against the Rohingya and other

ethnic minorities. The first of these was the International Investigative Mechanism (IMM) established by the UN Human Rights Council. The IMM took over the work of the Fact-Finding Mission, which was established by the Human Rights Council in the wake of the atrocities of 2017. The Fact-Finding Mission provided the Council with a Final Report that concluded the acts of state agents in persecuting the Rohingya were, in likelihood, genocide. The IMM's role was to gather and preserve evidence of international crimes in preparation for future legal proceedings.

The second procedure was a process before the ICC. Although Myanmar is not a party to the Rome Statute of the International Criminal Court and can only be subject to the Court's jurisdiction through a referral by the UN Security Council (or in the unlikely event of a self-referral), the Prosecutor argued that Myanmar could be investigated in relation to the particular crime against humanity of deportation. This is because an element of this crime (the crossing of a border) took place on the territory of a State party to the Statute (Bangladesh). In September 2018, the ICC Pre-Trial Chamber accepted the Prosecutor's argument, paving the way for an investigation into deportation (and potentially other crimes).

The third procedure was before the ICJ, where Gambia brought a case against Myanmar for violation of the Genocide Convention. Burma ratified the Genocide Convention in 1956, in the brief period of parliamentary democracy between gaining independence from British rule and the coup d'état of General Ne Win.

Without the co-operation of the government of Myanmar in providing evidence, serving warrants on alleged perpetrators and granting access to investigators and court officials, all of these proceedings face serious problems. The ICJ does not have the capacity to gather evidence on its own: it is reliant on the material gathered in other international courts and tribunals. In the case of Myanmar, material from other courts and tribunals at present consists primarily of eyewitness accounts from refugees. Forensic evidence from the sites of atrocities – which was devastating in proceedings before the International Criminal Tribunal for Rwanda and the former Yugoslavia – is largely missing. The question, for my purpose here, is whether despite these shortcomings, international proceedings have the potential to fulfil any of the aims of transitional justice: to rebuild the rule of law; to change the behaviour of the police and military towards civilian populations; to instil trust between the people and transitional elites; and most importantly, deter the commission of further atrocities.

In the early years of Myanmar's transition, key international actors decided to support domestic measures aimed at gradual reform, and to accept a time frame for historical accountability that was congenial to Myanmar's transitional leaders. By the end of 2017, it was clear that new measures were in order. It was less clear to what extent new strategies would succeed in deterring further atrocity. The history of Myanmar/UN engagement was not auspicious. Between 1993 and 2011, UN human rights bodies – with the arguable exception of the International Labour Organisation – were largely unsuccessful in efforts to positively engage with Myanmar's military leaders (Renshaw, 2019). Indeed there is near uniform consensus among scholars and analysts that past policies of condemnation, isolation, and sanctioning were ineffective in encouraging greater human rights observance (Abramowitz and Kolieb, 2008; Hadar, 1998; Pedersen,

2000, 2007). Indeed, in the view of many scholars, these measures were in fact counterproductive. Their primary consequence was to prolong the political stalemate that existed between the military government and the opposition, while at the same time exacerbating the suffering and impoverishment of the Burmese people (Taylor, 2004). Burma's colonial history and its leader's fears of external interference fostered a culture of xenophobia that external condemnation only exacerbated (Holliday, 2005). Myanmar's politicians and generals became adept at bureaucratic obfuscation, deceit, and delay in their dealings with the UN and their efforts to deflect accountability.

The first Special Rapporteur on the human rights situation in Myanmar was Dr. Yozo Yokota, appointed by the UN Human Rights Council in 1993. Yokota carried out his investigation with a reasonable degree of co-operation from Myanmar's government, which at the time was the State Law and Order Restoration Council (SLORC). Yokota was permitted to enter Myanmar and inspect various sites, including Insein Prison, and travel to ethnic minority areas including Rakhine state. Yokota interviewed members of the SLORC, including General Khin Nyunt, and victims and witnesses of alleged human rights violations. The report is remarkable for the level of detail it provides. For example, in relation to allegations about the deaths and disappearances of thousands of people after anti-government demonstrations in 1988 and 1990, Yokota was told the precise site of the mass graves where the military had buried the bodies of protesters (Commission on Human Rights, 1993: para 232). In relation to the rape of ethnic women by the military in conflict zones, he was informed of the date, location, identities of victims and regiment to which alleged perpetrators belonged. In relation to forced relocation of civilians by the military, he was shown a relocation order, containing the names of villagers who were required to move and the edict that those who did not move by that date would be considered "bandit-insurgents" and "would be eliminated" (Commission on Human Rights, 1993: para 76).

The report is also remarkable for what it reveals about the approach of Myanmar's rulers to engagement with UN bodies. When Yokota wrote to the government on the final day of his visit, complaining that he had not been able to establish direct contact with imprisoned political opposition leaders, the response from the Ministry of Foreign Affairs was that "there are no political prisoners in this country, but only some politicians who are under detention for breaking the established laws of this nation" (Commission on Human Rights, 1993: para 68). When he complained that intelligence services had threatened and intimidated potential witnesses, the Minister's office responded that the reason why people did not communicate with the Rapporteur was probably because they were engaged in illegal activities and they did not want to draw attention to this. When Yokota provided the Minister with a list of detainees he wished to see in Insein Prison, he was told that higher authorities do not interfere with the running of the prison and that the request should be made to the prison authorities. When he inquired of the prison authorities, they explained that they were unable to comply with his request because they required authorisation from higher authorities (Commission on Human Rights, 1993: para 64).

The experience of the first Rapporteur was repeated with subsequent Rapporteurs. The military government stage-managed the visit of Special Rapporteurs and impeded

investigations with bureaucratic obfuscation. Intimidation and the threat of government reprisals hung over anyone who engaged with the Rapporteurs. Rapporteurs were not permitted to interview members of the military who may have been directly responsible for carrying out human rights violations, nor were Rapporteurs given access to the military documents and personnel that might have confirmed the systemic nature of abuses. On some occasions, Rapporteurs were denied access to the country.

Nonetheless, Rapporteurs were able to marshal specific, plausible evidence of international crimes. Paul Pinheiro, who was Rapporteur between 2000 and 2008, reported widespread and systematic violations of human rights in Myanmar (Special Rapporteur, 2006). Tomás Ojea Quintana, who was Special Rapporteur between 2008 and 2014, reported that:

[g]iven the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a state policy that involves authorities in the executive, military, and judiciary at all levels.

He said that “[a]ccording to consistent reports, the possibility exists that some of these human rights violations may entail categories of crimes against humanity or war crimes under the terms of the Statute of the International Criminal Court” (Human Rights Council, 2010: para 121).

But the tone of Quintana’s reports changed markedly as Myanmar’s nascent democratisation process garnered support from the NLD and from the United States and its Western allies. In his September 2011 report to the UN General Assembly, Quintana refrained from repeating his call for the establishment of a Commission of Inquiry (COI). He identified ongoing grave human rights issues, but he also emphasised the importance of assisting the transition to democracy and building a more positive environment for the protection of human rights (General Assembly, 2011). In 2013, the Special Rapporteur recommended merely that the government consider establishing a truth commission, to “inform continuing democratic reform and national reconciliation” (General Assembly, 2013: para 75).

In 2014, events in Rakhine and Kachin made clear that Myanmar’s progress on human rights had stalled. In his final report to the Human Rights Council, Quintana said that in Rakhine state, extrajudicial killing, rape and other forms of sexual violence, arbitrary detention, torture and ill-treatment in detention, denial of due process and fair trial rights, and the forcible transfer and severe deprivation of liberty of populations had taken place on a large scale and had been directed against the Rohingya Muslim population. He repeated his statement that:

[g]iven the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a state policy that involves authorities in the executive, military, and judiciary at all levels.

He referred again to the ICC (General Assembly, 2014: para 51). The High Commissioner for Human Rights produced a 2016 report suggesting widespread or systematic attacks against the Rohingya, which if established by a court of law would indicate the possible commission of crimes against humanity. The High Commissioner stated that the allegations, if proven, would amount to violations of international humanitarian law and human rights law, and that in the context of armed conflict, some of them would amount to war crimes (High Commissioner for Human Rights, 2016). This report was followed, in February 2017, by the High Commissioner's report into the government's clearance operation in Northern Rakhine state after 9 October 2016. Investigators, who were denied access to Northern Rakhine state, gathered evidence from 220 refugees who had fled across the border to Bangladesh. Investigators gathered first-hand testimony from men, women, and children in eight different refugee camps, who had been fired upon by helicopters, driven from their villages, raped, burnt, and beaten. The Report stated:

The testimonies gathered by the team – the killing of babies, toddlers, children, women and elderly; opening fire at people fleeing; burning of entire villages; massive detention; massive and systematic rape and sexual violence; deliberate destruction of food and sources of food – speak volumes of the apparent disregard by Tatmadaw and BGP officers that operate in the lockdown zone for international human rights law, in particular the total disdain for the right to life of Rohingyas. (High Commissioner for Human Rights, 2017)

In the wake of this report, the High Commissioner for Human Rights and the Special Advisor on the Prevention of Genocide, together with human rights advocates, urged the Human Rights Council to establish a COI to investigate allegations of violations, identify the perpetrators and determine whether international crimes had taken place. In other cases, COIs have paved the way for the establishment of International Criminal Tribunals (Rwanda in 1994; Yugoslavia in 1992) or prompted the Security Council to refer those situations to the ICC (Darfur in 2004; Libya in 2012). Within the Human Rights Council, however, there was only sufficient support to establish a Fact-Finding Mission. In 2017, a UN Fact-Finding Mission was created with a mandate to “investigate reports with a view to ensuring full accountability for perpetrators and justice for victims” (Human Rights Council, 2017). The Mission provided its Final Report to the Human Rights Council in September 2018 (Human Rights Council, 2018). The report concluded that there were grounds to establish genocidal intent on the part of the State of Myanmar. The reasoning was straightforward: the Rohingya are a distinct racial, religious, ethnical group; they were subjected to killing, serious bodily and mental harm, and conditions of life calculated to bring about their physical destruction; these acts were attributable to the State and committed intentionally; it could be inferred that the purpose of the acts was to destroy the Rohingya as a people, in whole or in part (Human Rights Council, 2018: paras 84–87). The legal elements of genocide were satisfied. In September 2019, the Fact-Finding Mission published a statement warning that Myanmar continued to harbour genocidal intent and that the Rohingya remained under serious risk of genocide (Fact-Finding Mission, 2019).

The government of Myanmar's response followed the pattern that had been set in the early 1990s. The government did not engage directly with the claim that government

actors had committed international crimes. Noting that the reports of UN investigators were largely produced without physical inspection of the sites of suspected atrocities and without the co-operation of the government, they insinuated that the reports were false or exaggerated, based on fabrication and disinformation, and that allegations were unsubstantiated and unfounded. Government officials claimed that the reports were unfairly one-sided, that the government had a responsibility to maintain order and that force was only being used to that end; that those who were killed were terrorists; and that if there had been transgressions by the military or the police, these would be dealt with according to existing domestic legal rules and procedures. U Kyaw Tin, Permanent Representative of the Republic of the Union of Myanmar to the UN, claimed that UN reports were unfairly one-sided, that they did not acknowledge the significant progress that had been made since Myanmar began its transition to democracy or the difficult circumstances in which the transition was taking place. In relation to the Special Rapporteur, Kyaw Tin argued that it was time for the mandate of the Special Rapporteur to come to an end.

Myanmar's government, which included Aung San Suu Kyi as Special Counsellor of State, opposed the creation of UN investigative mechanisms and consistently refused to provide entry visas to members of the UN Missions. Myanmar's ambassador to the UN in Geneva, U Htin Lynn, said that:

Such kind of action is not acceptable to Myanmar as it not in harmony with the situation on the ground and our national circumstances. Let the Myanmar people choose the best and the most effective course of action to address the challenges in Myanmar. (President's Office, 2017)

Myanmar's Foreign Ministry said that the decision to send an independent international Fact-Finding Mission to Myanmar "would do more to inflame, rather than resolve, the issues at this time" (McPherson, 2017). The Tatmadaw's Senior-General Min Aung Hlaing said the decision to send a Fact-Finding Mission threatened national security. He told an Armed Forces Day parade in the capital Naypyidaw that Burmese armed forces would shun the UN mission (Agence France Press, 2017). Aung San Suu Kyi said: "We are disassociating ourselves from the [Human Rights Council Resolution appointing a Fact-Finding Mission] because we don't think the resolution is in keeping with what is actually happening on the ground" (*Guardian*, 2017).

Is there potential for the various processes and procedures of international criminal law to prevent further atrocities in Myanmar? On one view, the defensive responses from Myanmar's generals, from the 1990 reaction to talk of "Nuremberg-style tribunals" to the 2017 response to the establishment of an international investigative mission, suggest that there is a level of sensitivity to the ignominy of potential international prosecutions. Aung San Suu Kyi's reaction also suggests high levels of sensitivity to disapprobation: in 2018, Suu Kyi cancelled an appearance before the UN General Assembly and failed to make scheduled appearances during a trip to Australia. But sensitivity to the prospect of prosecution is one thing: changing a course of behaviour based on a reasonable prospect of being tried for committing offences is another. In relation to Suu Kyi, her power to

influence military behaviour is limited. In 2016, at the same time as Suu Kyi was presiding over peace talks with armed ethnic organisations, the military was intensifying attacks in Kachin state.

Evidence that international criminal law has a deterrence effect is very weak (Alexander, 2009). To understand the reason for this, we need to understand why mass atrocities occur. The most compelling explanation we have, gathered from studies of the Holocaust onwards, is that state-perpetrated atrocities are not the result of individual evil. Instead, they occur as part of a political response to a particular problem – an extreme and horrific response, certainly, but nonetheless one that is carried out for reasons connected to matters of state: the defence of the nation, the protection of other citizens, or the preservation of ethnic or religious identity. If this is so, then it is unlikely that the threat of punishment will be enough to dissuade a leader from doing what he or she thinks (misguidedly) is right. For this reason, the prospect of individual punishment will not usually be sufficient to cause potential perpetrators to refrain from acting. Even if the threat of punishment becomes part of the calculation about what course of action to follow, the limited enforcement potential and long delays of international criminal law are likely to diminish its salience. Connected to this question is the issue of who should be tried in international criminal proceedings. The principle in international criminal law is that those most responsible (the generals and political leaders) should be tried before ordinary soldiers who carry out the acts of atrocity. But in relation to those under command – ordinary soldiers – the distant threat of international prosecution, when balanced against the present threat of court martial and immediate punishment for not following orders, is unlikely to cause them to stay their hand.

One particular incident stands out among the many barbarities that occurred in Myanmar in 2016 and 2017. In February 2018, the bodies of ten Rohingya men (seven fishermen, a teacher of Islam, and two high school students) were discovered buried in a shallow grave near a village called Inn Din. Their hands were tied behind their backs and their bodies bore evidence of having been shot or stabbed to death. For several reasons, the incident caught the attention of the international media. One reason was that the murders were reported by two Reuters journalists who were later arrested and charged with breaching the *Official Secrets Act*, after being framed by the police. One of the policemen admitted to this in open court proceedings. Another reason is that a photograph was taken of the ten men immediately prior to their deaths. The men are seen kneeling, in a row, with their hands tied behind their backs. The photograph was disturbingly similar to the one that horrified the court in the Srebrenica case, where a similar number of Muslim men were photographed kneeling with their hands tied behind their backs, just prior to their execution.

One way of understanding the killings at Inn Din is that they were the ultimate consequence of the original military order to “clear” the area of Muslim terrorists: an order that was passed down the military chain of command to the 33rd Light Infantry Division and the 8th Security Police Battalion. The relevant soldiers and police understood this order to mean the removal and killing of Muslims who lived in the area: this understanding was not corrected by their superiors. On this reading, what happened at Inn Din was a crime of state; one that the architecture of international criminal law can



address. There are details of the event, however, that complicate this reading. Some months after the murders, the military confirmed that the killings had taken place and that those involved would be punished. The military said that the perpetrators were army officers and two Buddhist villagers. The villagers, it was reported, were brothers whose father, Maung Ni, had disappeared – believed killed. The soldiers invited the brothers to decapitate and slash the Rohingya prisoners with swords, before the soldiers finished off the job with bullets (Reuters, 2018). On this reading, what happened at Inn Din was more a crime of hate than a crime of state (Alvarez, 1999); one that the architecture of international criminal law is ill-suited to addressing.

If criminal processes and procedures at the international level are unlikely to change the behaviour of Myanmar's military leaders, and are also unlikely to change the mindset and proclivities of those who operate at the lower levels, then they do not fulfil the most basic requirement of transitional justice – the prevention of further atrocities against civilian populations. This is not to say that they have no purpose at all. At a minimum, they satisfy the deep sense of many in the international community that in the face of such horror, there must be some response. Perhaps, they serve to comfort ethnic minorities in the North and West of Myanmar that what is happening is being recorded: history will not forget them. It is arguable that international criminal processes have a pedagogical function, signalling to decision-makers that certain responses to political problems are beyond the pale. The difficulty is that the UN has been sending these signals to decision-makers in Myanmar for a quarter of a century and there is limited evidence of behavioural change.

#### **4. Conclusion: Towards 2020**

The backdrop to Myanmar's transformation from military rule to a limited form of constitutional democracy in the period 2008–2018 was a complex, fragile politics of transition and cultural ambivalence about pursuing accountability for past wrongs. In the particular circumstances of Myanmar, the moral justification for deferring serious discussion about transitional justice was that it might not ultimately be beneficial to the people whose lives had been disrupted or destroyed by the perpetrators of violence. Key actors believed that transitional justice measures, if introduced too early and in circumstances of political uncertainty, would not serve the goals of rebuilding trust, increasing political stability, reconstructing the rule of law, or alleviating the social, economic, and psychological effects of long-term suffering and injustice. Faced with the dilemma of choosing between stability and justice, Myanmar's new democratic leaders chose stability.

The period from five to twenty years after transition is when post-authoritarian societies undergo the social and political reconstruction necessary to reconceptualise political morality after years of authoritarian rule. The transitional justice challenges for political actors in Myanmar, as the country approaches elections in 2020, remain significant. The obvious contradictions of the early transitional period remain. Aung San Suu Kyi, for decades a staunch opponent of military rule and an icon of democracy, shares power with the military and occupies a position "above the President." Some

ensorship laws have been abolished only to make way for new laws constraining freedom of speech and expression. Commitments to ending civil war are matched by increasing levels of conflict in some ethnic states. The rule of law remains in grave disrepair. Belief in the precepts of Buddhism, the basis upon which many Burmese accepted the argument for forgiveness rather than retribution, has not alleviated the personal suffering and physical hardship resulting from decades of oppression and conflict. The overall pattern is one of uncertainty and confusion and it is in these circumstances that extreme violence takes shape as a possible method of achieving a political goal. The country's post-2020 leaders will at some point have to address the structural causes of distrust and pessimism and implement measures that will prevent past atrocities from reoccurring. The title of the most recent report of ND-Burma is portentous – “You cannot ignore us” (ND-Burma, 2018).

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