

**WILL THE LAW OF STATE RESPONSIBILITY AND THE INTERNATIONAL JUSTICE
SYSTEM FAIL THE ROHINGYA?¹**

Sim Khadijah Binte Mohammed²

INTRODUCTION	2
I. FACTUAL MATRIX, ISSUES & COMPLICATIONS.....	2
(a) Preliminary Issues & Complications	2
<i>The Special Position of the Myanmar Military</i>	2
<i>Political Complications & State-Sponsored Attacks</i>	3
<i>Evidentiary Issues</i>	5
(b) The Relevant Actors	6
(c) The Specific Events.....	6
<i>Events in 2012 & 2016</i>	7
<i>Events in 2017</i>	7
(d) The Applicable International Obligations & International Justice Regimes	9
II. THE LAW OF STATE RESPONSIBILITY	10
(a) Whether the Conduct was Attributable to the State of Myanmar	10
(b) Whether the Conduct <i>Prima Facie</i> Constitutes Breaches of International Obligations	14
<i>Genocide</i>	15
<i>Crimes Against Humanity & War Crimes (IHL)</i>	18
(c) Whether the Acts Were Committed in Circumstances Precluding Wrongfulness	20
(d) Whether Myanmar is Likely to be Held Responsible.....	20
III. OTHER INTERNATIONAL JUSTICE REGIMES	22
(a) Individual Criminal Responsibility	22
(b) Humanitarian Intervention.....	23
IV. CONCLUSION	23
V. BIBLIOGRAPHY.....	24

¹ Last updated April 2018.

² Advocate & Solicitor (Singapore); Founder & Principal Legal Skills Trainer, Lacuna Training Solutions.

INTRODUCTION

The mass exodus of approximately 650,000 Rohingya Muslims from the Rakhine state in Myanmar since August 2017 has brought international attention to their plight. But as observed by political and legal experts alike, resolving the crisis will be a much more complex task, entailing nuanced issues of state,³ individual, and communal responsibility. Moreover, the political dimension of the crisis permeates any discussion on legal liability, and effectively incapacitates the international justice regimes that would otherwise have operated to hold those responsible to account.

In Part I of this Paper, the writer first sets the parameters for discussion, providing the factual matrix and circumscribing the relevant actors, specific events, and applicable international obligations and justice regimes. Having set the parameters for discussion, the writer proceeds to analyse the issue of state responsibility for the acts and omissions in Part II. She concludes that while numerous breaches of international obligations are made out, and a number of the acts and omissions are attributable to the State of Myanmar, legal and political challenges nonetheless make state responsibility an unlikely result. The writer then proceeds in Part III to examine if other international justice regimes will nonetheless apply. However, given that the political challenges which plague the law of state responsibility are equally prevalent in the regimes of individual criminal responsibility and humanitarian intervention, this brief examination concludes with a reluctant acceptance that an affirmative answer to the question posed is inevitable.

I. FACTUAL MATRIX, ISSUES & COMPLICATIONS

(a) *Preliminary Issues & Complications*

The Special Position of the Myanmar Military

It is important to first understand the special position of the military in Myanmar politics. Myanmar was ruled by the military for over 40 years. Before allowing democratic elections to take place in Myanmar, the military junta first secured its political stake through constitutional amendments.

³ In this Paper, “state” is used as a general reference to states, while “State” is used as a specific reference to the State of Myanmar.

Under the 2008 Constitution,⁴ the military retains significant control of the government. 25% of Parliament seats are reserved for serving military officers. The 3 vital Ministries of Home Affairs, Defence, and Border Affairs are headed by serving military officers, and ensure the military's control over the police. The military also appoints one of the country's two Vice Presidents, and retains the right to declare a state of emergency.

While State Counsellor,⁵ Aung San Suu Kyi, has been recognised as Myanmar's *de facto* leader with great moral authority, legal authority remains largely in the military's hands. Suu Kyi makes most of the important decisions, but the military is the real power in Rakhine, where our discussion takes place, as it shares a border with Bangladesh.⁶

Image 1 – Map of Rakhine State⁷



Political Complications & State-Sponsored Attacks

The Rohingya are a distinct ethnic and religious minority (mostly Muslim) who, until the recent exodus, were living in the Rakhine state. Many Rohingya families have lived in Myanmar for centuries. Yet, the Myanmar government refuses to acknowledge the group as citizens, and do not

⁴ 2008 Myanmar Constitution.

⁵ A position akin to Prime Minister.

⁶ BBC News (25 January 2018(2)).

⁷ Taken from ICG Report (7 December 2017).

use the term “Rohingya”, preferring instead the derogatory name “Bengalis”, implying that they are illegal migrants from Bangladesh.

Under the 1982 Citizenship Act, the Rohingya are not among the 135 officially recognised ethnic groups, and are denied citizenship.⁸ This has significant legal consequences, as being undocumented (i.e. stateless) means that the following rights are not constitutionally protected for the Rohingya:⁹

- (i) Education;
- (ii) Health care;
- (iii) Voting;
- (iv) Marrying;¹⁰
- (v) Freedom of movement;¹¹
- (vi) Working in the civil service; and
- (vii) Protection from arbitrary arrests and detention.

As a consequence, their children are shut out from schools, they are subjected to mob violence with impunity, and laws limit who they can marry and how many babies they can have.¹²

Myanmar’s transition to democracy, and the opening up of free speech, has sharply exacerbated inter-communal tensions and prejudice. The 969 Movement, a hard-line Buddhist nationalist movement led by Buddhist monks has been propagating hate-speech amongst its followers, inciting communal violence against the Rohingya.¹³ To make matters worse, in a 2015 Islamic State (IS) sermon, leaders raised the persecution of the Rohingya as a potential cause,¹⁴ and analyst reports subsequently suggested that IS was looking to recruit and train Rohingya militants.¹⁵ This development, along with the emergence of a group of Rohingya militants in 2013 – the Arakan Rohingya Salvation Army (ARSA) – only fuelled the hatred of the Buddhists for their Muslim neighbours.

⁸ The Economist (24 December 2016).

⁹ The Economist (24 December 2016), The Economist (13 June 2015(2)), BBC News (19 September 2017), Harvard Political Review (21 February 2017).

¹⁰ BBC News (19 September 2017).

¹¹ Even to leave detention camps to seek medical treatment. BBC News (19 September 2017).

¹² The Economist (13 June 2015(2)).

¹³ IPI Global Observatory (12 June 2015).

¹⁴ The Economist (13 June 2015(2)).

¹⁵ Huffington Post (22 July 2015).

To align themselves with the influential Buddhist nationalist movement, the military has echoed the hate-speech, and organised and sponsored communal violence. In a study conducted by the International State Crime Initiative (ISCI), it was found that in the 2012 communal riots, Rakhine Buddhist men were bussed into the town of Sittwe to attack Muslims, encouraged to bring knives, and given free food for a day's "work". Over 200 died, mostly Rohingya Muslims.¹⁶ In the 2017 military crackdown, Rakhine Buddhist mobs armed with military-issued weapons were witnessed burning villages, and committing atrocities, alongside the uniformed soldiers.¹⁷

Evidentiary Issues

Lastly, it must be acknowledged that any legal analysis will likely run into some evidentiary difficulties, for 2 main reasons:

- (i) First, the information blackout perpetrated by the military; and
- (ii) Second, the destruction of evidence by the military.

In relation to (i), UN aid personnel were forced to leave Rakhine when the military crackdown took place in August 2017, and Myanmar has refused to allow journalists and external investigators into Rakhine to look into the allegations of abuses.¹⁸ Originally scheduled to visit Myanmar in February 2018, UN Human Rights investigator Yanghee Lee was banned in December 2017, as the Myanmar government accused her of not being impartial and objective.¹⁹ The information embargo also culminated in the arrest and detention of 2 Reuters journalists who had been investigating the unlawful killings of 10 Rohingyas in Inn Din²⁰ on 2 September 2017. While Myanmar officials maintain that the journalists have been arrested for possessing information under the Official Secrets Act, a Police Captain called as a witness has admitted that the journalists were set-up in a sting.²¹

In relation to (ii), satellite images following the August 2017 military crackdown showed that villages where the atrocities had taken place had been completely razed to the ground. Any remains

¹⁶ The Economist (13 June 2015(1)).

¹⁷ BBC News (19 September 2017).

¹⁸ BBC News (28 September 2017(1)).

¹⁹ BBC News (10 January 2018).

²⁰ A town near Maungdaw, just west of Rathedaung, and north of Sittwe.

²¹ Reuters (21 April 2018). Thankfully, in the present case, extensive contemporaneous interviews, satellite imaging, and independent reports have been documented, making future legal action (if any) possible.

were subsequently bulldozed to erase any evidence of the unlawful destruction and killings, effectively erasing any evidence that these Rohingya villages had ever existed.²² Officials once again had a ready excuse: the removal was necessary to aid the rebuilding process. Yet, further reports and satellite images showed that the exercise was actually a “*military land grab*”, with new military bases being erected to house the very same military personnel who had driven the Rohingya out by force.²³

Such evidentiary challenges by virtue of a state’s exclusive control has been acknowledged in the case of *Corfu Channel*, with the ICJ concluding that in such cases, “*liberal recourse to inferences of fact and circumstantial evidence*” could be resorted to where direct proof was difficult or impossible.²⁴

(b) *The Relevant Actors*

As alluded to above, there are multiple actors involved in the alleged breaches of international obligations, but our discussion will largely centre around the acts and omissions of the following:

- (i) Military, police, and border guard patrol who make up the security forces of the State (collectively referred to as the “military”);
- (ii) The civilian government led by Suu Kyi; and
- (iii) Buddhist Rakhine villagers who participated in the atrocities.

(c) *The Specific Events*

Given the constraints of this Paper, it would not be possible to analyse all the instances of persecution and violence against the Rohingya. The legal analysis thus focuses on the events during the most recent military crackdown which began on 25 August 2017. Nevertheless, it is important to note the main events in 2012 and 2016, as they chart the escalation of violence.

²² BBC News (23 February 2018).

²³ BBC News (12 March 2018).

²⁴ *Corfu Channel* at 18.

Events in 2012 & 2016

In October 2012, violence erupted between the majority Buddhist Rakhines in Rakhine state and the Rohingya.²⁵ Around 200 people were killed in the violence, and more than 100,000 Rohingya were forced to flee their homes. Since 2012, around 120,000 – 140,000 Rohingyas have been held in camps against their will.

In 2016, following attacks on the Myanmar border posts by the ARSA, a military crackdown took place in the town of Maungdaw, during which the military barred entry to journalists, aid workers, and international monitors. Mass arrests, torture, burning of villages, killings of civilians, and systematic rape of Rohingya women by uniformed soldiers ensued. Amnesty International called the military's "*callous and systematic campaign of violence*" a crime against humanity.²⁶

6 months before the 2017 military crackdown, UN High Commissioner for Human Rights ("UN High Commissioner"), Zeid Ra'ad Al-Hussein, issued a warning and appeal to Suu Kyi to cease military operations which were causing immeasurable suffering and human rights abuses, but his warning fell on deaf ears.²⁷

Events in 2017

On 25 August 2017, the latest military crackdown in Rakhine began. The military justified this as a response to an ARSA attack on 30 police posts and a military base.²⁸ At least 6,700 Rohingya were killed in the month following the military crackdown, but after an internal investigation, the military exonerated itself of any blame in November 2017 and put the death toll at about 400.²⁹

²⁵ The riots came after weeks of sectarian disputes including a gang rape and murder of a Buddhist Rakhine woman by Rohingyas, and the killing of 10 Muslims by Buddhist Rakhines.

²⁶ The Economist (24 December 2016).

²⁷ BBC News (18 December 2017).

²⁸ UN High Commissioner Al-Hussein listed some of the documented acts of violence against the Rohingya, committed by the military backed by the armed Buddhist Rakhines, as follows: "*killing by random firing of bullets, use of grenades, shooting at close range, stabbings, beatings to death and the burning of houses with families inside*". BBC News (5 December 2017).

²⁹ BBC News (7 January 2018).

In January 2018, when photographic evidence of the military's involvement in the Inn Din massacre surfaced, the military finally admitted that 4 of its soldiers had been involved, but claimed that the 10 skeletons found in a mass grave in Inn Din belonged to Rohingya militant "terrorists".³⁰

Image 2 – Victims of the Inn Din Massacre³¹



The following documented acts and omissions shall be relied upon in the legal analysis (the "conduct"):

- (i) Indiscriminate murders, summary executions, and massacres of civilians (i.e. unarmed Rohingya men, women, and children) including:³²
 - (a) Door-to-door killings;
 - (b) Decapitations;
 - (c) Butchering by machetes;
 - (d) Herding civilians into buildings, and setting them ablaze;
 - (e) Firing upon fleeing civilians with automatic weapons, mortars, and grenades;³³ and
 - (f) Laying landmines along the border, to kill refugees fleeing into Bangladesh.³⁴

³⁰ BBC News (10 January 2018).

³¹ Taken from BBC News (8 February 2018).

³² The Economist (9 September 2017(2)), BBC News (28 September 2017(2)), BBC News (30 December 2017).

³³ BBC News (14 November 2017).

³⁴ BBC News (28 September 2017(2)).

- (ii) Widespread rapes of Rohingya women and children by uniformed soldiers, including brutal gang-rapes which resulted in the deaths of numerous victims.³⁵
- (iii) Torture, and beatings.³⁶
- (iv) Widespread pillaging, burning, and destruction of villages, including setting fire to houses with families trapped inside.³⁷
- (v) Arbitrary arrests, and detentions.³⁸
- (vi) Failure to prevent the above.

(d) *The Applicable International Obligations & International Justice Regimes*

Myanmar owes relevant international obligations as a party to the following:

- (i) 1948 Genocide Convention;
- (ii) 1949 Geneva Conventions; and
- (iii) 1966 ICESCR.

Myanmar is also subject to customary international law (CIL), which includes *jus cogens* norms and international humanitarian law (IHL) / *jus in bello* norms.

It should be noted that Myanmar is not a party to the following:

- (i) Article 36(2) ICJ Statute declaration;
- (ii) 1966 ICCPR;
- (iii) 1951 Convention on the Status of Refugees;
- (iv) 1954 Convention on the Status of Stateless Persons;
- (v) 1973 Convention on Apartheid; and
- (vi) 2002 Rome ICC Statute.

The relevant international justice regimes for our purposes are:

- (i) The law of state responsibility;
- (ii) International criminal law; and
- (iii) The law on humanitarian intervention (R2P).

³⁵ New York Times (22 November 2017).

³⁶ BBC News (5 December 2017).

³⁷ BBC News (14 November 2017).

³⁸ BBC News (19 September 2017)

II. THE LAW OF STATE RESPONSIBILITY

To hold Myanmar responsible for the acts and omissions referred to, it must be established that the conduct:³⁹

- (i) Is attributable to the State; and
- (ii) Constitutes breaches of its international obligations.

(a) *Whether the Conduct was Attributable to the State of Myanmar*

For our purposes, the conduct is attributable to the State under international law if it is the:

- (i) Conduct of any state organ;⁴⁰
- (ii) Conduct of persons or entities exercising elements of governmental authority;⁴¹
- (iii) Conduct in excess of authority or contravention of instructions;⁴²
- (iv) Conduct directed or controlled by a state;⁴³ or
- (v) Conduct acknowledged and adopted by a state as its own.⁴⁴

The writer would posit that the identified conduct is attributable to Myanmar under all the above circumstances.

In relation to (i) above, unlike typical analyses involving Westphalian-model states with civilian state organs, the Myanmar military occupies political positions in Parliament, and wields significant

³⁹ ARSIWA Article 2.

⁴⁰ ARSIWA Article 4, which provides that this is regardless of whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the state, and whatever its character as an organ of the central government or of a territorial unit of the state. "Organ" includes any person or entity which has that status in accordance with the state's internal law.

⁴¹ ARSIWA Article 5, which provides that the conduct of a person or entity not an organ of the State under Article 4 but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state, provided the person or entity is acting in that capacity in the particular instance.

⁴² ARSIWA Article 7, which provides that the conduct of a state organ or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the state if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

⁴³ ARSIWA Article 8, which provides that the conduct of a person or group of persons shall be considered an act of a state if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.

⁴⁴ ARSIWA Article 11, which provides that conduct which is not attributable to a state under Articles 4 – 10 shall nevertheless be considered an act of that state if and to the extent that the state acknowledges and adopts the conduct in question as its own.

governmental power. Its control over the 3 vital Ministries of Home Affairs, Defence, and Border Affairs makes for a unique case in which the military actually operates as an “*organ of the central government or of a territorial unit of the state*”, particularly in the border state of Rakhine. Moreover, this status as an organ is conferred by Myanmar’s internal law, i.e. its Constitution. This satisfies the first step of the test of direct attribution found in the *Bosnian Genocide* case.⁴⁵

In relation to (ii) above, should it be determined that the military is not a state organ, it is nonetheless empowered by Myanmar law to exercise elements of governmental authority, and the conduct in this case was clearly undertaken in that capacity, given the numerous instances in which the military and civilian leaders justified the military crackdown as a necessary response to the ARSA attacks.⁴⁶

In relation to (iii) above, the Inn Din massacre by members of the military may be perceived as an instance of exceeding its authority or contravening instructions. However, Article 7 of the ARSIWA makes it clear that if the conduct is that of a state organ or of a person or entity empowered to exercise elements of the governmental authority, such excess or contravention does not affect the attribution to the state.⁴⁷

In relation to (iv) and (v) above, and the involvement of Buddhist Rakhine men who participated in the atrocities, investigations and reports reveal a more sinister plot. These credible sources suggest that preparations for the assault on the Rohingya were well thought-out and planned, and began well before the ARSA attack on 25 August 2017. A BBC Report further discovered that the military had been training and arming the Rakhine Buddhists prior to the crackdown, offering them a chance to become “*part of the local armed police*”. This account was borne out by fleeing refugees who witnessed local men and boys, armed with the same weapons as the military, attacking the Rohingyas, burning their houses, and torturing them. The account is further buttressed by BBC journalist Jonathan Head, who witnessed first-hand Rakhine Buddhist mobs armed with military-issued weapons burning villages alongside the uniformed soldiers and police.⁴⁸

⁴⁵ *Bosnian Genocide* Case at Para 379.

⁴⁶ BBC News (14 November 2017), BBC News (25 January 2018(2)).

⁴⁷ Furthermore, it should be noted that while on the one hand, the military admitted that soldiers were involved and sentenced them to prison, the military nonetheless insisted that the massacred men were “*terrorists*”, suggesting the military’s view that the summary executions were justified.

⁴⁸ BBC News (19 September 2017).

Prior to the military crackdown as well, the Rohingya were first isolated, and their food supplies were cut-off. From early to mid-August 2017, massive military reinforcements had been flown in. This explained the military's overwhelming capability to conduct a systematic and immediate crackdown, as soon as the 25 August ARSA attacks took place.⁴⁹

In relation to the Inn Din massacre on 2 September 2017, despite claims by the military that the 10 men were militant "terrorists", no connection could be found between the slain men and terrorism. Instead, eyewitness accounts⁵⁰ had been that these men were randomly singled out while seeking refuge on the beach, and local villagers were told to dig a grave before the men were killed. At least 2 of the men were hacked to death by villagers upon the military's instructions, and the others shot dead by the military.⁵¹

The above facts point towards a finding that insofar as the atrocities were committed by the Buddhist Rakhine villagers, these were attributable to the military who, in turn, issued such instructions or exercised such control over the villagers. This satisfies the second step of the test of indirect attribution found in the *Bosnian Genocide* case.⁵²

Insofar as the atrocities were committed by the individual members of the police, military, and border guard patrol, it is clear that the military had not only "effective control", but "complete control" over such security forces, by virtue of the constitutional safeguards entitling the heads of the 3 vital Ministries to be appointed by the military. This clearly satisfies the test of degree of control in *Nicaragua*, and the test of "complete dependence" in *Bosnian Genocide*. It is also in line with James Crawford's observation that the conduct of military personnel while in uniform, as opposed to those while in civilian clothing and acting in their personal capacities, lean in favour of attribution to the state.⁵³

Even the US State Department, following a "careful and thorough analysis of available facts", determined that there was intent and planning behind the horrendous atrocities, leading then Secretary of State,

⁴⁹ BBC News (18 December 2017).

⁵⁰ Even from amongst the Buddhist Rakhine villagers.

⁵¹ Channel News Asia (11 April 2018), BBC News (8 February 2018).

⁵² *Bosnian Genocide Case* at Para 379.

⁵³ Crawford 2013(2) at 120.

Rex Tillerson, to conclude that the Myanmar military was directly involved.⁵⁴ Similarly, UN High Commissioner Al-Hussein has concluded that, “[g]iven the scale of the military operation, clearly these would have to be decisions taken at a high level”.⁵⁵

Taking the analysis a step further, by standing by and watching as the atrocities were committed,⁵⁶ and later seeking to justify them as coming within the umbrella of a necessary military crackdown against the ARSA, the military effectively acknowledged and adopted the conduct as its own, pursuant to the test in *Tehran Hostages*.

The writer pauses to note that the discussion thus far has not involved Myanmar’s civilian government, and for good reason. The conduct discussed so far largely involves the acts of atrocities themselves. However, the civilian government’s conduct which is the subject of breaches of international responsibility relates to omissions. In this regard, while the constraints of a civilian government forced to share power with the military are recognised, the civilian government nonetheless holds 75% of the Parliamentary seats. Apart from the 3 vital Ministries, the civilian government led by Suu Kyi makes all the important decisions for the State. Notably, it is the civilian Ministers who are responsible for negotiating the repatriation of refugees from Bangladesh, albeit under the watchful eye of the military.

Yet, despite the legal and moral authority of Suu Kyi as *de facto* leader, her indifference and lack of sincerity in addressing the human rights and IHL violations of the Rohingya have been disappointing at its best, and shocking at its worst. While portraying herself as an advocate for universal human rights, Suu Kyi’s hypocrisy is immediately palpable from her refusal to even acknowledge the Rohingya by their name, thereby betraying her belief that the Rohingya are not a people to whom such rights apply. This move of “stripping” the Rohingya of their name has been described by UN High Commissioner Al-Hussein as “dehumanising to the point where you begin to believe that anything is possible”.⁵⁷

⁵⁴ BBC News (22 November 2017), US State Department Statement (22 November 2017).

⁵⁵ BBC News (18 December 2017).

⁵⁶ BBC News (19 September 2017).

⁵⁷ BBC News (18 December 2017).

In her 19 September 2017 maiden speech on the Rohingya crisis, she flatly claimed that no violence or village clearances had occurred since 5 September 2017, despite satellite images continuing to capture fresh fires across Rakhine. Amnesty International branded her speech “a mix of untruths and victim-blaming”.⁵⁸ Senior US diplomat and long-time friend of Suu Kyi, Bill Richardson, resigned from an international advisory panel on Rakhine, calling the panel a “whitewash” and accusing Suu Kyi of lacking “moral leadership”. Richardson stated that he was “taken aback by the vigour” with which Suu Kyi had “disparaged” the media, the UN, human rights groups, and the international community during the 3 days of meetings.⁵⁹

By refusing to acknowledge the rights of the Rohingya, and wilfully turning a blind eye to the violent military campaign and atrocities committed against them, Suu Kyi’s civilian government has crossed the threshold into the realm of complicity or, at the very least, a lack of due diligence. As set out in the case of *Velásquez Rodríguez*, illegal acts that violate human rights but are initially not directly attributable to the state (or in this case, the civilian government of the State) may nonetheless lead to international responsibility because of “the lack of due diligence to prevent the violation or to respond to it as required by the Convention”.⁶⁰

In the present case, the civilian government’s:

- (i) Failure to keep the military government in check;
 - (ii) Failure to conduct inquiries and independent investigations;
 - (iii) Failure to put safeguards in place to protect the rights and interests of the Rohingya; and
 - (iv) Failure to take allegations of the Rohingya seriously,
- all amount to lack of due diligence.

(b) *Whether the Conduct Prima Facie Constitutes Breaches of International Obligations*

Having established that the various acts and omissions are attributable to the State of Myanmar, we now proceed to examine whether such conduct amounts to breaches of Myanmar’s international

⁵⁸ The Economist (21 September 2017).

⁵⁹ BBC News (25 January 2018(1)).

⁶⁰ *Velásquez Rodríguez* Case at Para 172.

obligations.⁶¹ In this regard, ARSIWA Article 12 provides that such a breach would be established when an act of the state is “*not in conformity with what is required of it by that obligation, regardless of its origin or character*”. This thus clarifies that obligations need not be found in treaties or conventions, and could arise under CIL.

Genocide

The strongest allegation and highest threshold of international breaches alleged against Myanmar is the allegation of genocide. Special Rapporteur on the Situation of Human Rights in Myanmar, Yanghee Lee, in her March 2018 Human Rights Council address said, “*I am becoming more convinced that the crimes committed following 9 October, 2016 and 25 August, 2017 bear the hallmarks of genocide and call in the strongest terms for accountability*”,⁶² while UN High Commissioner Al-Hussein, called the military crackdown in 2017 a “*textbook example of ethnic cleansing*”.⁶³ As further reports surfaced of the scale of atrocities targeted at the Rohingya, Al-Hussein subsequently told the Human Rights Council that genocide could not be ruled out.⁶⁴

From a social science perspective, genocide has been described to take place in 5 stages, all of which have been established in relation to the political and military campaigns against the Rohingya:⁶⁵

- (i) Stigmatisation;
- (ii) Harassment;
- (iii) Isolation;
- (iv) Systematic weakening; and
- (v) Mass annihilation.

From a legal perspective, however, the rules governing when acts amount to genocide are contained in the Genocide Convention, the provisions of which have now been duplicated in the Rome ICC Statute. While Myanmar is not a party to the latter, it is a party to the former, and is thus subject to

⁶¹ The proviso, “*prima facie*”, is used in this Section as the issue of circumstances precluding wrongfulness is examined in the next Section although, by definition, such circumstances, if established, would render otherwise wrongful acts not so.

⁶² The ASEAN Post (13 March 2018).

⁶³ The Economist (21 September 2017).

⁶⁴ BBC News (18 December 2017).

⁶⁵ The Economist (13 June 2015(1)).

its provisions, though the prohibition against genocide has long been regarded as a peremptory norm or *jus cogens* (a fact confirmed by the 2001 ILC Report and numerous judicial decisions).⁶⁶

Article II of the Genocide Convention makes it clear that the specified acts will only amount to genocide if committed “*with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*”.⁶⁷ Such specific intent was confirmed as a necessary requirement in the *Bosnian Genocide* case, where the ICJ held that:⁶⁸

- (i) Establishing deliberate unlawful killings was not enough, and there must be a specific intent to destroy the group as such in whole or in part. The intent must be to destroy that protected group.
- (ii) A mere discriminatory intent was not enough.
- (iii) “Genocide” and “crimes against humanity” were of the same genus, but genocide would only be established if the crimes against humanity were committed with that specific intent to destroy the group in whole or in part.
- (iv) “Ethnic cleansing” referred to “*rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from an area*”. It was essentially a deliberate deportation or displacement of persons belonging to a group.
- (v) But ethnic cleansing would not amount to genocide because:
 - (a) Deportation or displacement, even if effected by force, is not necessarily equivalent to destruction of that group.
 - (b) Destruction is not an automatic consequence of the deportation or displacement.
- (vi) Ethnic cleansing could constitute genocide where it involved “*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*” under Article II(c) of the Genocide Convention.

⁶⁶ 2001 ILC Report at 85.

⁶⁷ Article II provides for the following acts:

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

⁶⁸ Dunoff 2015 at 577 – 578.

The Court found that only the massacre of the 5,000 – 8,000 Bosnian men at Srebrenica in July 1995 constituted genocide, as it was committed with the intent to destroy the Bosnians in whole or in part. The other atrocities that took place during the Bosnian civil war did not. In any event, however, the acts were committed by a non-state actor, and Serbia was absolved of responsibility under the Genocide Convention for genocide, and conspiracy or complicity in genocide. As such, no damages were awarded as compensation to Bosnia.

In relation to the Rohingya, the relevant acts fall within Articles II(a) – (c) of the Genocide Convention. While the killings and causing of bodily and mental injury are easily made out, the writer contends that the violent military crackdown leading to the mass exodus of the Rohingya were a form of deliberate inflicting of conditions of life calculated to bring about the physical destruction of the group in whole or in part. In this regard, international aid agencies have reported that one-third of the refugees are not receiving a full ration of food, fewer than half of the 130,000-odd small children and pregnant mothers are getting enough to eat, and the unsanitary conditions in the camps make outbreaks of diseases likely.⁶⁹ Of the 650,000 refugees, nearly 200,000 are children, many of whom are malnourished and injured.⁷⁰ Conditions of the makeshift refugee camps are poor, with many shelters precariously perched on muddy hillsides and at the risk of being washed away during the monsoon season.⁷¹

As for whether the Rohingya constitute a protected group, citizenship or formal documentation is not a requirement. The Rohingya have their own language, religion, and culture,⁷² which qualifies them as an ethnic or religious group. This analysis is consistent with the ICTR for Rwanda's ("ICTR") dicta that *"the intention of the drafters of the Genocide Convention... was patently to ensure the protection of any stable and permanent group"*, not only the 4 listed. The ICTR defined such groups as where *"membership... would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner"*. The Rohingya certainly fall within such an interpretation.

⁶⁹ The Economist (21 October 2017).

⁷⁰ The Economist (19 October 2017)

⁷¹ BBC News (30 December 2017).

⁷² BBC News (25 January 2018(1)).

The problem arises in respect of the specific intent requirement. While it may be argued that the general intent of the military-led violence was to drive the Rohingya out of Myanmar, such mass displacement, while amounting to “ethnic cleansing”, may be insufficient to prove genocidal intent, pursuant to the principles in *Bosnian Genocide*. In the same vein, while the massacre in Inn Din was undoubtedly due to hatred for the Rohingya as a group, it is unlikely that a Court would find the mass murder of 10 men as establishing a specific intent to destroy the group as such in whole or in part.⁷³

Crimes Against Humanity & War Crimes

In the event that genocide cannot be made out against Myanmar, the writer nonetheless contends that it would be possible to establish responsibility for crimes against humanity and war crimes.

In relation to crimes against humanity, Article 7 of the Rome ICC Statute provides the list of acts which, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, amount to crimes against humanity.⁷⁴ It would appear that the atrocities against the Rohingya tick most, if not all, the boxes under Article 7, thereby amounting to clear instances of crimes against humanity. Additionally, the military, who conceived, directed, and oversaw the attacks, cannot thereby deny knowledge of the same.

⁷³ This is not to say that there is some “magic number” which would qualify as genocide. It is only an observation that to hold a state responsible for genocide is not an easy feat from a legal perspective, though the social science research establishes such methodical escalation suggesting intent.

⁷⁴ Article 7 provides for the following acts:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

More specifically, vis-à-vis the “*crime of apartheid*” which has been alluded to but not discussed in detail above, this is defined in Article 7(2) as “*inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime*”. There can be no better example of such systematic oppression than in the case of the Rohingya.

According to Amnesty International, the Rohingya have been “*trapped for decades in a vicious system of state-sponsored discrimination that satisfies the legal definition of apartheid*”.⁷⁵ It has stated that safe and dignified returns for the refugees are doubtful “*while a system of apartheid remains*”.⁷⁶

While the writer acknowledges that Myanmar is noticeably not a party to the Rome ICC Statute, these definitions of crimes against humanity have their roots in CIL, and were eventually codified in the 1945 Nuremberg Charter. Myanmar thus cannot hide behind being a non-signatory to avoid such obligations.

Similarly, in relation to war crimes, this is defined in Article 8 of the Rome ICC Statute, but has its roots in the 1949 Geneva Conventions codifying CIL in relation to the laws and customs of war (*jus in bello*). Notably, Myanmar is a party to the 1949 Geneva Conventions and 1977 Additional Protocols, and have clearly breached their obligations, at the very least:⁷⁷

- (i) To clearly distinguish at all times between civilian populations and objects, and military objectives;⁷⁸
- (ii) Not to target civilian populations and objects; and
- (iii) Not to inflict superfluous injury or unnecessary suffering.⁷⁹

In the circumstances, therefore, Myanmar is responsible for crimes against humanity and war crimes.

⁷⁵ Reuters (22 December 2017).

⁷⁶ BBC News (16 January 2018(1)).

⁷⁷ See in particular, Geneva Convention IV and Additional Protocol II, insofar as the provisions relation to conflicts not of an international character.

⁷⁸ For e.g. Rohingya civilians, houses, mosques, and property were clearly targeted.

⁷⁹ For e.g. the use of automatic weapons, mortars, grenades and landmines against Rohingya civilians.

(c) *Whether the Acts Were Committed in Circumstances Precluding Wrongfulness*

Myanmar has raised justifications for its military crackdown which appear to resemble self-defence⁸⁰ and necessity,⁸¹ both of which amount to “*circumstances precluding wrongfulness*” under Chapter V of the ARSIWA. However, as the international obligations involved (genocide, crimes against humanity, and war crimes) are textbook examples of peremptory norms,⁸² and Article 26 of the ARSIWA clearly states that “[n]othing in this chapter precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law”, these purported justifications are non-starters.

(d) *Whether Myanmar is Likely to be Held Responsible*

The above analysis paints a promising picture for the operation of the law of state responsibility against Myanmar, yet the writer must draw the unfortunate conclusion that Myanmar as a state is unlikely to be held responsible for the genocide, crimes against humanity, and war crimes. There are 2 broad reasons for this conclusion, which range from legal to political:

- (i) No state is likely to bring a case against Myanmar;
- (ii) ICJ jurisdiction will be difficult to establish; and
- (iii) Previous ICJ decisions suggest overly formalistic, onerous thresholds.

On (i), the problem of standing to bring a claim is the first hurdle. As individuals are not entitled to institute proceedings in the ICJ, the case must be brought by a state on behalf of wronged individuals. Given that Bangladesh has not identified with the Rohingya as an ethnic group of their own, nor shown any interest in conferring the refugees any legal status,⁸³ it is unlikely that Bangladesh would bring a claim on their behalf against Myanmar. Instead, Bangladesh’s concern all along has been to expedite a repatriation agreement, and to begin repatriation of the Rohingya back to Myanmar.⁸⁴ Additionally, apart from exploiting potential political capital, it is unclear what the upside for Bangladesh would be in bringing such a claim against Myanmar in the ICJ.

⁸⁰ ARSIWA Article 21.

⁸¹ ARSIWA Article 25.

⁸² 2001 ILC Report at 85.

⁸³ This despite Bangladesh having ratified the 1951 Convention on the Status of Refugees and 1954 Convention on the Status of Stateless Persons.

⁸⁴ BBC News (16 January 2018(1)).

Similarly, while the US has had strong words for Myanmar, and implemented unilateral sanctions against individuals from the military,⁸⁵ it has not expressed any desire to bring a case against Myanmar. This position is likely informed by the fact that bringing such a claim would alienate Russia and China, who have clearly expressed support for the Myanmar government. While the UNSC has issued a unanimous statement in September 2017 (the first time in 9 years in relation to Myanmar) calling for “*immediate steps to end the violence in Rakhine, de-escalate the situation, re-establish law and order, [and] ensure the protection of civilians*”, Russia and China clearly will not countenance a UNSC Resolution against Myanmar. This was evident from their votes against the UNGA Resolution on 24 December 2017 condemning the violence.⁸⁶

The problem of standing is compounded by the fact that ICJ jurisdiction would be difficult to establish. Given that Myanmar has not signed an Article 36(2) declaration accepting compulsory jurisdiction, jurisdiction must be established by way of a compromissory clause, *compromis*, or *forum prorogatum*. While the latter 2 require Myanmar’s consent which will not be given, the former raises its own set of difficulties. In respect of the Genocide Convention, Myanmar’s 1956 ratification included reservations against Articles VI and VIII. These reservations effectively preclude foreign courts and tribunals from exercising jurisdiction over Myanmar. While the efficacy of such preclusions is debatable (as possibly defeating the purpose of the Convention), they nonetheless evince Myanmar’s objections to jurisdiction, which could work in its favour as a “persistent objector”.

Furthermore, the ICJ’s formalistic approach to jurisdiction in the cases of *Belgium v Senegal* and *Marshall Islands* suggest that ICJ jurisdiction would be extremely difficult to establish. At the same time, the onerous thresholds for establishing genocide and attributing genocide to states in the *Bosnian Genocide* case and *Second Genocide* case do not bode well for the Rohingya.

For these reasons, the writer takes the view that the law of state responsibility would, regrettably, fail the Rohingya.

⁸⁵ Reuters (22 December 2017).

⁸⁶ The Guardian (24 December 2017).

III. OTHER INTERNATIONAL JUSTICE REGIMES

Given the above conclusion in relation to the law of state responsibility, the writer proceeds to examine whether the other international justice regimes will nonetheless rise to the aid of the Rohingya. However, as the brief nature of this Part will indicate, both individual criminal responsibility and humanitarian intervention at the international level are unlikely.

(a) *Individual Criminal Responsibility*

As one observer laments:⁸⁷

“In more than 70 years of recorded abuses by the Burmese armed forces, there are almost no records of military officers being disciplined in Rakhine State or in many other areas where armed conflicts continue inside the country. It is hard to see that happening now.”

While the military did eventually admit to wrongdoing on the part of a handful of its soldiers in the Inn Din massacre, sentencing them to “10 years in prison with hard labour in a remote area”,⁸⁸ this admission only came after photographic evidence of their involvement surfaced. On an even more cynical note, the writer posits that the military’s dispensing of such summary “justice” was a pre-emptive manoeuvre to avoid responsibility at an international level. By conducting its own internal investigation and dispensing its own justice, the military displayed savvy cognisance of the rule against double jeopardy or double claims.⁸⁹

More importantly, all of the following international tribunals were established by way of UNSC Resolutions, at the request of the state governments:

- (i) International Criminal Tribunal for the former Yugoslavia (ICTY);
- (ii) International Criminal Tribunal for Rwanda (ICTR);
- (iii) Special Court for Sierra Leone (SCSL); and
- (iv) Extraordinary Chambers in the Courts of Cambodia (ECCC).

This is unlikely to happen on both fronts for the Rohingya, as vetoes by Russia and China would prevent any UNSC Resolution, and the state government of Myanmar is unlikely to request for the

⁸⁷ BBC News (19 September 2017).

⁸⁸ Channel News Asia (11 April 2018).

⁸⁹ See also Articles 44(b) which acknowledges situations where a local remedy has been exhausted.

establishment of such a tribunal to prosecute crimes it denies were committed, against peoples it denies are citizens.

(b) Humanitarian Intervention

Finally, while the Rohingya crisis arguably meets the legal requirements of R2P,⁹⁰ any humanitarian intervention based on UNSC authorisation would be out of the question in light of the political stances of Russia and China. Additionally, from a more cynical (albeit justifiable) perspective, humanitarian interventions have generally only been resorted to where the “*advancement of big power’s interests*” are concerned.⁹¹ If this is true, it is unlikely that any major power will intervene on behalf of the Rohingya.

Moreover, the EU’s Fact-Finding Mission on the Georgia Conflict has cast doubt on the legality and application of R2P. The Report found that:⁹²

- (i) The legality of R2P in international law is suspect.
- (ii) If R2P is available under international law at all, it is only available through authorisation of the UNSC.
- (iii) R2P, if available under international law, would be a collective action. Unilateral intervention is not permitted.

For these reasons, assistance for the Rohingya through humanitarian intervention is unlikely to be forthcoming.

IV. CONCLUSION

The current Rohingya refugee crisis is “*one of the most rapid international movements of people in modern history, eclipsing in its intensity... Syrians’ flight from civil war over the past six years*”.⁹³ The actions of the Myanmar government’s policies in relation to the Rohingya have been described as “*a system of*

⁹⁰ Namely: (i) seriousness of threat; (ii) proper purpose; (iii) last resort; (iv) proportional means (v) balance of consequences. See Dunoff 2015 at 903, and the 3 pillars of implementation at 904.

⁹¹ Sornarajah (2014) at 300.

⁹² Dunoff 2015 at 905.

⁹³ The Economist (21 October 2017).

apartheid”,⁹⁴ while the military’s violent campaign against them have been labelled a “textbook example of ethnic cleansing”,⁹⁵ crimes against humanity, and genocide. The atrocities committed are reminiscent of those in Rwanda.⁹⁶ Yet, for various reasons ranging from legal to political, those truly responsible are unlikely to be held to account.⁹⁷

This unsatisfactory state of affairs is both gut-wrenching and unsurprising, in equal parts. While the phrase “never again” has been bandied about by international leaders on numerous occasions, unspeakable crimes have continued to occur, time and again.⁹⁸ And while it pains the writer to conclude as such, the law of state responsibility and the international justice system will likely fail the Rohingya as well.

V. BIBLIOGRAPHY

Materials Referenced in Paper

1. Agence France-Presse, “China and Russia Oppose UN Resolution on Rohingya”, *The Guardian* (24 December 2017) (Referred to in paper as “The Guardian (24 December 2017)”.)
2. Alex J Bellamy, “Protecting the Rohingya: Delivering on a Shared Responsibility”, *IPI Global Observatory* (12 June 2015) (Referred to in paper as “IPI Global Observatory (12 June 2015)”.)
3. BBC News, “Could Aung San Suu Kyi Face Genocide Charges”, *BBC News* (18 December 2017) (Referred to in paper as “BBC News (18 December 2017)”.)
4. BBC News, “How Aung San Suu Kyi Sees the Rohingya Crisis”, *BBC News* (25 January 2018) (Referred to in paper as “BBC News (25 January 2018(2))”.)
5. BBC News, “Myanmar ‘Militarising’ Rohingya Villages in Rakhine, Says Amnesty”, *BBC News* (12 March 2018) (Referred to in paper as “BBC News (12 March 2018)”.)
6. BBC News, “Myanmar Rohingya Militants ARSA Vow to Fight on After Attack”, *BBC News* (7 January 2018) (Referred to in paper as “BBC News (7 January 2018)”.)
7. BBC News, “Rohingya Abuses: Myanmar Army Report Clears Itself of Blame”, *BBC News* (14 November 2017) (Referred to in paper as “BBC News (14 November 2017)”.)

⁹⁴ BBC News (16 January 2018(1)).

⁹⁵ The Economist (21 September 2017).

⁹⁶ The Economist (19 October 2017).

⁹⁷ It should be noted that as at the date of this paper, the ICC Prosecutor has petitioned the ICC to opine on whether it has jurisdiction over Myanmar’s mass deportation of the Rohingya (though not over its acts of genocide and crimes against humanity). It remains to be seen if this attempt will succeed. See Reuters (10 April 2018).

⁹⁸ For a commentary on possible reasons why IHL continues to be violated, see excerpts from Peter Malanczuk in Dunoff 2015 at 500 – 501.

8. BBC News, "Rohingya Crisis: Are Suu Kyi's Rohingya Claims Correct?", *BBC News* (19 September 2017) (Referred to in paper as "BBC News (19 September 2017)".)
9. BBC News, "Rohingya Crisis: Bangladesh and Myanmar Agree Repatriation Timeframe", *BBC News* (16 January 2018) (Referred to in paper as "BBC News (16 January 2018(1))".)
10. BBC News, "Rohingya Crisis: Myanmar Army Admits Killings", *BBC News* (10 January 2018) (Referred to in paper as "BBC News (10 January 2018)".)
11. BBC News, "Rohingya Crisis: Myanmar Postpones Diplomats' Rakhine Visit", *BBC News* (28 September 2017) (Referred to in paper as "BBC News (28 September 2017(1))".)
12. BBC News, "Rohingya Crisis: Reuters Journalists Held 'for Investigation Myanmar Killings'", *BBC News* (8 February 2018) (Referred to in paper as "BBC News (8 February 2018)").)
13. BBC News, "Rohingya Crisis: UN Chief Warns of 'Humanitarian Nightmare'", *BBC News* (28 September 2017) (Referred to in paper as "BBC News (28 September 2017(2))".)
14. BBC News, "Rohingya Crisis: UN Rights Chief 'Cannot Rule Out Genocide'", *BBC News* (5 December 2017) (Referred to in paper as "BBC News (5 December 2017)").)
15. BBC News, "Rohingya Crisis: US Diplomat Quits Advisory Panel", *BBC News* (25 January 2018) (Referred to in paper as "BBC News (25 January 2018(1))".)
16. BBC News, "Rohingya Refugee Horror Stories 'Beyond Comprehension'", *BBC News* (30 December 2017) (Referred to in paper as "BBC News (30 December 2017)").)
17. BBC News, "Rohingya Villages Destroyed 'to Erase Evidence'", *BBC News* (23 February 2018) (Referred to in paper as "BBC News (23 February 2018)").)
18. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, ICJ Judgment on Merits of 27 June 1986 (Referred to in paper as "Nicaragua Case".)
19. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Judgment of 26 February 2007 (Referred to in paper as "Bosnian Genocide Case".)
20. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, ICJ Judgment on Merits of 3 February 2015 (Referred to in paper as "Second Genocide Case".)
21. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Judgment of 24 May 1980 (Referred to in Paper as "Tehran Hostages Case".)
22. Constitution of the Republic of the Union of Myanmar (2008) (Referred to in paper as "2008 Myanmar Constitution" or "2008 Constitution".)
23. Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Referred to in paper as "Genocide Convention".)
24. Convention Relating to the Status of Refugees (1951) (Referred to in paper as "Convention on the Status of Refugees".)
25. Convention Relating to the Status of Stateless Persons (1954) (Referred to in paper as "Convention on Status of Stateless Persons".)
26. Darwin Peng, "Understanding Aung San Suu Kyi's Silence on the Rohingya", *Harvard Political Review* (21 February 2017) (Referred to in paper as "Harvard Political Review (21 February 2017)").)

27. Dr Maha Hosain Aziz, "How ISIS Could Destroy Myanmar", *Huffington Post* (22 July 2015) (Referred to in paper as "Huffington Post (22 July 2015)".)
28. Eijas Ariffin, "ASEAN's Responsibility in the Rohingya Crisis", *The ASEAN Post* (13 March 2018) (Referred to in paper as "The ASEAN Post (13 March 2018)".)
29. Geneva Conventions, Specifically Geneva Convention IV – Relative to the Protection of Civilian Persons in Time of War (1949) (Referred to in paper as "Geneva Conventions".)
30. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) (Referred to in paper as "Convention on Apartheid".)
31. International Covenant on Civil and Political Rights (1966) (Referred to in paper as "ICCPR".)
32. International Covenant on Economic, Social and Cultural Rights (1966) (Referred to in paper as "ICESCR".)
33. International Crisis Group Asia Report No. 292 – Myanmar's Rohingya Crisis Enters a Dangerous New Phase (7 December 2017) (Referred to in paper as "ICG Report (7 December 2017)".)
34. International Law Commission Articles on Responsibility of States for International Wrongful Acts (2001) (Referred to in paper as "ILC Articles" or "ARSIWA".)
35. International Military Tribunal Charter (1945) (Referred to in paper as "Nuremberg Charter".)
36. James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) (Referred to in paper as "Crawford 2013(2)".)
37. Jeffrey L Dunoff, Steven R Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach*, 3rd Ed. (Wolters Kluwer Law & Business, 2015) at Chapter 14. (Referred to in paper as "Dunoff 2015".)
38. M Sornarajah, "The Role of the BRICS in International Law of the Multipolar World" in Vai Io Lo and Mary Hiscock, Eds., *The Rise of the BRICS in the Global Political Economy* (Cheltenham: Edward Elgar Publishing Limited, 2014), 288 – 307 (Referred to in paper as "Sornarajah (2014)".)
39. Mark Landler, "Myanmar's Crackdown on Rohingya is Ethnic Cleansing, Tillerson Says", *The New York Times* (22 November 2017) (Referred to in paper as "The New York Times (22 November 2017)".)
40. *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, ICJ Judgment of 5 October 2016 (Referred to in paper as "Marshall Islands Case".)
41. Protocol Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977) (Referred to in paper as "Additional Protocol II".)
42. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Judgment of 20 July 2012 (Referred to in paper as "Belgium v Senegal Case".)
43. Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), Document A/56/10 (Referred to in paper as "2001 ILC Report".)

44. Reuters, "Myanmar Police 'Set Up' Reuters Reporters in Sting: Police Witness", *Reuters* (21 April 2018) (Referred to in paper as "Reuters (21 April 2018)".)
45. Reuters, "Rohingya Crisis: US Sanctions Myanmar General, Dozens of Others Over Rights Abuses", *Reuters* (22 December 2017) (Referred to in paper as "Reuters (22 December 2017)".)
46. Reuters, "Seven Myanmar Soldiers Sentenced to 10 Years for Massacre Exposed by Reuters", *Channel News Asia* (11 April 2018) (Referred to in paper as "Channel News Asia (11 April 2018)".)
47. Reuters, "War Crimes Prosecutor Seeks Jurisdiction Over Rohingya Deportations", *Reuters* (10 April 2018) (Referred to in paper as "Reuters (10 April 2018)".)
48. Rome Statute of the International Criminal Court (1998) (Referred to in paper as "Rome ICC Statute".)
49. *The Corfu Channel Case*, ICJ Judgment on Merits of 8 April 1949 (Referred to in paper as "*Corfu Channel Case*".)
50. The Economist, "A Peace Prize, But No Peace: Aung San Suu Kyi Fails to Calm Myanmar's Ethnic Violence", *The Economist* (24 December 2016) (Referred to in paper as "The Economist (24 December 2016)".)
51. The Economist, "Daily Chart: The Flow of Rohingya Refugees into Bangladesh Shows No Sign of Abating", *The Economist* (19 October 2017) (Referred to in paper as "The Economist (19 October 2017)".)
52. The Economist, "Daily Chart: The Rohingya Refugee Crisis is the Worst in Decades", *The Economist* (21 September 2017) (Referred to in paper as "The Economist (21 September 2017)".)
53. The Economist, "Going Along with a Pogrom: Aung San Suu Kyi and Her Foreign Admirers Must Help the Rohingyas", *The Economist* (9 September 2017) (Referred to in paper as "The Economist (9 September 2017(2))".)
54. The Economist, "No Respite: Not Nearly Enough is Being Done for the Rohingyas Fleeing Myanmar", *The Economist* (21 October 2017) (Referred to in paper as "The Economist (21 October 2017)".)
55. The Economist, "The Rohingyas: Apartheid on the Andaman Sea", *The Economist* (13 June 2015) (Referred to in paper as "The Economist (13 June 2015(2))".)
56. The Economist, "The Rohingyas: The Most Persecuted People on Earth?", *The Economist* (13 June 2015) (Referred to in paper as "The Economist (13 June 2015(1))".)
57. UNGA Resolution 72/248 – The Situation of Human Rights in Myanmar (24 December 2017) (Referred to in paper as "UNGA Resolution 72/248".)
58. US Department of State Diplomacy in Action Press Statement by Secretary of State, Rex W Tillerson (22 November 2017) (Referred to in paper as "US State Department Statement (22 November 2017)".)
59. *Velásquez Rodríguez Case* (1988), Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (Referred to in paper as "*Velasquez Rodriguez Case*".)

Background Materials Consulted:

60. Agence France-Presse, "Draft UN Resolution Pressures Myanmar Over Rohingya Crisis", *The Daily Mail* (25 October 2017)
61. Amnesty International News, "UN Security Council: End Disgraceful Inaction on Myanmar Rohingya Crisis", *Amnesty International News* (12 November 2017)
62. BBC News, "Myanmar Rohingya Crisis: US Withdraws Military Assistance", *BBC News* (24 October 2017)
63. BBC News, "Myanmar Rohingya: What You Need to Know About the Crisis", *BBC News* (16 January 2018)
64. BBC News, "Rohingya Crisis: Humanitarian Situation Catastrophic, UN Says", *BBC News* (14 September 2017)
65. BBC News, "Rohingya Crisis: Military Build-up on Myanmar Border with Bangladesh", *BBC News* (1 March 2018)
66. BBC News, "Rohingya Crisis: Myanmar's Suu Kyi Visits Troubled Rakhine", *BBC News* (2 November 2017)
67. BBC News, "Rohingya Crisis: UN Envoy Says Refugees Facing 'Forced Starvation'", *BBC News* (6 March 2018)
68. BBC News, "Rohingya Crisis: US Calls Myanmar Action 'Ethnic Cleansing'", *BBC News* (14 September 2017)
69. Charlie Campbell, "Cambodia's Khmer Rouge Trials are a Shocking Failure", *Time* (13 February 2014)
70. Charter of the United Nations (1945)
71. Christine Gray, "The Different Forms of Reparation: Restitution", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
72. David I Steinberg, "US Sanctions Not the Solution to Rohingya Crisis", *The Straits Times* (27 November 2017)
73. Dr Noel Morada, "Is ASEAN the Solution to the Rohingya Crisis?", Australian Institute of International Affairs (26 September 2017)
74. Fourth Report of the Special Rapporteur, Mr James Crawford (2 and 3 April 2001), Document A/CN.4/517 and Add.1
75. Gordon A Christenson, "Attributing Acts of Omission to the State" (1991) 12 *Michigan Journal of International Law* 312 – 370
76. James Crawford, "International Crimes of States", James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
77. James Crawford, "Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Wrongful Acts", in U Fastenrath et al, Eds., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 224 – 240

78. James Crawford, "The International Court of Justice and the Law of State Responsibility", Christian J Tams & James Sloan, Eds., *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013)
79. James Crawford, *Brownlie's Principles of Public International Law*, 8th Ed. (Oxford: Oxford University Press, 2012)
80. James Crawford, Summary on Articles on Responsibility of States for International Wrongful Acts (2012), available online: <http://legal.un.org/avl/ha/rsiwa/rsiwa.html>
81. Jean-Marc Thouvenin, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
82. Joe Freeman, "Aung San Suu Kyi Sidesteps Atrocity Allegations in First Address on Rohingya Crisis", *The Washington Post* (19 September 2017)
83. John Barker, "The Different Forms of Reparation: Compensation", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
84. Jonah Blank and Shelly Culbertson, "How the US Can Help Resolve the Rohingya Crisis", *RAND Commentary* (5 January 2018)
85. Kimberley N Trapp, "Of Dissonance and Silence: State Responsibility in the Bosnian Genocide Case" (2015) 62 *Neth Int Law Rev* 243 – 257
86. Kimberly N Trapp, "Can Non-State Actors Mount an Armed Attack?" in M Weller, Ed., *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 679 – 696
87. Lau Seng Yap, "UN's Futile Effort to Engage Myanmar on the Rohingya Crisis", *The Diplomat* (9 November 2017)
88. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004
89. M Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59(4) *Law and Contemporary Problems* 63 – 74
90. Maja Ménard, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
91. Michelle Nicols, "US Urges UN to Hold Myanmar Military Accountable for 'Ethnic Cleansing'", *Reuters* (13 February 2018)
92. Montevideo Convention on the Rights and Duties of States (1933)
93. Office of the United Nations High Commissioner for Human Rights, "Myanmar: UN Security Council Must Act on Rohingya Crisis – UN Expert", *OHCHR News* (26 October 2017)
94. Office of the United Nations High Commissioner for Human Rights, "Human Rights Council Opens Special Session on the Situation of Human Rights of the Rohingya and Other Minorities in Rakhine State in Myanmar", *OHCHR News* (5 December 2017)
95. Olivier Corten, "The Obligation of Cessation", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
96. Reuters, "UN Chief 'Shocked' by Top Myanmar General's Comments on Rohingya", *The New York Times* (27 March 2018)

97. Richard C Paddock, "Rohingya Militants in Myanmar Claim Responsibility for Attack", *The New York Times* (7 January 2018)
98. Ryan Goodman & Vladyslav Lanovoy, "State Responsibility for Assisting Armed Groups: A Legal Risk Analysis", *www.justsecurity.org* (22 December 2016)
99. Sandrine Barbier, "Assurances and Guarantees of Non-Repetition", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
100. Sarah Heathcote, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity", in James Crawford et al, Eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010)
101. Simran Nayak, "Double Trouble: International Law Failing the Rohingyas", *Brown Political Review* (27 October 2017)
102. The Economist, "A Hiding to Nothing: Aung San Suu Kyi's Ideas About Curbing Attacks on Rohingyas Won't Work", *The Economist* (14 September 2017)
103. The Economist, "Scorched Earth: A State-Led Massacre Triggers an Exodus of Rohingyas from Myanmar", *The Economist* (9 September 2017)
104. The Editorial Board of the New York Times, "'Never Again,' Holocaust Museum Tells Burmese Leader", *The New York Times* (11 March 2018)
105. UN News, "UN Security Council Calls on Myanmar to End Excessive Military Force in Rakhine State", *UN News* (7 November 2017)
106. UN Secretary-General's Report on Children and Armed Conflict in Myanmar (22 December 2017)
107. UNGA Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (8 September 2017)
108. UNGA Resolution 2526 – Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations
109. UNGA Resolution 3314 – Definition of Aggression (14 December 1974)
110. UNHCR Joint Statement on the Rohingya Refugee Crisis (16 October 2017)
111. Universal Declaration of Human Rights (1948)
112. UNSC Briefing by High Commissioner for Refugees (Filippo Grandi) and Assistant Secretary-General for Political Affairs (Miroslav Jenča) on The Situation in Myanmar (13 February 2018)
113. UNSC Briefing by UN Secretary-General (António Guterres) on The Situation in Myanmar (28 September 2017)
114. UNSC Briefing by Under-Secretary-General for Political Affairs (Jeffrey Feltman) and Special Representative for Sexual Violence in Conflict (Pramila Patten) on The Situation in Myanmar (12 December 2017)
115. UNSC Draft Resolution of the UK and US on Myanmar (12 January 2007)
116. UNSC Report, Chronology of Events on Myanmar, available online: <http://www.securitycouncilreport.org/chronology/myanmar.php>
117. UNSC Statement by the President of the Security Council (6 November 2017)

118. Vienna Convention on the Law of Treaties (1969)
119. Vincent A Auger, "Will Anyone Protect the Rohingya?", *The Conversation* (25 October 2017)