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Pathways to Justice for 'Atrocity Crimes' in Myanmar: Is There Political Will?

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Abstract

What instruments and mechanisms are available to harness the 'political will' to pursue justice for the allegations of 'atrocity crime' in Rakhine, Myanmar? Analysing country's ratification trend, declarations upon ratification on relevant global instruments, and interactions with the UN on human rights issues, this paper reveals the 'mind' of Myanmar and its obligations. Exploring the mechanism of four International Crime Tribunals (ICTs), it outlines the pathways to pursue justice. Revealing the inadequacies of current actions by key state actors resulting in invidious outcomes that privilege impunity for atrocity crimes, the paper suggests ways to harness the political will to pursue justice. This paper contends that the establishment of an ICT for the trial of atrocity crimes in Rakhine (ICTM-R) would be best facilitated by: a consensus mandate to prosecute individuals and not the state; precisely defined jurisdiction; and provisions to integrate the host nation's apparatus, buttressed by the advocacy of the right groups and media.

Keywords

atrocity crime – Myanmar – International Crime Tribunals – Rohingya – culture of impunity

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As the dust begins to settle,[1] the bone-chilling accounts of the Rohingyas facing 'excessive violence', 'serious violations of human rights'[2] and 'ethnic cleansing'[3] demand that the allegations are investigated, and the perpetrators are held accountable to end the culture of impunity in Myanmar. Despite the contested labelling,[4] investigating the allegations of atrocity crimes is essential for national reconciliation and to restore 'international legality and the faith of the world community in the triumph of justice and reason'—as stressed by the Russian envoy during a similar crisis in former Yugoslavia.[5] But how can we pursue justice for atrocity crimes in the absence of the willingness of either the state or the United Nations Security Council (UNSC)? What mechanisms and instruments are available and how are those applicable in the Myanmar context? The paper seeks to answer these questions exploring the existing scholarship and experiences. First, the paper outlines the definitions of genocide, war crimes, the crime against humanity and ethnic cleansing (that is, atrocity crimes) to reveal the boundaries set by the global instruments for establishing political and individual criminal responsibility. Exploring the mandates of the International

1 At the time of writing, Myanmar has signed an agreement with Bangladesh to take back the refugees in an effort to 'settle the dust'. However, the move has been described as 'play for the galleries'. See Moe Myint, 'Myanmar, Bangladesh to Begin Repatriating Refugees in January', *The Irrawaddy*, 20 December 2017; and Arunabh Saikia, 'Rohingya refugee crisis: It's not Muslims versus Buddhists, says writer Bertil Lintner' 10 December 2017, https://scroll.in/article/860053/rohingya-refugee-crisis-its-not-muslims-versus-buddhists-says-writer-bertil-lintner, accessed 29 December 2017.

2 As stated by the UN Secretary-General, S/PV.8060, 28 September 2017, p. 2.

3 See press statement by Rex W. Tillerson, Secretary of State, U.S. Department of State, 'Efforts to Address Burma's Rakhine State Crisis', 22 November 2017, https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275848.htm, accessed 30 December 2017.

4 See Thu Thu Aung, 'Govt Information Committee Objects to UN Terminology on Rakhine', *The Irrawaddy*, 27 September 2017; Poppy McPherson, 'A lot of "fake news": Burmese back Aung San Suu Kyi on Rohingya crises', *The Guardian*, 20 September 2017; Michael Shafi, 'Myanmar treatment of Rohingya looks like "textbook ethnic cleansing", says UN', *The Guardian*, 11 September 2017; Jonathon Head, 'Who is burning down the Burmese Villages?', *BBC News*, 11 September 2017; Euan McKirdy, Rebecca Wright and Z. Saeed, 'There is "genocide going on there": Rohingya huddle on Bangladesh border', *CNN*, 4 September 2017; Harriet Agerholm, 'Burma soldiers burning bodies of Rohingya Muslims to conceal evidence', *The Independent*, 4 September 2017.

5 See S/PV.3217, 25 May 1993, p. 44. For a historical account of how civilian immunity has operated to shape responses to actual cases, see Alex J. Bellamy, 'Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity', *Human Rights Quarterly,* 34: 927–958 (2012). For a persuasive account of the legacy of impunity in Myanmar, see Sally Kantar, 'The Myanmar Military's Legacy of Impunity', 14 December 2017, https://www.foreignaffairs.com/articles/burma-myanmar/2017-12-14/myanmar-militarys-legacy-impunity, accessed 24 January 2018.

Crime Tribunals (ICTs) in former Yugoslavia, Rwanda, Sierra Leone, and Cambodia, the paper reveals that individual criminal responsibility has been the primary focus for atrocity crimes. Second, to reveal the 'mind' of Myanmar and its potential obligations, the paper examines the ratifications, declarations upon ratifications of relevant instruments and interaction of Myanmar with the UN on human rights issues. Third, exploring the process of establishing the four ICTs, the paper reveals the centrality of political will and outlines three pathways for establishing an ICT for the atrocity crimes in Rakhine, Myanmar (ICTM-R). It shows that international political will has often triumphed and shaped the host nation's willingness to pursue justice. Fourth, analysing the current ideational and material incentives/disincentives to Myanmar the paper outlines their inadequacies and suggests ways to harness the willingness of the key actors. Consequently, the paper suggests that a precisely defined jurisdiction, strong advocacy, a consensus mandate to prosecute individuals and not the state, and provisions to integrate host nation's institutional apparatus and judicial wisdom is the way forward to establish the ICTM-R.

Methodology and Scope

The research is based on content analysis of relevant UN documents; it includes examining: the relevant resolutions, statements, reports, and letters by state actors, UN agencies, expert commissions, Civil Society Organisations' (CSOs) reports on the human rights issues in Myanmar and the declarations upon ratifications of relevant instruments by states. The data, text and commentary are from official websites, credible media outlets, peer-reviewed journals and scholars including sources from Myanmar. The paper is *not* a historical account of Myanmar's politics and conflict. However, based on the overwhelming evidence, the paper is inclined to the view that a prima facia case of atrocity crimes being committed exists in the context of Rakhine[6] and aims to explore the processes and mechanisms needed to pursue justice.

Atrocity Crimes Defined

The collective wisdom of the international community identifies three grave crimes—genocide, crimes against humanity and war crimes—as 'atrocity

6 Yale Law School, 'Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?' A legal analysis prepared by Allard K. Lowenstein International Human Rights Clinic, Yale Law School, for Fortify Rights, October 2015, https://law.yale.edu/system/files/

crimes'.[7] The ambit of atrocity crimes was extended to include 'ethnic cleansing' following the pledge by all UN member states on the Responsibility to Protect (R2P) during the 2005 World Summit at UN General Assembly (UNGA).[8] All these crimes are legally defined in various conventions and statutes, in particular, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: Genocide Convention). In it, 'genocide' is defined as any act committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Such action may include (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.[9] It recognises that, even though the victims of the crimes are individuals, they are targeted because of their membership, real or perceived, in one of the groups. 'Crimes against humanity' encompasses acts that are part of a widespread or systematic attack directed against any civilian population.[10] The Rome Statute lists eleven such crimes. These include murder, extermination, enslavement, deportation/forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape/sexual slavery/enforced prostitution/forced pregnancy/enforced sterilisation/any other form of sexual violence of comparable gravity, political, racial, national, ethnic, cultural, religious persecution, enforced disappearance, crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[11] However, for an act to be regarded as a crime against humanity, the ultimate *target* must be the civilian population. Finally, 'war crimes' are defined as crimes committed against combatants or non-combatants in international or non-international armed conflicts.[12] In international armed conflicts, victims

documents/pdf/Clinics/fortifyrights.pdf, accessed 30 December 2017; and Kantar, 'The Myanmar Military's Legacy of Impunity: How the Rohingya Crisis Fits a Historical Pattern'.

7 David Scheffer, 'Genocide and Atrocity Crimes', *Genocide Studies and Prevention*, 1/3: 229–250 (December 2006), p. 237 and 'Framework of Analysis for Atrocity Crimes: A Tool for Prevention', http://www.un.org/en/preventgenocide/adviser/pdf/framework/, accessed 30 September 2017, pp. 1–3

8 See A/RES/60/1, 16 September 2005, p. 30.

9 See Article II, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter Genocide Convention).

10 See Article 7, the Rome Statute of the International Criminal Court, 1998. Myanmar is not party.

11 Ibid.

12 For details of war crimes see Article 8, Ibid.

include those specifically protected by the four 1949 Geneva Conventions.[13] In non-international armed conflicts, common Article 3 of the four Geneva Conventions affords protection to 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause'.[14] Additionally, it includes protection for medical and religious personnel, humanitarian workers and civil defence staffs in both types of conflicts.

'Ethnic cleansing' does not have a legal definition.[15] However, a working definition was first introduced by the UN Commission of Experts investigating the violations of international humanitarian law committed in the territory of former Yugoslavia (hereafter: Commission of Experts). They defined ethnic cleansing as 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.'[16] The R2P document extends the realm of atrocity crimes to include ethnic cleansing, requiring all states, regional organisations and the UN system 'to give a doctrinal, policy and institutional life' to prevent and respond to such crime.[17] The acts codified as ethnic cleansing are similar to acts listed as genocide and crime against humanity. They also include confinement of civilian population in ghetto areas, displacement and deportation, deliberate military attacks or threats of attacks on civilians and civilian areas, use of civilians as human shields, destruction of property, robbery of private property, attacks on hospitals, medical personnel, and locations with the Red Cross/Red Crescent emblem.

Despite such well-defined boundaries, every mass killing evokes an emotive political use of these terms. However, the political depiction of atrocity crimes is not necessarily conflicting and irreconcilable with the legal-empirical depiction. The former is often a part of preventive strategy while the latter

13 Four Geneva Conventions accord protection to the (a) wounded and sick in armed forces in the field, (b) shipwrecked members of https://ihl-databases.icrc.org/ihl/WebART/375-590006 https://ihl-databases.icrc.org/ihl/WebART/375-590006 armed forces at sea, (c) prisoners of war, (d) civilian persons, including in occupied territory. Myanmar is party to all four Conventions since 25 August 1992.

14 See for details, Geneva Convention, Article 3 (1), 'Conflicts not of an international character', https://ihl-databases.icrc.org/ihl/WebART/375-590006, accessed 30 September 2017.

15 See UN Office on Genocide Prevention and the Responsibility to Protect, 'Ethnic Cleansing', http://www.un.org/en/genocideprevention/ethnic-cleansing.html/, accessed 30 September 2017.

16 See S/1994/674, 27 May 1994, p. 33.

17 Several UN documents highlight the implementations strategy of the R2P to protect the populations from atrocity crimes. For example, A/63/677, 12 January 2009, p. 4.

requires gathering systemic data, facts, and evidence leading to the indictment, prosecution, and trial of the perpetrators. The legal codification helps to separate the emotive-political part from the the empirical-legal account. Thus, the difference between political and legal versions collapses when the allegation of atrocity crimes is meticulously investigated, evidence is systematically recorded and documented to pursue justice. State actors with the capacity and willingness to ensure the rule of law and justice can provide such separation. But such ideal conditions do not always exist. So what instruments and mechanisms are available to hold the state and the individuals accountable for atrocity crimes?

State Responsibility

According to the Genocide Convention, a state or its organs may be held accountable for committing genocide. The state's responsibility stems not only from its direct involvement but also from failing to prevent any of its organs from committing acts of genocide.[18] R2P is not legally binding but enables the invocation of the genocide doctrine against a state actor. It provides an accepted set of frameworks to guide effective international responses to imminent or occurring atrocity crimes. The R2P provisions are based on two core principles. First, upholding the sovereignty norm, R2P recognise that the primary responsibility for preventing atrocity crimes lies with the state. Second, if the state is unable/unwilling to stop such crime, the principle of non-intervention yields to the international community's responsibility to protect.[19] A state that has 'manifestly failed' to protect its population can face a 'timely and decisive' external intervention.[20] The R2P document suggests that a 'large-scale ethnic cleansing, when carried out by killing, forced expulsion, acts of terror or rape',

18 See Article I of the Genocide Convention. For details in Myanmar context, see Yale Law School, 'Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?' pp. 37–62. And Harvard Law School, 'Crimes in Burma', http://hrp.law.harvard.edu/wp-content/uploads/2009/05/Crimes-in-Burma.pdf, accessed 30 December 2017, pp. 21–74.

19 International Commission for Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001), pp. xii–xiv. Between January 2006 – December 2017, total 67 UNSC resolutions refer to the R2P. See, 'UN Security Council Resolutions and Presidential Statements Referencing R2P', 22 Jan 2018, http://www.globalr2p.org/resources/335, accessed 30 January 2018.

20 A/RES/60/1, 16 September 2005, p. 30

would constitute a valid condition at which state's sovereignty might yield to the international community. The nature of intervention could be diplomatic, humanitarian, coercive sanctions or in extreme cases military action, often to establish safe zones to save lives.[21] Viewed these way, the R2P provisions appears not an abrogation of state's sovereignty, but a commitment and resolve of the global community to protect humanity and to strengthen host nations' capacity and willingness to prevent irreparable harm and large-scale loss of life within its population.

However, R2P is also viewed as an interventionist political instrument due to its selective use and practical challenges.[22] Establishing that the state has 'manifestly failed' to protect its population is almost always contested. Evidence presented in the UNSC to invoke R2P provisions in the past have been found to be partial, conflated or conflicting. The UNSC's public debate on the Rohingya issue on 29 September 2017 also contained a competing account of the issue. The statement by the Russian envoy did not have any mention of the acts by Myanmar security forces and their supporting militias as documented in the reports, satellite images, and statements of the victims by the UN agencies, right groups, and credible media.[23] Echoing Myanmar's statement, the Russian envoy only cited the attack by the Arakan Rohingya Salvation Army (ARSA) on security forces and blamed them for 'massacre of civilians' and arson attacks 'on entire villages'.[24] He also suggested being 'very precise' if terming the crisis as 'genocide' and 'ethnic cleansing'.

The selective choice of evidence at the UNSC reflects the challenge of separating the individual perpetrators from the state in order to attribute political responsibility. A contrasting account of the event at the UNSC weakens the normative legitimacy of the R2P. As a result of this, the UNSC has been inconsistent in its decision making and international action under R2P has been rare

21 According to ICISS, *The Responsibility to Protect*, (p. xii), the military option is an 'exceptional and extraordinary measure' and can only be justified to prevent 'serious and irreparable harm' such as large-scale loss of life, 'ethnic cleansing' occurring or imminently likely to happen.

22 The R2P document (*Ibid*., p. 70) notes that '…faced with conscience-shocking situations, [the UNSC] failed to respond as it should have with timely authorisation and support'. Also, see David Chandler, 'The Responsibility to Protect? Imposing the "Liberal Peace"', *International Peacekeeping*, 11/1: 59–81 (2004), pp. 65–68; Philip Cunliffe, *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (New York: Routledge, 2011), pp. 51–70.)

23 Jonathon Head, 'Who is burning down the Burmese Villages?'

24 S/PV.8060, 28 September 2017, p. 15.

and controversial.[25] Thus, harnessing the political will of the key state actors is integral to the pursuit of justice as it allows to focus on the criminal responsibility of perpetrators and their commanders.

Individual and Command Responsibility

Most human rights instruments focus on an individual's criminal responsibility to prevent atrocity crimes. For example, Article IV of the Genocide Convention states: '*Persons* committing genocide…shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' Article V of the same convention underpins the criminal liability of individuals, requiring states to enact the necessary legislation to provide 'effective penalties for persons guilty of genocide or any of the other acts enumerated in article III'.[26] Thus, provision to hold an individual criminally liable is fundamental to the legal regime on atrocity crimes, in addition to state responsibility to enable their prosecution in a Court duly constituted for such purpose.[27]

Establishing *command responsibility* is also integral to deter atrocity crimes and requires establishing the criminal-intent of individual commanders. However, in most cases, the political or military leadership denies their knowledge about their subordinates and what they were doing at a particular time. Thus, it is necessary to gather specific information on what the commander knew and what s/he did with that information. The Commission of Experts outlined several indices to determine command responsibility.[28] These include the (i) number, type and scope of illegal acts; (ii) time during which the illegal acts occurred; (iii) number and type of troops and logistics involved

25 The inconsistency regarding applications of R2P was most evident in Darfur and Syria. See Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect', November / December 2002, https://www.foreignaffairs.com/articles/2002-11-01/responsibility-protect, accessed 25 January 2018; and Neville F. Dastoor, 'The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect', *Harvard Human Rights Journal*, 22/1: 25–62, (2009), p. 31.

26 The acts under Article III includes (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

27 See David Scheffer, *Genocide and Atrocity Crimes*, p. 239.

28 The doctrine of command responsibility mainly applies to military commanders but may also include political leaders and public officials. See Article 28 of the Rome Statute and S/1994/674, 27 May 1994, pp. 16–27.

(iv) geographical location of the acts; (v) widespread occurrence of the acts; (vi) tactical tempo of operations; (vii) modus operandi of similar illegal acts; (viii) officers and staff involved; and (ix) location of the commander at the time of the occurrence. Such information is critical to determine the criminal-intent of the commander and help in deciding the command responsibility during any prosecution.

The emphasis on the individual's criminal liability and command responsibility is evidenced by the mandates of the ICTs for the trial of atrocity crimes committed in former Yugoslavia (ICTY), Rwanda (ICTR), Sierra Leone (SCSL) and Cambodia (ECCC). The ICTR was mandated to 'prosecute *individuals* for the crime committed in the territory of Rwanda and neighbouring states'.[29] Similarly, the focus of Special Court for Sierra Leone (SCSL) was to prosecute '*persons* who bear greatest responsibilities' for the grave violation of international humanitarian law and SL law.[30] The mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC) was for the trial of '*senior leaders and those most responsible*' for atrocity crimes committed during the period of Democratic Kampuchea.[31] The focus on the individual, facilitated serving justice to 252 people through these four ICTs (see Table 1).[32]

In sum, a consensus on accepting the state's political responsibility unlocks the possibilities of attributing criminal responsibility, allowing the separation of the state from the individuals committing atrocity crimes. In this context, exploring the process of how the other four ICTs were established could be useful. However, any such investigation must start with the examination of the 'mind' of the state regarding the global norms on atrocity crimes.

29 See 'Key Documents', http://unictr.irmct.org/en/documents, accessed 23 September 2017. The ICTR operation ended on 31 December 2015. Italics added.

30 See 'The Mandate of the Residual Special Court for Sierra Leone', http://www.rscsl.org/RSCSL-Mandate.html, accessed 4 October 2017. Italics added.

31 See 'Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea', Article 1, https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf, accessed 4 October 2017. Italics added.

32 The data covers up to 15 October 2017. In 2010, the UN established the Mechanism for International Criminal Tribunals (MICT), with a mandate to perform a few essential functions previously carried out by the ICTR and ICTY. There are 85 cases involving 117 individuals awaiting trial and sentencing in MICT. See United Nations Mechanism for International Criminal Tribunals, http://www.unmict.org/en, accessed 15 December 2017.

TABLE 1 *Summary of justice served by the four ICTs (number of individuals)*[33]

	ICTY	ICTR	SCSL	ECCC	Total
Indicted/Charged	161	93	13	15	282
Proceedings concluded	154	85	10	3	252
Ongoing	7	0	0	3	10
Acquitted	19	14	0	-	33
Transferred to State Jurisdiction	13	5	-	-	18
Fugitive/At-large	0	8	1	-	9
Indictment Terminated/ Withdrawn/ Died or Illness	37	8	3	3	51
Suspects yet to be Charged	0	0	0	6	6

Reading the 'Mind' of Myanmar

The 'mind' of the state about global norms on atrocity crimes is often reflected by its endorsement, commitment to and compliance with the relevant global instruments.[34] As a collective social entity embedded in larger global societies of states, a state's ratifications, declarations/reservations on ratifications, and interactions with global institutions all reflect its 'mind'. Thus, this paper focuses on the ratification and declaration made by the Government of Myanmar (GOM) on relevant global instruments and the formal reports and replies on human rights issues by the GOM at the UN.

33 Author's compilation from 'Judgement List', http://www.icty.org/en/cases/judgement-list, accessed 24 January 2018; 'The ICTR in Brief', http://unictr.irmct.org/en/tribunal, accessed 24 January 2018; SCSL and No Peace Without Justice, 'Impact and Legacy Survey for the Special Court for Sierra Leone', August 2012, http://www.rscsl.org/Documents/NPWJ_SCSLImpactLegacyReport_04OCT12.pdf, accessed 24 January 2018; 'caseload', https://www.eccc.gov.kh/en/case-load, accessed 24 January 2018.

34 Notwithstanding the 'compliance gap', ratification of a global instrument is often deemed as the first reflection of state's commitment towards compliance. See Ann Marie Clark, 'The normative context of human rights criticism: treaty ratification and UN mechanisms' in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013); and Anja Jetschke and Andrea Liese, 'The power of human rights a decade after: from euphoria to contestation?' in Ibid.

Trends in Ratification and Reservation

Myanmar acceded to only a few Conventions relating to the atrocity crimes and human right issue (see Annex A for a list of international human rights instruments and Myanmar's ratification status). GOM's ratification trend of human rights instruments is significantly at odds with its ratification of Counter-Terrorism (CT) instruments. Before 2001, the GOM was party to four CT and human rights instruments. After 2001, the GOM formed a 'study group' to examine remaining CT conventions to ratify the same;[35] by 2006, it became a party to five more CT Conventions; and it ratified a total of ten CT Convention by 2017.[36] In contrast, GOM ratified only one human rights convention during this period. Myanmar's preference to ratify coercive conventions[37] over human rights conventions arguably reflects its 'mind'. However, Myanmar did ratify the Genocide Convention—the key instrument relating to atrocity crimes—with two reservations.

Table 2 lists the Articles of Genocide Convention on which the state parties expressed reservations. Most reservations relate to involving the International Court of Justice (ICJ) (Article IX). However, Myanmar's reservations were on engaging the International Penal Tribunal (IPT) (Article VI) and 'competent UN organs' (Article VIII) for the trial, prevention, and suppression of genocide. The GOM is the only state amongst the 148 signatories who declined to engage UN organs under this Convention.

Table 3 lists the nature of the reservations on Article VI, providing more insight to comprehend GOM's 'mind'. As evident, Morocco and Algeria accepted the provision to engage the IPT for atrocity crimes under 'exceptional' circumstances; the USA and Philippines did not reject but attached preconditions to accept the jurisdiction of the IPT. In contrast, Myanmar and Venezuela stand out as the only two countries refusing any jurisdiction of the IPT. Again, contrary to most states with declarations/reservations, Myanmar accepted Article IX, which allows involving ICJ to address disputes between state parties. It is also worth mentioning that Myanmar had previously rejected involving the ICJ for dispute settlement while ratifying the Convention to Eliminate all kinds of Discrimination against Women (CEDAW, Article 29).

35 S/2001/1144, 10 December 2001, p. 3.

36 Remaining CT instruments includes Nuclear Terrorism Convention and two Protocols.

37 Most CT conventions criminalise the act of terrorism, hence can be viewed as coercive convention.

TABLE 2 *Declaration/Reservation by the states on the 1948 Genocide Convention*[38]

Article	What the Article Says	Declaration / Reservation
Article VI	Persons charged with genocide…shall be tried by a competent tribunal of the State…, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.	Algeria, Morocco, Myanmar, Philippines, USA, Venezuela
Article VII	Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.	Malaysia, Philippines, Venezuela
Article VIII	Contracting party can call upon the competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.	Myanmar
Article IX	Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.	Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Montenegro, Morocco, Serbia, Singapore, UAE, USA, Venezuela, Viet Nam, Yemen

38 Author's compilation from UN Treaty Collection, 'Status of Treaties, Convention on the Prevention and Punishment of the Crime of Genocide', status as at 12 January 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec, accessed 12 January 2018.

Article	What the Article Says	Declaration / Reservation
Article XII	Any Contracting Party by notifying the UN can extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible (applicable for countries with external territorial jurisdiction).	Albania, Algeria, Argentina, Belarus, Bulgaria, Hungary, Mongolia, Poland, Romania, Russian Federation, Ukraine, Viet Nam

TABLE 3 *Declaration/Reservation on article VI of the 1948 Genocide Convention*[39]

Myanmar: Nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals authority over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.
Algeria: International tribunals may, as an exceptional measure, be recognised as having jurisdiction, in cases in which the Algerian Government has given its express approval.
Morocco: May be admitted exceptionally in cases for which the Moroccan Government has given its specific agreement.
The Philippines: Nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles.
USA: Reserves the right to effect its participation in any such [international] tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.
Venezuela: Any proceedings to which Venezuela may be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such international tribunal.

39 Author's compilation, Ibid.

Interaction with the UN CEADW Committee

Myanmar's interaction with the UN CEADW Committee (hereafter: Committee) also indicates the regime's 'mind' and outlook.[40] The GOM submitted five periodic reports to the Committee, and several follow up reports.[41] This can be viewed as a positive engagement. However, the Committee's final recommendations highlights several systemic obstacles in the context of Rakhine. These are limitations of the parliament's legislative power, legal and nationality status, widespread gender-based violence, limited access to justice, visibility and participation in political and public life, education and employment opportunities.[42] The Report observed the lack of 'comprehensive law guaranteeing protection against forced displacement or programmes…in particular those belonging to ethnic minority groups such as the Rohingya.'[43] The final recommendations were made after due consideration of the reports and replies from the GOM and different CSOs in Myanmar. The CSOs include Amnesty International,[44] CEDAW Action Myanmar (CAM),[45] Christian Solidarity Worldwide (CSW),[46] Global Justice Centre (GJC) and Gender Equality

40 According to Article 18 of the UN CEADW, state parties are required to submit reports to the Committee. The Committee is also mandated to receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention and to initiate inquiries into situations of grave or systematic violations of women's rights.

41 The GOM submitted its first Report in 1999 (CEDAW/C/MMR/1, 25 June 1999); combined second and third Report was submitted in 2007 (CEDAW/C/MMR/3, 4 September 2007) and the combined fourth and fifth Report was submitted in 2015 (CEDAW/C/MMR/4-5, 2 March 2015). The second, third, fourth and fifth Reports were supplemented by additional replies and follow up reports.

42 See CEDAW/C/MMR/CO/4-5, 25 July 2016, pp. 4–8, 10, 14–15.

43 See Ibid., p. 14.

44 See Amnesty International, '64th Pre-sessional Working Group: The Republic of the Union of Myanmar - Information on "Race and Religion Protection" Laws and situation of Women Human Rights Defenders (WHRDS)', 29 September 2015, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_21795_E.pdf, accessed 5 October 2017.

45 See CAM, 'Myanmar CSO shadow report on thematic issues: violence against women to 64th session of UN CEDAW committee, in relation to Myanmar combined fourth and fifth periodic report of state party', 17 June 2016,https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24232_E.pdf, accessed 7 October 2017.

46 CSW, 'CEDAW Committee 64th session CSW – stakeholder submission Myanmar', June 2016, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24254_E.pdf, accessed 9 October 2017.

Network (GEN),[47] Karen Human Rights Group (KHRG),[48] Landesa and Namati,[49] The Arakan Project,[50] Women Peace Network – Arakan (WPN-A),[51] Women's League of Burma,[52] and Myanmar National Human Rights Commission (MNHRC).[53] A summary of the recommendations related to the Rohingyas from the CSO's shadow reports is in Annex B. The Annan Commission Report, submitted before the current spate of violence, also notes episodes of

47 GEN and GJC, 'Shadow report on Myanmar for the 64th Session of the CEDAW', July 2016, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24273_E.pdf, accessed 9 October 2017; GJC, 'Promises not progress: Burma's national plan for women falls short of gender equality and CEDAW', August 2015, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_21890_E.pdf, accessed 8 October 2017;

48 KHRG, 'Submission for the 64th session (4–22 July 2016) of the CEDAW', 10 June 2016, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24239_E.pdf, accessed 8 October 2017.

49 Namati and Landesa, 'Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices', October 2015, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_21937_E.pdf, accessed 7 October 2017.

50 The Arakan Project, 'Key issues concerning the situation of stateless Rohingya women and girls in Rakhine state, Myanmar, submission to the CEDAW for the examination of the combined 4th and 5th periodic State Party Reports (CEDAW/C/MMR/4-5) Myanmar', 10 June 2016, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24280_E.pdf, accessed 7 October 2017.

51 WPN-A, 'Observations and topics to be included in the list of issues on the occasion of Myanmar's combined fourth and fifth periodic reports on the implementation of the CEDAW' October 2015, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_21938_E.pdf, accessed 7 October 2017. And 'Submission to the 64th Session CEDAW Committee for Consideration of Myanmar's Combined Fourth and Fifth Periodic Reports', June 2016, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24229_E.pdf, accessed 7 October 2017.

52 Women's League of Burma, 'Shadow report on Burma for the 64th session of the committee on the elimination of discrimination against women', July 2016,https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24233_E.pdf, accessed 7 October 2017.

53 See MNHRC, 'A report to the United Nations committee on the Elimination of Discrimination Against Women on the implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in Myanmar', June 2016, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_IFN_MMR_24177_E.pdf, accessed 8 October 2017.

serious human rights violations by the security force and recommends holding the perpetrators accountable.[54]

The GoM's reply to the Committee's recommendations claimed that 'the people of Myanmar do not recognise the term "Rohingya" which has never existed in Myanmar ethnic history'.[55] It also requested the Commission for not using the term 'Rohingya'. As a result, the Commission's report does not use the term 'Bengali' or 'Rohingya' and refers to them as 'Muslims' or 'the Muslim community in Rakhine'.[56] This denial of an ethnic group appears contrary to Myanmar's constitutional provisions that guarantees 'non-discrimination based on race, birth, religion, official position, status, culture, sex and wealth'. [57]

In sum, Myanmar's minimalist ratification of the human rights instruments and its reservations reflects its 'protective mind' aimed at insulating the regime from external scrutiny. However, an optimistic interpretation, such as GoM's engagement with the Committee and the acceptance of Article IX of the Genocide Convention, suggest an opportunity to engage the ICJ in addressing the Rohingya issue. With these insights, let us now examine the process of establishing the four ICTs so as to explore possible pathways for accountability.

Pathways of Accountability: Establishing the ICTM-R

Each context of the four ICTs was unique except that all were housing UN peacekeeping forces. The Myanmar context differs on two major grounds: first, there are no UN troops deployed in Myanmar. Second, despite having a civilian political government, the country is under 'disciplined democracy' where the military continues to be in the centre of political power.[58] These realities stand in sharp contrast to the other examples but do not restrict us from exploring the process of establishing ICTs so as to arrive at some general conclusions.

54 Advisory Commission on Rakhine state, 'Towards a peaceful, fair and prosperous future for the people of Rakhine, final report of the advisory commission on Rakhine state', August 2017, http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf, accessed 10 October 2017, p. 55.

55 CEDAW/C/MMR/Q/4-5/Add.1, 3 May 2016, p. 13.

56 Advisory Commission on Rakhine state, 'Towards a peaceful, fair and prosperous future for the people of Rakhine, final report of the advisory commission on Rakhine state', p. 12

57 CEDAW/C/MMR/Q/4-5/Add.1, 3 May 2016, p. 2.

58 See, Marco Bünte, 'Burma's Transition to "Disciplined Democracy": Abdication or Institutionalization of Military Rule?', *GIGA Working Papers*, No 177, August 2011; Casy Cagley, '"Disciplined Democracy" – Lessons for Cuba from Myanmar', *Open Democracy*, 4 October 2016, https://www.opendemocracy.net/casey-cagley/disciplined-democracy-lessons-for-cuba-from-myanmar, accessed 19 November 2018.

The broad focus is to find the pathways that will enable Myanmar to (i) pursue justice ending the culture of impunity, and (ii) facilitate establishing the ICTM-R that will be viewed as legitimate and neutral.

Table 4 provides a brief comparison of the mandate, political will (domestic and global) and status of key international instruments by the host country that was crucial to the process of establishing the ICTY, ICTR, SCSL and ECCC. Political will in this context is narrowly defined as the 'the determination of an individual political actor *to do and say* things that will produce the desired outcome'.[59] Consequently, international political will is captured by analysing the actions by the actors, such as, the voting in the UN, support from regional organisations and member states leading to the resolutions required to establish the respective ICTs. A host state's consent/opinion and involvement in the Court's establishment is considered as the proxy for the domestic political will. A more detailed account of the actions by different actors in the process of establishing these four ICTs can be found in Annex C.

The analysis suggests three potential pathways to establish the ICTM-R, as shown in Table 5. It reveals that domestic political will is a *necessary* but not *sufficient* condition[60] to establish ICTs. Although convergence of domestic and international political will is ideal and desirable, the UNSC, acting under Chapter VII, can establish ICTs even when the host state is unwilling. In such cases, the Court is located outside the host state. Again, Tribunals established based only on host nation's willingness may suffer from legitimacy and neutrality deficits evidence by the ECCC (see annex C). Table 5 also reveals that the host nation's involvement in establishing and functioning of ICTs has gradually increased; it reflects a greater reliance on the 'principles of complementarity' enshrined in the Rome Statute to prosecute atrocity crimes.[61] However, all this

59 Department for International Development, 'Appendix 3: Understanding "Political Will"', 1 January 2004, p. 1, https://www.gov.uk/dfid-research-outputs/appendix-3-understanding-political-will, accessed 11 February 2018. Italics added.

60 A *necessary* condition 'A' is said to be necessary for a condition B, if (and only if) the non-occurrence of 'A' results into the non-occurrence of 'B'. A *sufficient* condition 'A' is said to be sufficient for a condition 'B', if (and only if) the occurrence of 'A' results the occurrence of B. The fact that some ICTs were established in absence of domestic political will, makes it a necessary but not sufficient condition.

61 The 'principles of complementarity' are guided by the partnership with the host state that are genuinely investigating and prosecuting such crimes and a vigilance by the international elements of the Court to carry out its responsibilities with diligence. See Articles 17–20 and Article 53 of the Rome Statute and Paul Seils, *Handbook on Complementarity an Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (New York International Center for Transitional Justice, 2016).

TABLE 4 *Comparison of the nature and process of establishing the ICTY, ICTR, SCLS, and ECCC.*

ICTY	ICTR	SCLS	ECCC
1. **Mandate: nature and limits**			
Prosecute *persons* responsible for specific crimes committed since January 1991 in the territory of the former Yugoslavia.	Prosecute *individuals* for the crime committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.	Prosecute *persons* who bear greatest responsibilities for the grave violation of international humanitarian law and SL law during the civil war after 30 November 1996.	Crimes committed between 17 April 1975 to 6 January 1979 by the *senior leaders and those who are most responsible* in Democratic Kampuchea.
2. **Political Will (international): What UN instrument formally initiated the process of establishing the Court and how did the UNSC vote?**			
Acting under Chapter VII, the UNSC unanimously (15-0) adopted Resolution 827 (1993).	Acting under Chapter VII, the UNSC adopted (13-1-1) Resolution 955 (1994) China: abstained, Rwanda: against.	The UNSC unanimously (15-0) adopted Resolution 1315 (2000). Economic Community of West African States (ECOWAS) was supportive.	Commission on HR Resolution 1997/49, (1997); UNGA Resolution A/RES/ 52/135 (1997) A/ RES/ 53/145, (1999)
3. **Political Will (domestic): Consent and involvement by the host nation in the Court composition and establishment**			
Unwilling acceptance. All 14 Permanent Judges appointed by the UNGA and UNSC (Ad-litem). Court located outside the host country.	Unwilling acceptance. All judges appointed by UN. Court located in Arusha, Tanzania.	Willing. Requested to set up SCSL in light of the Lomé Peace Agreement (Article XXVI). The Court in the host country (initially); appoints 6/16 judges.	Willing and requested to setup ECCC. Passed the ECCC Law & signed MoU with the UN. The Court is in the host country; appoints 3/5 Pre-trial/Trial and 4/7 Supreme Court Chamber judges.

ICTY	ICTR	SCLS	ECCC
4. **Party to Key International Instruments on Atrocity Crimes: Ratification/accession**			
(*i*) *1948 Genocide Convention*			
Ratified in August 1950 (Former Yugoslavia)	Accession in 1975 (reservations on Article IX withdrew in 2008).	Not a party	Accession in 1950
(*ii*) *1949 Geneva Conventions and Protocols*			
Bosnia & Herzegovina (1992) Croatia (1992) Serbia (2001)	Convention (1964), Protocol I & II (1984)	Convention (J1965), Protocol I & II (1986)	Convention (1958), Protocol I & II (1998)
(*iii*) *Acceptance of the Competence of the International Fact-Finding Commission according to Article 90 of Additional Protocol I*			
Bosnia & Herzegovina (1992), Croatia (1992), Serbia (2001)	Party since 1997	Not a party	Not a party
(*iv*) *1998 Statute of the International Criminal Court*			
Bosnia & Herzegovina (2002), Croatia (2002), Serbia (2001)	Not a party	Party since 2000	Party since 2002.

Source: Author's compilation from the official websites of ICTY, ICTR, SCSL, ECCC, and UN Treaty Collection Database.

TABLE 5 *Pathways to establish ICTM-R*

	International Political Will	
Domestic Political Will	**Willing / Willing** **Pathway -1** (ICTM-R formed on the Principles of Complementarity)	**Unwilling/ Willing** **Pathway -2** (ICTM-R formed outside host state under Chapter VII)
	Willing/ Unwilling **Pathway -3** (State Tribunal with contested legitimacy/neutrality)	**Unwilling/ Unwilling** **Pathway -4** (Status quo, No ICTM-R)

begs the question: how do we harness the international and domestic political will to establish the ICTM-R?

Harnessing International Political Will

Any analysis of the international 'political will' entails focusing on the incentives and disincentives faced by the leadership of a country that is contemplating a possible action, and those faced by other political actors who might support or oppose that action.[62] The flow of bilateral assistance, official development assistance (ODA), foreign direct investments (FDI) and sanctions, embargos are often regarded as proxy indicators for the material incentives and disincentives, reflecting the political will of an actor. In the case of a divided international political will, state actors rely on national instruments. For example, failing to achieve a consensus in the UNSC, the US resorted to the Global Magnitsky Act and sanctioned the military commander who oversaw the operation in Rakhine.[63] The EU extended its (limited) sanctions on sale, supply, transfer or export of arms and related material of all types and provision of technical assistance, brokering and financing services to Myanmar military to till 30 April 2018.[64] However, Myanmar had survived harsher sanctions in the past. Until 2013, the EU sanctions included 936 entities and 564 individuals (see Figure 1).[65] The US imposed similar sanctions but removed 111 entities and individuals from its Specially Designated Nationals and Blocked Persons (SDN) list in 2016.[66]

62 Department for International Development, 'Appendix 3: Understanding "Political Will"' p. 2.

63 See U.S. Department of the Treasury, 'Issuance of Global Magnitsky Executive Order; Global Magnitsky Designations', 21 December 2017, https://www.treasury.gov/resource-center/sanctions/OFAC-enforcement/Pages/20171221.aspx/, accessed 25 December 2017.

64 See Council Decision 2013/184/CFSP of 22 April 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2013:111:FULL&from=EN/, accessed on 25 December 2017; Council Decision (CFSP) 2017/734 of 25 April 2017, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D0734&from=EN/, accessed 25 December 2017..

65 Data compiled by author from annex I–V of the Official Journal of the European Union, 'Council Decision 2010/232/CFSP', 26 April 2010, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0022:0108:EN:PDF, accessed 31 October 2016.

66 See Foreign Assets Control Office, 'Unblocking of Specially Designated Nationals and Blocked Persons Resulting From the Termination of the National Emergency and Revocation of Executive Orders Related to Burma', 31 October 2016, https://www.federalregister.gov/documents/2016/10/31/2016-26124/unblocking-of-specially-designated-nationals-and-blocked-persons-resulting-from-the-termination-of/, accessed 25 Dec 2017.

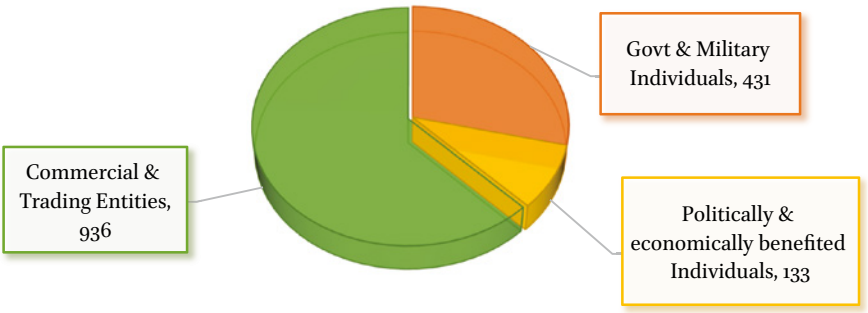


FIGURE 1 *EU Sanctions on Myanmar till 2013* (*Number of Entities and Individuals*)
Source: Author's compilation from Annex I–V of Council Decision 2010/232/cfsp 26 April 2010.

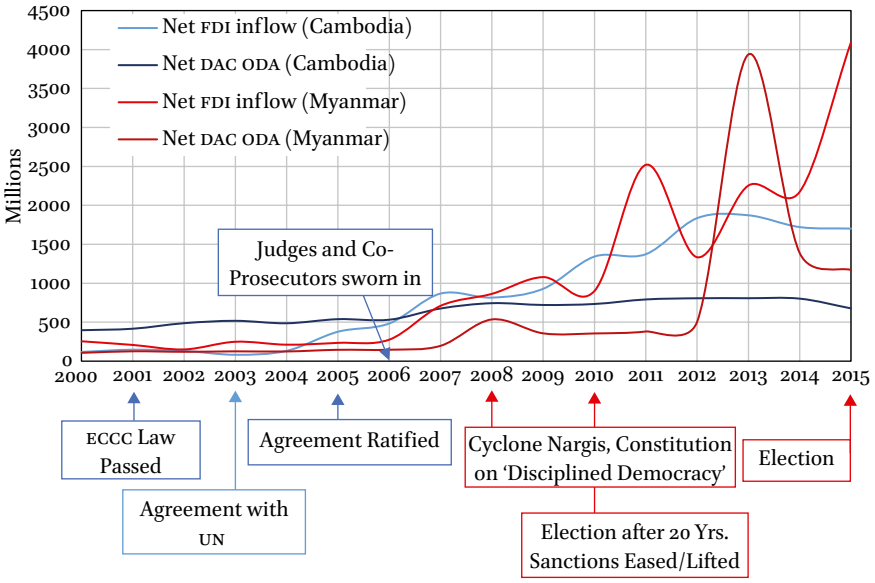


FIGURE 2 *Flow of FDI and ODA to Myanmar and Cambodia 2000–2015* (*BoP, Current US$*)
Source: Author's compilation from World Development Index data.

A comparison of the FDI and ODA flow to Myanmar and Cambodia (Figure 2)[67] reveals that material incentives to Cambodia closely paralleled the key

67 Data from, The World Bank, 'World Development Indicators (WDI)', https://datacatalog.worldbank.org/dataset/world-development-indicators, accessed 27 November 2017.

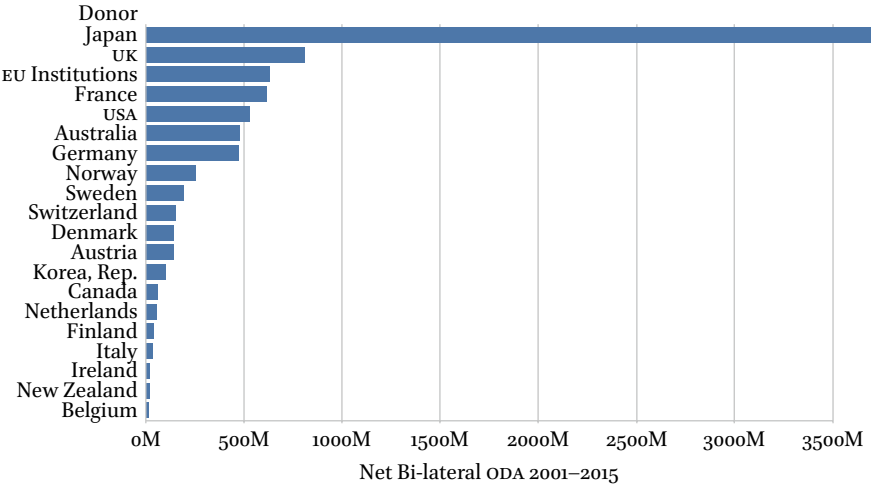


FIGURE 3 *Top 20 Donors of ODA to Myanmar 2000–2015*
Source: Author's compilation from the World Development Index Data.

endorsements to establish the ECCC. In the case of Myanmar, it is largely paralleled by its democratic reforms and cyclone Nargis. The lifting of the sanctions after the country introduced its 'disciplined democracy' sharply increased the aid and FDI flow to Myanmar until reaching a decline in 2014 and 2016 respectively. However, they remain well above the pre-2010 flows.

Figure 3 breaks down the ODA to Myanmar in terms of top 20 donors to identify key providers of material incentives. The 'political will' of these donor countries in general—and Japan in particular—to hold Myanmar accountable for the allegation of atrocity crimes, could pave the way to pursue justice.

China and Russia's unreserved support for Myanmar originates from a complex set of geopolitical considerations, security issues, transit rights, access to natural resources, energy and military sales markets[68]—detailed discussion of which is beyond the scope of this paper. However, Figure 4 shows Myanmar's weapon purchases between 2001–16.[69] It reflects that weapons from Russia

68 See David I. Steinberg, and Fan Hongwei, *Modern China–Myanmar Relations: Dilemmas of Mutual Dependence* (Copenhagen: Nordic Institute of Asian Studies, Denmark, 2012), pp. 306–342.

69 The data are based on SIPRI's Trend Indictor Value (TIV) that accounts 'known unit production costs of a core set of weapons' rather than the actual price paid. See *SIPRI Arms Transfers Database – Methodology*, https://www.sipri.org/databases/armstransfers/background/, accessed 26 January 2017.

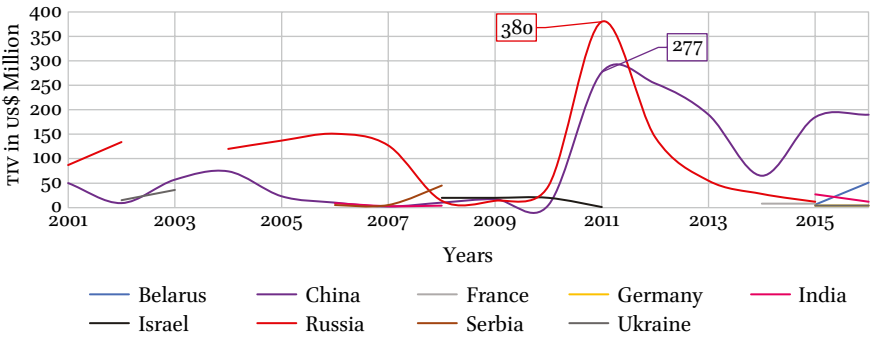


FIGURE 4 *Trend in Myanmar's Arms & Weapon Import 2001–2016*
Source: Author's compilation from SIPRI Arms Transfers Database.

and China largely pivoted the Western embargo on Myanmar. Justifying the recent sale of six Sukhoi jets to Myanmar, the Russian deputy defence minister remarked that the jets would become the main combat plane of Myanmar's air force, crucial for 'protecting the country's territorial integrity and *countering terrorist threats*'.[70] Such lame justifications show how the crisis is viewed as an *opportunity*. The sharp increase of arms supply to Myanmar after 2010 suggests that the lifting of the sanctions served as an *incentive* for China and Russia to beef up their arms sales.

In sum, the current state of material incentives and disincentives looks insufficient to change the status quo. The collective political will of the key external actors is fractured and inadequate to effect the desired change to pursue justice for the atrocity crimes. Such conditions necessitate ratcheting up material disincentives such as targeted sanctions and international arms embargos. This may also have a cascading effect on the others restricting their supply of coercive materials to Myanmar. Similarly, the bilateral aid to Myanmar needs to be at least conditional and/or staggered to facilitate achieving specific targets in the pursuit for justice.

Political will is also about the 'motives, thinking and feelings' of the actor and of other political actors pursuing or opposing the same aims.[71] Such intangible elements of political will are difficult to reduce into proxy indicators. However, some evidence can be drawn about the 'thinking and feelings' of China and Russia from their past actions in the UNSC. Russia voted in favour

70 See 'Russia ignores US charges over Sukhoi fighter jet supplies to Myanmar', *The Tass*, 26 January 2018, italics added.

71 Department for International Development, 'Appendix 3: Understanding "Political Will"', p. 3.

of establishing the ICTY and ICTR (pathway 2) under Chapter VII. As the President of the ICTY committee, Russia cosponsored the draft resolution stating 'the entire international community …, through the Tribunal, will be passing sentence on those who are grossly violating not only the norms of international law but even quite simply our human concepts of morality and humanity'.[72] China provided qualified support to establish ICTY[73] and abstained from voting during the ICTR.[74] However, in the past, China always maintained that perpetrators of atrocity crimes 'should be brought to justice' and called the UN to adopt a 'prudent attitude' by signing a treaty with the host country to provide 'solid legal foundation' for establishing such Courts.[75] Russian and Chinese judges have also served in the ICTs.

China's ambitious One Belt, One Road (OBOR) project that runs through the Rakhine state has also been referred to as the key geopolitical reasons for its unreserved support to Myanmar.[76] However, shielding the perpetrators of atrocity crimes committed in its neighbourhood risks not only tainting China's OBOR project—an unnecessary price for a unique initiative—but also dampening China's growing clout of 'soft power'. The three-stage approach suggested by China hints at a regional solution to resolve the crisis and salvage the global backlash.[77] The proposal includes: (i) effecting a ceasefire on the ground; (ii) safe repatriation of the refugees; and (iii) a plan for the economic development of Rakhine. However, the current Chinese plan does not include investigating and/or prosecuting of the allegation of atrocity crimes and stands at odds with its past moral standing in the UNSC.

Be that as it may, the past evidence tends to suggest that Russia and China are not fundamentally opposed to the idea of pursuing justice. Russia has been party to both pathways 1 and 2. In contrast, China seems to prefer a consensus pathway (pathways 1 and 3). Given China's strong preference of

72 S/PV 3217, 25 May 1993, pp. 44–45.

73 The Chinese envoy clarified that 'this political position of ours, however, should not be construed as our endorsement of the legal approach involved' adding that the ICTY can only be an 'ad hoc arrangement' and shall not 'constitute any precedent'. Ibid., pp. 32–33.

74 S/PV.3453, 8 November 1994, p. 11.

75 Ibid., p. 33.

76 See Parth Sharma, 'Rohingya Crisis: The Larger Geopolitics Nobody Is Talking About', *The Huffington Post*, 23 September 2017; Saibal Dasgupta, 'What connects Rohingya genocide with China's 7.3 billion investment in Rakhine state', *The Times of India*, 26 September 2017; Sanakhan, 'What connects Rohingya genocide with China's 7.3 billion investment in Rakhine state?' *The Siasat Daily*, 26 September 2017.

77 See Yimou Lee (2016), 'China draws three-stage path for Myanmar, Bangladesh to resolve Rohingya crisis', *Reuters*, 20 November 2017.

the host country's legal endorsement to establish ICTs, it is plausible to assume that China will prefer pathways 3, reached through bi-lateral/regional consultation.

The Rohingya crisis is also labelled as an 'ASEAN challenge'.[78] Three ASEAN countries (Thailand, Malaysia, and Indonesia) house significant numbers of Rohingya refugees. Despite compelling reasons, political will to address the issue within ASEAN, let alone pursue justice, is missing. Several channels like the ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Sectoral Ministerial Bodies,[79] and the office of the ASEAN Secretary and the Troika[80] have remained silent.[81] Popular support and sympathy to the Rohingyas in ASEAN cities contrast ASEAN's lack of political will. A strong willingness could lead to establishing a joint UN-ASEAN project for an independent and impartial investigation of atrocity crimes in Rakhine. Singapore (the new ASEAN Chair) is better poised to persuade Myanmar as it is one of the largest trading partners.[82] It needs to be stressed that there has always been a general

78 The ASEAN Charter emphasises the promotion and protection of human rights and freedom stressing the rights and responsibilities of member states. ASEAN's Human Rights Declaration recognises the need for accountability (Article 9) but refers to the ASEAN Charter for the parameters to promote and protect human rights (Article 39). *ASEAN Charter*, http://agreement.asean.org/media/download/20160509062115.pdf, accessed 9 February 2018; *ASEAN Human Rights Declaration*, https://asean.org/asean-human-rights-declaration/, accessed 9 February 2018; ASEAN Parliamentarians for Human Rights 'The Rohingya Crisis and the Risk of Atrocities in Myanmar: An ASEAN Challenge and Call to Action', April 2015, https://aseanmp.org/wp-content/uploads/2015/08/The-Rohingya-Crisis-and-the-Risk-of-Atrocities-in-Myanmar-An-ASEAN-Challenge-and-Call-to-Action.pdf; Pavin Chachavalpongpun, 'Rohingya refugee crisis shames Southeast Asia', *The Japan Times*, 21 May 2015; Jera Lego, 'Why ASEAN Can't Ignore the Rohingya Crisis', *The Diplomat*, 17 May 2017.

79 For example, the ASEAN Defence Ministers Meeting (ADMM) and the ASEAN Defence Senior Officials Meeting (ADSOM) provides a platform to engage the Myanmar military.

80 ASEAN Troika consists of the Foreign Ministers of the present, past and future chairs of its Security Committee. It was set up to address urgent and important political and security issues.

81 ASEAN's 2017 summit declaration did not mention the Rohingya issue but expressed support for the country's efforts. See 'ASEAN silent on Rohingya crisis', *The Daily Star*, 17 November 2017 and Gamez, K. Ramos, 'Examining the AICHR: The Case Study of The Rohingya Crisis', *LLM dissertation*, Tilburg University, June 2017.

82 Within the ASEAN, Singapore has the highest FDI to Myanmar reaching US$1,541.18 million in 2016. See https://data.aseanstats.org/fdi-by-hosts-and-sources, accessed 12 February 2018.

reticence in the human rights discourse and lukewarm response to such issues by the ASEAN states.[83] The doctrine of 'development ought to precede human rights', and the need to maintain amicable foreign policy has contributed to such ambivalence when dealing with human rights violations.

In sum, combined actions by the key state actors reflect the international political will that begs to be harnessed to pursue justice. The geo-strategic considerations are not irreconcilable. The jurisdiction and functioning of the ICTM-R needs to be precise, detaching the perpetrators of the atrocity crimes from the state and including provisions to integrate the host nation's judicial apparatus considering the Principles of Complementarity. Such an approach can free China and Russia from being a hostage of their geo-strategic considerations and allow them to stand by their moral and ethical principles as maintained during the formation of ICTY and ICTR. Second, the current status of material incentives/disincentives is neither conducive nor sufficient to persuade Myanmar to pursue justice. The flow of ODA and FDI and the imposition of sanctions by key states including Japan needs to be conditional, reflecting the international community's resolve and commitment to pursue justice and to end the culture of impunity. Such collective efforts could help to reach a consensus Resolution, agreeable by Myanmar and thus follow pathway 1 to establish the ICTM-R. However, if Myanmar rejects the proposal, pathway 2 remains open, invoking Chapter VII in light of the R2P principle, and the Court would have to be established in a neighbouring country. Indeed, such a possibility was hinted at by Myanmar's national security advisor, stating that 'the UN has listed Myanmar as a code red country, meaning it is experiencing a crisis'.[84]

Harnessing Domestic Political Will

Myanmar's domestic political will needs to be viewed in light of the brittle power equilibrium between the military and the civilian leadership, and the deep-rooted animosity against the Rohingyas that has flared up under the permissive environment of 'discipline democracy'. Such a condition has constrained and blinded political leadership and encouraged them to take a utilitarian approach that hindered the pursuit for justice. The domestic

83 See Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (Cambridge, Cambridge University Press, 2011), pp. 25–28.

84 See Lawi Weng, 'Govt Frets UN Will Invoke Genocide Doctrine to Intervene in Rakhine', *The Irrawaddy*, 27 November 2017.

political will has so far remained deflationary, resulting in replacing the commander of Western Command and acquitting the security forces of any wrong doing through an internal investigation.[85] By aligning with the military, the civilian leadership is apparently losing their hard earned support and legitimacy earned from the international community through prolonged struggle.[86] The limited civilian space and the rising influence of the Buddhist nationalists make it a 'political suicide' for anyone to side with the Rohingyas, let alone seek justice.[87]

Under such a context, it is demanding but not impossible to conceive of a change of the domestic political will. Apart from fine-tuning the external incentives/disincentives as discussed, harnessing domestic political will would require renewed advocacy and sensitisation. The activities of several CSOs in Myanmar (see Annex B) testifies that the 'agency' to initiate change exist.[88] As the legitimate representative of the Union, civilian leadership needs to declare an end to impunity for such crimes. They need to expand the civilian space, embracing the fact that impunity for atrocity crimes is not compatible with values of democracy, peace and reconciliation. Just as the new political leadership has introduced the idea of 'democratic federal union', challenging the old 'unitary idea' of statehood to consolidate democracy and reconciliation,[89] they need to stand up for ending impunity to place Myanmar alongside the global democratic polity. Dispensing political expediency, such a bold step by

85 The internal investigation was led by Inspector-General of Defence Services. See 'Myanmar Army Denies Abuses against Rohingya after Investigation', *The Irrawaddy*, 14 November 2017.

86 'Not Muslims vs. Buddhists', *The Irrawaddy*, 11 December 2017.

87 Aye Thein, 'Putting Myanmar's "Buddhist Extremism" in an International Context,' *The Irrawaddy*, 3 September 2017.

88 Over 100 CSOs in Myanmar signed a letter in opposition to the 'Protection of Race and Religion Bills' advanced by the Buddhist ultra-nationalist group Ma-Ba Tha, engaged to inflame anti-Muslim prejudice and fear (ASEAN Parliamentarians for Human Rights, 'The Rohingya Crisis and the Risk of Atrocities in Myanmar: An ASEAN Challenge and Call to Action', p. 5. The demand to eliminate impunity for the military and government actors and their trial is also echoed in several shadow reports, for example GEN and GJC, 'Shadow report on Myanmar for the 64th Session of the CEDAW', p. 24.

89 Under military rule, the idea of federal union was considered a taboo. In contrast, the 2011 Nationwide Ceasefire Agreement (NCA), is based on 'democratic federal union'. Tun Tun Thein 'Burmese govt agrees, in principle, to a federal union' *DVB*, 16 August 2014, http://www.dvb.no/news/burmese-govt-agrees-in-principle-to-a-federal-union-burma-myanmar/43310, accessed 12 November 2017.

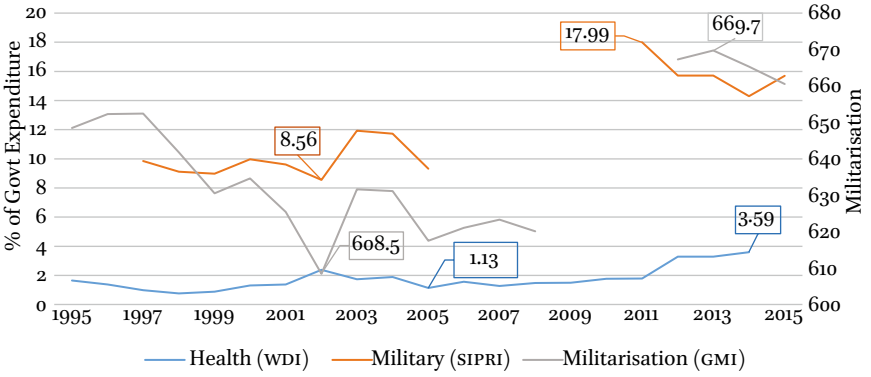


FIGURE 5 *Trend in Myanmar's militarisation 1995–2015*
Source: Author's compilation from GMI, WDI and SIPRI data.

the civilian leadership can instil respect for human rights, contributing to the pursuit of peace, democracy and justice. Conversely, any delays/absence in taking such bold steps could shrink the civilian space further.

Second, the prolonged military rule has created an uneven society in Myanmar, dwarfing resource allocation to other sectors, most notably, health and education.[90] Figure 5 plots Myanmar's militarisation trend, measured by of the Global Militarisation Index (GMI), and compares the share of government military expenditure with the health sector for the period 1995–2015.[91] The 'militarisation score' reflects the relative weight and importance of the military apparatus of the state in relation to its society;[92] it started to decline after 2000 coinciding with harsher sanctions on Myanmar by the West, only to reach new heights in 2010 when the sanctions were lifted/eased. Increased assistance after 2010 freed up more assets, resulting in rapid militarisation.[93] The GOM's

90 See Ei Ei Toe Lwin, 'Military spending still dwarfs education and health', *Myanmar Times*, 30 March 2014.

91 Data on Myanmar compiled from Bonn International Center for Conversion, 'Global Militarization Index', 2017, https://gmi.bicc.de/index.php?page=ranking-table, accessed 27 November 2017; SIPRI, 'Military expenditure by country as percentage of government spending, 1988–2016', 2017, https://www.sipri.org/databases/milex, accessed 27 November 2017; The World Bank, 'World Development Indicators (WDI)'.

92 The GMI score is arrived at by normalising the weighted scores on military expenditure, military personnel and heavy weapon and expressed on a scale of 0 (least militarised) to 1,000 (most militarised). For the methodology see Bonn International Center for Conversion, 'The Method of the GMI', https://gmi.bicc.de, 2017, accessed 10 February 2018.

health spending after 2010 increased to 3.59 percent, while the military expenditure jumped from 9–12 percent to 15–18 percent of government total expenditure.

Clearly Myanmar's transition to democracy came at a price, in which the military continues to benefit the most. Thus, the civilian polity needs to reclaim their position and demand distributive justice of the internal and external resources that are meant for improving their lives. A renewed reflection of the key actors about the nature and conditions of material assistance to Myanmar and their utilisation could shape the domestic political will. Such reflection would help the military to adopt a people-centric national security, abandoning the culture of impunity as it risks tainting the total forces. This could encourage the military to single out the units and individuals who committed or conspired to the atrocity crime and make them accountable to remove the stigma attached to the military. The military leadership needs to view national security in terms of protecting the people and the image of the state.

Third, the existing peace treaties could be a legitimate source to rally domestic 'political will'.[94] In Myanmar, the Nationwide Ceasefire Agreement (NCA) and National Reconciliation and Peace Centre (NRPC) [95] could be useful

93 Also see Yu Mon Saw, Khine Lae Win, Laura Wen-Shuan Shiao, Moe Moe Thandar, Rachel M Amiya, Akira Shibanuma, Soe Tun and Masamine Jimba, 'Taking stock of Myanmar's progress toward the health-related Millennium Development Goals: current roadblocks, paths ahead', 11 September 2013, http://www.equityhealthj.com/content/12/1/78, accessed 12 November 2017.

94 The Lomé Peace Agreement was a catalyst for the SCSL. The 7th Colloquium of International Prosecutor also stressed that the ICTs cannot operate in a vacuum and 'political will of states to accept or permit prosecutions of *all* persons accused or suspected of committing international crimes' is a key challenge. See 'Local Prosecution of International Crimes: Challenges and Prospects' Summary Report, 7th Colloquium of International Prosecutor, 4–5 November 2014, Arusha, Tanzania, p. 2.

95 The NCA is Myanmar's first multilateral ceasefire agreement formalised on 31 March 2015, outlining a seven-step roadmap for peace and national reconciliation. The NRPC is the successor of Myanmar Peace Centre (MPC) and operates under the Office of State Counsellor. It is mandated for national reconciliation, peace processes, and coordination with ethnic groups, civil society, and international donors. See NRCP, Summary, http://www.mmpeacemonitor.org/stakeholders/myanmar-peace-center/227-nrpc, accessed 8 November 2017; Institute for Security and Development Policy (ISDP), 'Myanmar's Nationwide Ceasefire Agreement: Background', October 2015, pp. 3–5.

in the pursuit of justice. Despite conditional and exclusionary provisions,[96] the NCA provides a starting framework as it guarantees the political dialogue (Chapter 5) and suggests taking confidence-building measures under 'interim arrangements' (Chapter 6) that are conducive to pursue justice. The combined 'political will' of the civilian and military leadership could function through the NRPC to establish either a State Tribunal without any external involvement (pathway 3) or the ICTM-R (pathway 1). Such possibilities would satisfy the Chinese view as they go hand in hand with the peace and reconciliation process in Myanmar.[97] However, justice through a State Tribunal (pathway 3) might suffer from legitimacy deficit and hinder funding from the external sources.

Domestic and International Advocacy

Beyond state actors, advocacy by the CSOs, institutions, and academia could also harness political will. This is particularly evident in the case of ECCC that has a particularly chequered history of coming into operation. The Cambodian Genocide Project, Inc. established by the Yale Law School in 1981 and supported by many including the U.S. Institute of Peace, helped to gather documentary evidence and videotaped testimony of many eyewitnesses.[98] The 'Campaign to Oppose the Return of the Khmer Rouge' was instrumental in its advocacy leading to the adoption of the Cambodian Genocide Justice Act by the US Congress in 1994. In the context of Myanmar, the Yale and Harvard Law School have already published legal analyses and reports.[99] The Permanent Peoples' Tribunal (PPT) has also held an open (people's) trial on the issue.[100] As discussed, several CSOs inside Myanmar are also working on this issue demanding the end of impunity. The 'soft power' of these advocacy groups, including the brave

96 The current excluded ethnic groups in the NCA includes bigger groups like Arakan Army, Myanmar National Democracy Alliance Army, Ta'ang National Liberation Army, and smaller groups like Arakan National Council, Lahu Democratic Union, Wa National Organization / Army. See ISDP, 'Nationwide Ceasefire Agreement', p. 2.

97 S/PV.8060, 28 September 2017, p. 14

98 Gregory H. Stanton, 'Seeking Justice in Cambodia: Realism, Idealism, and Pragmatism', http://genocidewatch.org/images/By_Stanton_06_Seeking_Justice_in_Cambodia_Realism,_Idealism,_and_Pragmatism.pdf, accessed 17 November 2017.

99 See Yale Law School, 'Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?'; Harvard Law School, 'Crimes in Burma'.

100 See Permanent Peoples' Tribunal, 'State Crimes Allegedly Committed in Myanmar against the Rohingyas, Kachins and Other Groups', 18–22 September 2017, Kuala Lumpur, Malaysia, http://permanentpeoplestribunal.org/wp-content/uploads/2017/11/PPT-on-Myanmar-Judgment-FINAL.pdf, accessed 30 January 2018.

evidence-based reporting by reputed media, could greatly assist harnessing the political will.

A verified and cross-referenced initial database on the atrocity crimes prepared by such advocacy groups would be invaluable to influence state's action through UN or ASEAN and subsequent prosecution. Several UN agencies are mandated for data collection on such crimes.[101] The UN Office for Genocide Prevention and R2P is mandated for, among other things: collection and assessment of information on situations worldwide; sending fact-finding missions; dissemination of monthly reports to UN partners; preparation and dissemination to UN partners of analytical briefings on country situations; and promoting systematic and cohesive information gathering and assessment by the UN on situations at risk of atrocity crimes.[102] The division for Advancement of Women of the UN Department of Economic and Social Affairs is authorised to document, disseminate and analyse data on gender-based violence and update their searchable database/ portal. Credible media houses and regional bodies are also acceptable sources. Relentless advocacy by the CSOs, right groups and international organisations bolstered by the media reporting could galvanise support and encourage state actors to take actions.

Concluding Remarks

'Political will' is not a neutral concept. It can produce both benign and invidious outcomes. The atrocity crimes committed against the Rohingyas were not only a product of 'limited statehood' but also an outcome of the invidious 'political will' of the key domestic actors. Such 'political will' privileged immunity over justice. Despite having a well-established international legal and institutional regime that criminalises atrocity crimes and can prosecute the perpetrators, the relationships of power and privileges between and within the domestic and international actors have triumphed in the context of Myanmar, according immunity to the perpetrators. Competing accounts of the situation

101 For example, A /Res61/143, 19 December 2006, p. 5, mandates UN entities and regional organisations for 'data collection, processing and dissemination of data' for their possible use particularly on all forms of violence against women.

102 See UN Office on Genocide Prevention and the Responsibility to Protect, 'Our Work', http://www.un.org/en/genocideprevention/early-warning.html, accessed 25 January 2018.

have been used by some key actors to justify maintaining the status quo; the lack of political will has strengthen the immunity enabling the perpetrators to hide their criminal responsibilities. However, such a condition is not perpetual. Political will can change. Outlining three potential pathways, this paper suggested how the political will of the global and local actors can be harnessed to pursue justice in the context of Myanmar. It argued that a precisely defined mandate to prosecute the individuals and not the state, and provisions to integrate the host nation's capacity could be a viable framework to establish the ICTM-R. The paper also showed that fine-tuning the material incentives to Myanmar—in particular by Japan and Singapore—and expanding the sanctions by the West could help to bring about the desired outcome of ending the culture of impunity in Myanmar. Within Myanmar, the elected leadership needs to reclaim and expand the civilian space, while the military needs to view national security in holistic terms and not just protect their narrow interests. Finally, the advocacy by right groups and CSOs remains an essential catalyst to the entire process of harnessing the political will to pursue justice in Myanmar.

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Annexes

A. International Human Rights Instruments and Ratification Status of Myanmar.
B. Summary of the CSOs Shadow Report on Human Rights Situation in Myanmar to the UN CEDAW Committee, 2015–2016.
C. Summary of the Key Actions by the Host Country and Other Actors to Establish the Four ICTs.

ANNEX A *International Human Rights Instruments and Ratification Status of Myanmar*

	Title of the Instrument	Ratified/ Accessed
1.	**Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 December 1948**	**14 March 1956** (Reservation, Article VI & VIII)
2.	**Geneva Conventions I–IV, 1949**	**25 August 1992**
2a.	Additional Protocol (I) relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.	Not a party
2b.	Acceptance of the Competence of the International Fact-Finding Commission (article 90 of Protocol I, 8 June 1977.	Not a party
2c.	Additional Protocol (II) relating to the Protection of Victims of Non-Int'l Armed Conflicts, Geneva, 8 June 1977	Not a party
2d.	Additional Protocol (III) relating to the adoption of an Additional Distinctive Emblem, Geneva, 8 December 2005.	Not a party
3.	**Convention on the Elimination of All Forms of Racial Discrimination (CERD), New York, 7 March 1966**	Not a party
3a.	Amendment to article 8 of the CERD, New York, 15 January 1992	-
3b.	Individual complaints procedure under Article 14 of the CERD 1966.	-
4.	**Covenant on Economic, Social and Cultural Rights (CESCR), New York, 16 December 1966**	**06 October 2017**
4a.	Optional Protocol to CESCR, New York, 10 Dec 2008	Not a party
4b.	Inquiry procedure under the Optional Protocol to the CESCR, 2008	Not a party
5.	**Covenant on Civil and Political Rights (CCPR), New York, 16 December 1966**	Not a party
5a.	Optional Protocol-I to the CCPR, New York, 16 December 1966	-
5b.	Optional Protocol-II to the CCPR on abolition of death penalty, New York, 15 Dec 1989	-
6.	**Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, New York, 26 November 1968**	Not a party
7.	**Convention on the Suppression and Punishment of the Crime of Apartheid. New York, 30 November 1973**	Not a party
8.	**Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), New York, 18 December 1979**	**22 July 1997** (Reservation, Article 29)

ANNEX A *International Human Rights Instruments and Ratification Status of Myanmar* (cont.)

Title of the Instrument		Ratified/ Accessed
8a.	Amendment to article 20, paragraph 1 of the CEDAW, New York, 22 December 1995	Not a party
8b.	Optional Protocol to the CEDAW, New York, 6 October 1999	Not a party
8c.	Inquiry procedure under the Optional protocol to the CEDAW, 1999	Not a party
9.	**Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), New York, 10 December 1984**	Not a party
9a.	Amendments to articles 17 (7) and 18 (5) of the CAT, New York, 8 September 1992	-
9b.	Optional Protocol to the CAT, New York, 18 December 2002.	-
9c.	Individual complaints procedure under Article 22 of the CAT, 1984	-
9d.	Inquiry procedure under Article 20 of the CAT, 1984	-
10.	**Convention against Apartheid in Sports, New York, 10 December 1985**	Not a party
11.	**Convention on the Rights of the Child (CRC), New York, 20 November 1989**	**15 July 1991**
11a.	Amendment to article 43 (2) of the CRC, New York, 12 December 1995	09 June 2000
11b.	Optional Protocol to the CRC, (involvement of children in armed conflict), New York, 25 May 2000	28 September 2015 (Signed)
11c.	Optional Protocol to the CRC (sale, prostitution and pornography), New York, 25 May 2000	16 January 2012
11d.	Optional Protocol to the CRC (communications procedure), New York, 19 Dec 2011	Not a party
11e.	Inquiry procedure under the Optional Protocol to the CRC, 2011	Not a party
12.	**Convention on the Protection of the Rights of Migrant Workers & Families (CMW), New York, 18 Dec 1990**	Not a party
12a.	Individual complaints procedure under Article 77 of the CMW,1990	-
13.	**Rome Statute of the International Criminal Court. Rome, 17 July 1998.**	Not a party

Title of the Instrument	Ratified/ Accessed
14. **Convention on the Rights of Persons with Disabilities (CRDP), New York, 13 December 2006**	**07 December 2011**
14a. Optional Protocol to the CRDP, New York, 13 December 2006	Not a party
14b. Inquiry procedure under Articles 6–7 of the CRDP, 2006	Not a party
15. Convention for Protection of All Persons from Enforced Disappearance (CED), New York, 20 Dec 2006	Not a party
15a. Inquiry procedure under Article 33 of CED, 2006	-
15b. Individual complaints procedure under the CED, 2006	-

Source: Author's compilation from United Nation Treaty Collection, http://treaties.un.org, accessed 12 December 2017 and United Nation Human Rights Office of the High Commissioner, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal, accessed 12 December 2017.

ANNEX B *Summary of the CSOs Shadow Report on Human Rights Situation in Myanmar to the UN CEDAW Committee 2015–2016*

CSOs	Relevant Observations /Recommendations
Amnesty International	Reports lack of clarity in several laws like Population Control Healthcare Laws, Buddhist Women's Special Marriage Law, and their potential negative impacts on the Rohingyas who are denied citizenship and many of the rights and protections. Report claims that the draft Buddhist Women's Special Marriage Law, could be interpreted 'to target specific communities identified on a discriminatory basis, in violation of international human rights law.' Calls for several measures to safeguards against discrimination, and the proposed practice of coercive reproductive control such as coerced abortion or forced sterilization (pp. 5–7).
CEDAW Action Myanmar (CAM)	Recommends zero tolerance policy on violence against women and sexual harassment in conflict-affected areas and a transparent trial processes conducted in 'public domain'. The report does not specifically mentions the Rohingya.
Christian Solidarity Worldwide (CSW)	Focuses on Kachin and Shan peoples but expresses concern about violence against women from religious minorities. Report claims that 'rape is used as a weapon of war' by Myanmar military and recommends to end GOM's 'culture of impunity' for such crimes. (p. 2).

ANNEX B *Summary of the CSOs Shadow Report on Human Rights Situation in Myanmar to the UN CEDAW Committee 2015–2016* (cont.)

CSOs	Relevant Observations /Recommendations
Global Justice Center (GJC) and Gender Equality Network (GEN)	Observes that the Rohingya's are subject to systematic discrimination and their right to self-determination are continually denied. (pp. 101–105). It recommends that GOM must combat the 'culture of victim blaming' and reports 'military's historical and ongoing use of sexual violence in conflict.' It suggests prohibiting such practice through legislation, policies, protocols and a 'zero tolerance policy' (p. 120). The 2016 joint report also recommends to eliminate 'impunity for the military and Government actors', including immunities provided for in the Constitution and by legislation. It specifically calls for the trial of military personnel accused of such crimes in civilian courts or in military courts under the Prevention (and Protection) of Violence against Women law (p. 24).
The Arakan Project	The 2015 Report notes that rape incidents increased from June 2012, perpetrated by State actors in northern Rakhine (p. 12). It recommends GOM to combat 'all acts of incitement to discrimination, hostility or violence against religious and ethnic minorities, in particular against the Rohingya …and take swift legal action against perpetrators' (p. 14)
Women Peace Network – Arakan (WPNA)	Report recommends to provide information on 'efforts to investigate, prosecute, or prevent' gender based violence in northern Arakan State committed by the military, police Border Guard and Ma Ka Pa' (p. 5). The 2016 report mentions the act of rape, gang rape and brutal killings of Rohingya women in northern Rakhine State and notes that 'justifications' for such act include punishment for alleged membership of their sons or husbands in insurgent groups or for their failure to fulfil their forced labour duties (p. 8).
Women's League of Burma	Report notes that 'women [in Rakhine state] are driven out of the village' (Annex, p. 1) and claims that GOM has 'failed to take action to address violence against women' and to develop and implement 'adequate legal, support, or policy measures to eliminate violence against women and punish perpetrators.' (p. 14)

CSOs	Relevant Observations /Recommendations
Myanmar National Human Rights Commission (MNHRC)	Outlines GOM'S measures for improving the gender based violence. It observes that Myanmar's reservation on Article 29 upon ratification is a hindrance for the effective protection for women's rights calling the GOM to withdraw the reservation.

Source: Author's compilation.

ANNEX C *Summary of the Key Actions by the Host Country and Other Actors to Establish the Four ICTs.*

ICTs	Resolution Prepared by	Reports to the Committee	Documents/Actions by Host State and Other Actors Reflecting 'Political Will'	Outcome
ICTY	France, New Zealand, Russia, Spain, U.K., and the U.S.A.	UN Secretary-General (S/25104 and Addendum 1)	**Host:** Yugoslavia challenged the legality claiming that any trial should be under its 'national laws, which are harmonised with international law and by competent judicial authorities, in accordance with the principle of territorial jurisdiction' (A/48/170, S/25801, 21 May 1993). Bosnia & Herzegovina and Croatia Joined the meeting without the right to vote. **Others:** Mexico (S/25417), Canada (S/25504 and S/25594, S/25765), Russia (S/2553, S/25829), Brazil (S/25540), USA (S/25575, S/25829); Slovenia (S/25652); Netherlands (S/25716), France, UK, Spain (S/25829) wrote letters to the UN Secretary-General on the issue.	Resolution 827 (1993) under *Chapter VII*
ICTR	Argentina, France, New Zealand, Russia, Spain, U.K., and US.A.	Secretary-General, Commission of Experts (S/1994/879)	**Host:** Rwanda denied any 'systematic and organised killings', 'mass exodus of people' to Tanzania and that 'refugees are not returning because of insecurity'. Questioning UNHCR's motive, it blamed 'irresponsible media' for	Resolution 955 (1994) under *Chapter VII* (China Abstained)

ANNEX C *Summary of the Key Actions by the Host Country and Other Actors to Establish the Four ICTs.* (cont.)

ICTs	Resolution Prepared by	Reports to the Committee	Documents/Actions by Host State and Other Actors Reflecting 'Political Will'	Outcome
		& Special Rapporteur (Human Rights) (S/1994/1157)	'encouraging divisive mentalities among the Rwandese along "ethnic" lines'. Requested the UN to reinforce government efforts to establish international tribunal by committing funds and voted against the Resolutions as a non-permanent member of the UNSC (S/1994/1115, 29 September 1994). **Others:** Uganda supported the establishment of ICTR but objected to its jurisdiction in Uganda (S/1994/1230).	
SCSL	Not Applicable	GoSL and the ECOWAS Report	**Host:** GoSL requests for establishing a 'Special Court' to pursue justice in light of the provisions of the Lomé Peace Agreement to bring lasting peace to Sierra Leon. **Others**. Economic Community of West African States (ECOWAS) supported to establish the 'Special Court'. UN interpreted the amnesty provisions of the Lomé Peace Agreement does not include crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law and passed Resolution to establish the SCSL.	Resolution 1315(2000). 1470 (2003)
ECCC	Not Applicable	Discussed under UNGA Resolutions on the 'Situation of human rights in Cambodia'	**Host:** In August 1979, The People's Revolutionary Tribunal tried the Khmer Rouge perpetrators in absentia and found them guilty. However, the Tribunal is said to have failed meeting international fair trial standards. Cambodia requested UN assistance, insisting local ownership for the trials to facilitate national reconciliation, strengthening democracy and individual accountability. In 2001, the Parliament passed the ECCC Law, signed an agreement with the UN in 2003 and ratified the UN-Cambodia ECCC Agreement that entered into force in 2005.	Para 16 of Resolution A/RES/52/135 accepts & Para 17, A/RES/53/145 appoints a group of experts.

ICTs	Resolution Prepared by	Reports to the Committee	Documents/Actions by Host State and Other Actors Reflecting 'Political Will'	Outcome
			Others: Apart from the UN and EU, 29 countries, two individuals (David Scheffer, William Schabas), three business entities (Foundation Open Society Institute, Microsoft, Information Today Inc) donated funds for the ECCC. Japan remains the highest (30 percent) donor.	

Source: Author's compilation from relevant UN documents and letters.