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By

Samuel G. Feigenbaum, B.A.

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ABSTRACT

This thesis seeks to explain the process required for engaging in a process of transitional justice for the Rohingya in Myanmar through analyzing like case studies that span a variety of transitional justice methods. The study will first explain the instability of the status-quo for the Rohingya, and outline the key problems that the transitioning Myanmar faces in regards to its worst-off minority. The study will then assess the current literature in transitional justice and psychology, and note where they intersect, and any gaps in the scholarship that this study will fill. Using the literature and a discussion of the theories in transitional justice and psychology, the study will then embark on the three case studies of the ICTY, ECCC, and TRC in South Africa that depict a variety of aspects of transitional justice in practice. These case studies will then be analyzed against the case of the Rohingya, and judged for their efficacy in the transitioning state of Myanmar. Finally, the study will conclude with an establishment of the next steps required to conduct a transitional justice process, and the policy implications that these steps may have.
The research and writing of this thesis is dedicated to Dr. Moghaddam, Dr. Villa-Vicencio, and Dr. Zelizer, for their support, to my parents Dr. Paul Feigenbaum and Dr. Judy Kemeny, for their sacrifices, and to the memory of Larry and Marian Feigenbaum, for an inspiring 26 years.

With my love,
Samuel G. Feigenbaum
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CHAPTER 1: INTRODUCTION

NO COUNTRIES WERE WILLING TO ACCEPT THE ROHINGYA REFUGEES, HE SAID. “BUT GOING BACK TO MYANMAR IS ALSO NOT AN OPTION BECAUSE OUR MOTHERS, BROTHERS, SISTERS AND OTHER FAMILY MEMBERS HAVE ALL DIED DUE TO THE CONFLICT” (THE JAKARTA POST).

THE PERPETUAL PLIGHT OF THE ROHINGYA

“As a photojournalist I have seen a lot of things others would never even want to imagine. Oddly enough what really gets to me, what gives me nightmares more than anything else, are situations in which people are trapped and have no options.” The acclaimed photojournalist Zoriah wrote this after a brief stay in a refugee camp. “This is the feeling you get in the Rohingya refugee camps… there are tens of thousands of people stuck in limbo, unable to move forwards and unable to go back. They are dying of disease, malnutrition, old age, child birth and I would have to imagine some die from plain hopelessness. They are trapped… hoping that at some point the world begins to pay attention to them” (Zoriah).

The journalist Assed Baig, who went to Myanmar in order to study the ethnic violence, echoed the sentiment. “We shouldn’t wait for death to take place before we report, we should shine a light on shit that is going to go down. Call power to account. Be the voice of the voiceless. Sounds cheesy,” he added, “but it is true” (Marsh). The voiceless, in this instance, were a small community of Muslims who fled to Mandalay from Meiktila after Than Sein, declared a state of emergency in Meiktila “for national security” because of the recent upsurge in ethnic violence between the Buddhists and Muslims, (Mizzima News). ‘National security’ took on a particularly brutal mask that week. Baig wrote that “a 17-year-old student told him about running for his life in Meiktila… Baig showed him the pictures he had from a local journalist. Some were teenagers. Two had massive gashes on the back of the neck… The boy touched the
screen and struggled to speak. ‘That’s my friend,’ he said, ‘and this one, those are Osama and Karimullah.’ The rest of the bodies were burned beyond recognition” (Marsh).

While the edge of the international spotlight has recently begun to highlight many of the ugly realities that the Muslim communities face in Myanmar, with credit due to the bravery of a few journalists risking life and limb to provide a glimpse of these realities, rarely does it shine on one of the world’s more persecuted minorities. There are persecuted Muslim minorities in Myanmar, and then there are the Rohingya; violently subdued, enslaved, butchered when they stay, unwanted when they flee, homeless, and stateless: they are the oppressed of the oppressed. And as the case stands at the writing of this paper, the Rohingya are the living exception to every statement of rights or promise of beneficence issued by the United Nations since its 1945.¹

When the United Nations does call upon the world to rally behind the Rohingya, their message is clear. Vijay Nambiar, a Special Adviser to Secretary General Ban Ki-Moon in the UN ended a five-day trip to Myanmar and concluded that:

The Myanmar government must solve the problems of the Rohingya Muslims problems[sic] as part of the democratization process. If this problem is not resolved on the basis of equality, the whole reform process will be negatively affected. First the physical problems of these people should be solved, their security should be guaranteed, and they should be allowed to return to the places they were forced to leave. The government should then make arrangements so that these two communities can live in peace arrangements. But since tensions are still high in the region, displaced persons will have to remain in camps for a while (World Bulletin/News Desk).

This statement represents a fairly accurate assessment of the problems that this paper will seek to address, but also raises a number of further questions that may help explain why there is very little concrete action taking place: if the military is persecuting the Rohingya, and the Rohingya are central to the reform process, how interested is the military in the reform process? How will the regime guarantee the security of the Rohingya if the security forces are the ones perpetrating

¹ See Appendix B
many of the offences? Does this include granting the Rohingya citizenship? Will the largely Buddhist security force help the Buddhist and Muslim communities live together without taking sides? How? Who will be responsible for addressing the psychological damage that comes after centuries of persecution once security is guaranteed? If the result of the instability is that the Rohingya must remain in the camps ‘for a while,’ what incentives does the state have to decrease the tensions?

These questions do not have easy answers, and yet the status-quo in Myanmar, especially in the Rakhine State, is unsustainable to the tune of daily murders and mushrooming violence that may soon have wide international consequences. This study intends to address some of the issues pertaining to transitional justice for the Rohingya by analyzing a broad array of transitional justice methods that have already been conducted in multi-ethnic societies. The reason why multiple case studies must be considered across a variety of transitional justice methods is informed by literature within the field that stresses the importance of judging each case on its own merit instead of imposing a single method wholesale. To be candid, this is also a statement about the relative popularity of the TRC process which, while considered an effective tool at mitigating violence, should be tempered against the political, economic, religious, and cultural contexts of the society in question. In spite of the near endless combinations of factors that each society has unique to their history, it may be surprising to find that many of these contexts share similar group dynamics explained within the field of psychology. While the methods and contexts may vary, the cases—when analyzed—may inform future efforts in transitional justice. The Truth and Reconciliation Commission (TRC) in South Africa’s emphasis on learning from the past TRCs to inform the implementation of their own program presents a similar methodology to this study (Myers).
Should a transitional justice paradigm be waylaid, the democratic transition within Myanmar will not be the only process negatively affected. Internationally, this conflict may have profound repercussions on Myanmar’s future relationship both with neighbors and Muslim nations around the world, many of which have already drawn strong criticism. The Organization of Islamic Cooperation (OIC) has met to discuss the violence against the Muslims in Myanmar. The Secretary-General of the OIC, Ekmeleddin Ihsanoglu, has stated in a conference in Jeddah that the government of Myanmar must “put an end to the Buddhist extremists and hate campaigns, as well as ethnic cleansing that they have launched against Muslims in the country,” further stating that the organization was “ready to take all necessary measures and actions to deal with it” (Kaladan News). The violence was not lost on Muslim extremist groups either, some of which seek to capitalize on the instability and strife in the Rakhine, including the Pakistani Taliban (Gallo). This will be detailed in the section on US Policy Actions, but suffice it to say here that the spread of political and religious violence due to the flight of the Rohingya is likely to have immediate repercussions beyond Myanmar’s borders to coastal Bangladesh, Thailand, Indonesia, and most likely beyond if responsible action is not taken soon.

**Structure:**

The structure of this paper is as follows. First, a brief history of the Rohingya will be presented. This includes expert accounts and histories, as well as the differing opinions of those in power in Myanmar’s current regime, and a further differing historical narrative from Bangladesh—which hosts the largest group of Rohingya outside of Myanmar. The rationale behind this is simply: while forensic history is important, transitional justice and psychology often deal with perceptions—and as a result, the perceived histories must be taken into account.
Second, the paper will outline the current regime’s methods to address the ongoing conflicts with the Rohingya, and propose transitional justice as an alternative method. Third, a literature review will be conducted both in the fields of transitional justice and minority rights. The intersection and possibility for future study in the fields of psychology and transitional justice will be noted and applied to the case studies. Fourth, the paper will lay a theoretical foundation to provide a perspective for the three case studies used in the methodology. Fifth, three case studies will be analyzed, each of which have employed a different transitional justice method used in the wake of an ethnic minority conflict. Sixth, the paper will analyze which methods apply to the case of the Rohingya given the similar psychological group dynamics. Seventh, the paper will then discuss the strength of the findings, and make suggestions as to how the methods may be improved. Finally, the paper will a discussion of potential economic, security, and political effects that transitional justice may have on the democratic process.
THE ROHINGYA: AN EARLY ETHNOGRAPHY IN DISPUTE

The Rohingya are a stateless people that reside in the Western Rakhine (formerly the Arakanese people of the Arakan). While statistics are difficult to find with great accuracy, it is estimated that 1.5 million Rohingya have been forced off of their land since 1948, and that 1,250,000 live in camps or resettlements, primarily in Bangladesh, Pakistan, and Saudi Arabia.
(Radio Free Asia). Even within Burma, however, the Rohingya are far below the rest of the nation in vital statistics. While these figures are not well documented, their rates of literacy, poverty, and GDP are well below the population at large.

Table 1: Burmese Vital Statistics

<table>
<thead>
<tr>
<th>Ethnic groups:</th>
<th>Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Languages:</td>
<td>Burmese (official)</td>
</tr>
<tr>
<td></td>
<td>note: minority ethnic groups have their own languages</td>
</tr>
<tr>
<td>Religions:</td>
<td>Buddhist 89%, Christian 4% (Baptist 3%, Roman Catholic 1%), Muslim 4%, animist 1% other 2%</td>
</tr>
<tr>
<td>Population:</td>
<td>55,167,330 (July 2013 est.)</td>
</tr>
<tr>
<td>GDP (purchasing power parity):</td>
<td>$89.23 billion (2012 est.)</td>
</tr>
<tr>
<td>GDP - per capita (PPP):</td>
<td>$1,400 (2012 est.)</td>
</tr>
<tr>
<td>Population below poverty line:</td>
<td>32.7% (2007 est.)</td>
</tr>
</tbody>
</table>

Source: CIA

The Rakhine borders the Bay of Bengal on its western coast and is enclosed by the Arakan Yoma mountain range that runs up the eastern border and into India (Encyclopedia Brittanica, Rakhine Mountains). Beyond this, it is difficult to trace the Rohingya back without encountering a fair amount of misinformation, theory, and speculation. The goal of this ethnography is to provide a rough context for how and why these histories are perceived, and not to establish a definitive narrative. It is primarily important to discuss the relative points of view in the case of the Rohingya because the current policy decisions (especially originating from Myanmar and Bangladesh), do not recognize the any account of the Rohingya’s claim to a legacy within the Rakhine—and thus their subsequent claim to citizenship.
The geography of the region is important. The Arakan state is geographically much closer to Bangladesh than it is to the rest of modern day Myanmar because the 600 mile-long Yoma Mountain Range splits the Arakan from the Chin to the North and Magwe to the East, while the border with Bangladesh is separated only by the Naf River. An article by Zul Nurain, informed by some of the work of the prominent Arakan historian, Pamela Gutman, notes that “throughout the Rakhine period there were co-existence and contribution of Muslims, who are today known as Rohingya… Indo-Aryan people ruled over Arakan dynasty after dynasty, century after century before the arrival of Burmans who are today called Rakhine,” as evidence of the blurred northern border (14). There are also common references to Arab traders having lived in the region since the 8th century when a group of Muslims survived a shipwreck and began to inhabit the region (Yunus, 9). The evidence gets stronger a later in the Mrauk-U Dynasty under the leadership of King Min Saw Mon in the 1400s (Chan). In a review of expert Pamela Gutman’s *Burma’s Lost Kingdoms: Splendors of Arakan*, fellow expert Dr. Habib Siddiqui notes that “for centuries, before the current poisonous situation in which one community does not recognize another, Arakan was a place of harmony and mutual trust… because of the first of the Mrauk-U kings who had sought and got help from the Muslim Sultan of Bengal in 1430 CE to restore his kingdom” (Siddiqui). There appeared to be a good relationship between the Bengali Sultans and Arakanese Kings based upon coins and court documents found in the region—and it is relatively well established that Muslims were settled in the Arakan state that lay on the opposite side of the Yoma to the larger empires that were not able to conquer the land throughout the Toungoo Dynasty (1486—1752).

This population was thrown into disarray during the Konbaung Dynasty, when King Bodawpaya was finally able to annex the Arakan in 1784. In his History of Arakan, Dr. Yunus
notes that “the fall of Mrauk-U was a mortal blow to the Rohingyas for everything that was materially and culturally Islamic was razed to the ground. Thousands of Muslims and nationalist Buddhists were put to death. At least 20,000 captives, including Muslim soldiers, artisans and technicians were herded away of central Burma across the Arakan hills” (49). This dispersal, as well as the three Anglo-Burmese wars (1824-1826; 1852-1853; and 1885-1886) which resulted in the British annexation of Burma after only forty years of unified Burmese rule, helped to both solidify the economic and ethnic divisions that would later play a major role in the oppression of the Rohingya.

Much is argued over this initial history from both the perspective of the ruling powers in Myanmar and in Bangladesh. It should be mentioned, however, that debates about the legitimacy of the Rohingya’s claim to Burmese citizenship have deep undercurrents in the modern political climate, which may call into question the historical accuracy of these assertions. One such document, written by the Burmese historian Khin Maung Saw, concludes that:

The name ‘Rohingya’ is neither a historical name nor the name of an ethnic minority in Burma… there was and there is no ethnic minority called ‘Rohingyas’ in Burma… At least 80% of the so-called ‘Rohingyas’ nowadays are illegal immigrants or new settlers coming from Bangladesh because of natural catastrophes, hunger and other reasons… I know that my articles about the ‘Rohingyas’ favor SLORC’s [State Law and Order Restoration Council, now the State Peace and Development Council (SPDC)] position unfortunately… like it or not we have to admit that the issue of the SLORC is correct that the so-called ‘Rohingyas’ are real illegal immigrants…Instead of trying to get undeserved opportunity and inventing fabricated and fanciful histories they should be honest. They should only request for residential permit in Burma as foreigners (Maung, 7).

On the other side of this claim, Bangladesh does not seem to recognize the Rohingya as Bangladeshi. They have also been committing human rights abuses against those fleeing the Rakhine state on boats, who are often already in a condition of emaciation or near death from exposure. The Guardian reported that “Bangladeshi authorities have refused to accept the refugees and have pushed back boatloads of Rohingyas” and quoted an anonymous official in
Dhaka, who said that ‘Voter lists of several elections in Burma in the last 50 years along with the agreements signed with the Bangladesh government prove that the Rohingya are citizens of Burma” (Al-Mahmood). While experts would probably reject Khin Maung Saw outright, and certainly challenge the Bangladesh’s response to the flight of the Rohingya, it is important to understand the experts’ history, as well as the perceived narratives of the parties involved and the role they play in domestic policy.

Currently, the Rohingya have very few rights, but probably more than they know about. Even if they understood these rights, there exists no official recourse for them to settle abuses legally on the domestic or international fronts. While it is unlikely that even the agreement on a definitive history will grant these people the rights they are owed by either officially recognizing them as Bangladeshi by virtue of their Bengali dialect, or Burmese because of their location, future transitional justice endeavors must be sensitive to the profound role that history plays in the Burmese culture. Most importantly, transitional justice methods must focus on efforts to build and then preserve a collection of stories that acknowledge the presence of the Rohingya in the region not for the politicized purpose of establishing a macabre ‘ownership’ of the impoverished group that will subsequently demand an influx of state resources, but for the sake of preserving a cultural heritage unique to the human race at the brink of extinction.

**THE ROHINGYA: SYSTEMATIC MARGINALIZATION**

The story of the people living in the Arakan continues with the annexation of the land from Konbaung Burma in 1785. There were two critical aspects of this annexation: the first, was that the British perceived this move as aggressive, and a challenge to British-controlled East Bengal and Manipur. They later used these circumstances to justify war against the Burmese,
effectively re-annexed the Arakan as reparations. The second aspect was the relocation of people by the monarchs throughout Burma. These practices first established by the monarchs but later practiced by the British disrupted many of the communities that were forced to flee or work as slaves. “Monarchs forcibly relocated people, and slaves taken in conquest were needed to increase agricultural production, and thus state revenues, and to build and maintain pagodas necessary for legitimacy” (Steinberg, 17). From the psychological perspective, communities remained fractured and persecuted, resorting to in-group solidarity to protect against the dominion of relatively privileged out-groups, which in turn led to a form of ethnic nationalism that would play out during the Panglong Agreement. With this in mind, one might suggest that some of the recent problems emanating from the western Rakhine can be traced back to three recent events that occurred between the 19th and 20th centuries: the British seizure of the Arakan after the first Anglo-Burmese War from 1824-1826 (Steinberg, 22) that blurred the borders under the Bengal administration leading to annexation and additional resettlement, the systematic relocation of entire communities by the British that grouped ethnicities together “resulting in minorities becoming more cohesive entities,” the side-effects of which “led to ethnic nationalism and the demands on the state for specialized rights,” and later, the exclusion of the Rohingya from the Panglong Conference in 1947 that manifested in the further isolation of the group as they reacted to form an insurgency around the idea of an independent Rakhine.

The current regime’s efforts to handle the Rohingya insurgency, and later communal violence that resulted in the 2012 Rakhine riots, has been almost exclusively violent in nature. The King Dragon Operation, or Operation Naga Min in 1978, saw the mass arrest, torture, rape, and killing of those related to the Rohingya insurgency. Human rights violations were extremely common, and led to the flight of hundreds of thousands of Muslims across the Naf River into
Bangladesh. According to Medecins Sans Frontieres-Holland, “although Burmese government [sic] in May 1978 declared that 35,590 people, all Bengali, fled leaving 6,294 empty houses behind them, the results of the Naga Min operation in Arakan in actual led to 200,000 to 250,000 Muslims [sic] refugees fleeing into Bangladesh” (Nemoto). In spite of repatriation efforts, massacres continued and the Rohingya were further targeted in their exclusion from the citizenship act—rendering them foreigners in their homeland.

The communal violence was less state-driven than Operation Naga Min, but still had an important element of majority versus minority religious power dynamics that transitional justice must contend with. In May of 2012, a Buddhist woman was raped and murdered in the Rakhine, sparking off a series of reprisal attacks against Muslims in the region. In June, ten Muslim men who were unconnected to the incident were murdered when their bus was besieged by a Buddhist mob. The state response to this communal violence was one sided: three Muslims were arrested for rape, two were quickly sentenced to death and the third died in custody (BBC, “Q&A”). A state of emergency was called shortly thereafter, which in accordance with the 2008 Constitution of Myanmar, affords the predominantly Buddhist police force almost unmitigated power in the region. As a result, and for want of anywhere to go, the Rohingya have undertaken desperate measures to flee by makeshift rafts that hope to land weeks later on foreign shores. The results of these voyages, when successful, are tragic at best. They often land in detention facilities where many die, overcrowded camps where similar fates await them, many are enslaved, some abandoned, some executed (Bangkok Post). The incidents are not limited to violence committed against the Rohingya. The latest example before the submission of this paper occurred in a Sumatra jail where eight Buddhists were beaten and stabbed to death by the Rohingya members in a detention facility upon hearing about the destruction of their homeland (Ahmad).
**Another Way: Transitional Justice**

There must be another way. Wanton violence on both sides of the communities have left scores of innocent people dead, and have destabilized relations between Myanmar and its neighbors in the process. There is no independent judiciary by which to call those the perpetrators to account, even given the recent efforts to reform and open the country. Military options have also added to the pervasive mistrust between the Rohingya and the society at large. The International Center for Transitional Justice (ICTJ) defines transitional justice as the “set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms” (ICTJ, “What is Transitional Justice?”). Transitional justice attempts to deal with the past in abuses in a constructive way that is best fit for the society’s case at hand. Sometimes the society decides to redress these abuses in the form of an international series of trials (for instance, in the charge of crimes against humanity), or sometimes transitional justice takes the form of a Truth and Reconciliation Commission as it did in South Africa—relying on local methods to achieve a similar goal. This paper gauges a variety of transitional justice methods used in similar cases, and analyzes them to suggest how this might be implemented in the case of Myanmar.

**Limitations: the Scope of this Work**

There are a few important points to make about the scope and reach of this study. In the field of Conflict Resolution and the theories within that guide much of the work in this thesis,
blanket solutions and processes that are used across conflicts are looked upon with skepticism. Each problem, rather, is taken on its own, with its own set of impacts, complexities, and dynamics that may apply broader theories to specific incidences. This presents both the opportunity for discovering new and innovative ways to solve problems through transitional justice and conflict sensitive approaches, as well as the challenge of applying the process to other circumstances. For instance, a truth and reconciliation commission had been proposed in both South Africa and Northern Ireland. In the case of South Africa, this method was chosen to help explain and move through the deep psychological hurt and mistrust of the past. In the case of Ireland, the TRC is being considered with the aid of South African leaders, but with a different procedure, structure, and plan to overcome Northern Ireland’s own set of impacts, complexities, and dynamics. Right now, Northern Ireland has a political settlement, but for the past five years or so has been looking for something more therapeutic or substantial (BBC, “Truth and reconciliation”). One such difference between the two cases that is hotly disputed at this juncture is the issue of naming perpetrators. Thus, in the case of the Rohingya, even if a TRC method is advocated in this study it by no means suggests that such a process would work elsewhere. The study would, however, be relevant to individuals or groups looking for the rationale behind choosing one process over another—and the means by which to go about determining the relevancy of a given method.

In a similar vein, the conclusions reached within the paper are going to be limited in scope by the political and social will on the ground in Myanmar, as well as the unique environment under which future cases exist (such as perhaps a broader TRC mandate for Sri Lanka, India-Pakistan, and Afghanistan). As a result, the scope of this paper may be broader in its analytical methods, than in the output of its conclusions. The broadest aspect of these findings
that serves as the Hippocratic Oath for those working in the Conflict Resolution is the mandate to ‘do no harm.’ This mandate implicitly demands that an individual study be conducted upon the culture at hand without attempting to blanket solutions from similar situations but from different contexts. This is to say, briefly, that the methods used to derive the feasibility and urgency of transitional justice in the study may be widely considered, while its specific recommendations remain constrained to the case of Myanmar alone.

**CHAPTER 2: LITERATURE REVIEW**

There are two fields of literature that pertain to the study of transitional justice for the Rohingya population: transitional justice, and minority rights. Both of these fields are concerned with the social, legal, political, and psychological aspects of conflict.

The field of Transitional Justice has evolved and expanded considerably since it was founded after the Nuremberg Trials. The focus after Nuremberg, as one might imagine, was specifically on Rule of Law and the legal tradition. The Transitional Justice Genealogy (Teitel) outlines how the failures of the World War I justice impacted the origins of World War II, and contributed well to the conversation by citing the need for a more comprehensive judicial format to prosecute individuals who were responsible at the highest level. This would later evolve into individual prosecutions, which differentiated between crimes committed by the regime to be treated locally, and genocide or crimes against humanity which was to be treated internationally by the International Criminal Court (ICC) in accordance with the Rome Statute.

Gerry Simpson and Karl Jaspers noted that “something other than law was at stake here and to address it in legal terms was a mistake.” (83). Part of this evolution was a step away from the legal, prosecutorial focus that had dominated the Cold War period. It was no mistake that
many of these ideas became prominent after the relative stasis of the Cold War, when intrastate violence and ethnic nationalism played a much stronger role in international conflict. The breakup of Yugoslavia and subsequent ICTY is a prime example. In the late 1970s and through to the 1990s, however, societies that were under the sway of the Soviet Union began to transition—Huntington called this period of transition the Third Wave of democratization. This was particularly relevant for transitional justice with the end of the Argentinian dictatorship in 1983, which introduced more nuances within the literature of the field—namely focusing on pardon, amnesty, and truth-telling. Such literature was aided greatly by the works of the historian Timothy Garton Ash’s (1990) pursuit of broadening the understanding of historical truth and narrative. This is contextualized in Villa-Vicencio’s discussion on Ash’s *The Truth about Dictatorship*, which identifies “three ways of dealing with past atrocities: trials, purges, and history lessons” (109).

These ideas began to fill gaps in the literature, and further contributed important non-legal nuances to the field at large. Dr. Villa-Vicencio added to this dialogue by astutely noting some of the failings of prosecutorial justice in the case of Saddam Hussein:

He was convicted of crimes against humanity, for the killing and torture of 148 Shi’ite villagers in Dujail following a failed assassination attempt in 1982. He was sentenced to death and subsequently hanged. The courts did not address the more extensive record of his reign of terror. Questions about America and the West encouraging Hussein to invade Iran in 1980—an invasion that led to the deaths of 1.5 million people—were not posed (109).

There was most certainly something more to consider, beyond a trial and beyond trading amnesty for peace, and it began as a dialogue about alternative methods to address the issue of reconciliation.

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2 A good journal article may be found from the ICTJ: http://ictj.org/sites/default/files/ICTJ-Argentina-Accountability-Case-2005-English.pdf
Truth Commissions thus emerged from the Argentinian example (Comisión Nacional sobre la Desaparición de Personas or CONADEP) within the specific context of desaparecidos from the clandestinos in 1983, and the Chilean report (Comisión Nacional de Verdad y Reconciliación) after Pinochet transferred power to Aylwin in 1990. The most famous of these commissions, and in no small part a predecessor to the discussion of transitional justice and minority rights, was the Truth and Reconciliation Commission in South Africa in 1995 that helped transition the nation out of apartheid. Literature written from this vantage point helped identify the contrasts that appeared as the field of transitional justice grew from the Nuremberg Trials. These are highlighted by the practitioner and scholar, Dr. Charles Villa-Vicencio in the South African example, which melded formal, legal rules that traded conditional amnesty for truth on one hand, and informal methods that work within the traditional notion of Ubuntu that encouraged storytelling as one aspect of a broader means to reestablish a relationship between the perpetrator and survivor.

There are two important documents that emerged in the field at the inception of these tribunals. Since the local courts and infrastructure could not sustain trials, the United Nations stepped in and through Resolutions 827 and 955 respectively created the methodology by which to conduct trials. While this may have represented a turn towards the more legalistic aspects of transitional justice, there was also the inclusion of traditional Gacaca courts in Rwanda as part of an effort towards local, community-based transitional justice. Another point of significance was the intense ethnically-motivated nature of the butcheries of the early 1990s, where states had to contend with new theories that were more at home in the field of conflict resolution than in

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3 See Moral Reconstruction in the Wake of Human Rights Violations and War Crimes (Zalaquett).
4 See Walk With Us and Listen (Villa-Vicencio).
transitional justice. In spite of the general trend towards addressing ethnic conflict through the lens of transitional justice, the Rohingya have been largely left out of the conversation.

The role of ethnic minorities and the psychology of inter-group dynamics as championed by Dr. Fathali Moghaddam are fundamental in understanding modern transitional justice. This has become more popular in the last few years, but additional gaps in the literature should be evaluated in the context of the intersection between psychology and transitional justice. One such gap is that there is little information on specific conflict assessment tools to use for governments before transition occurs, whereby a transitional justice system may emerge from within the society in a conflict-sensitive way. The United Nations laid out its Approach to Transitional Justice in 2010, which is a good start in identifying ways to go about promoting transitional justice—but falls short of addressing some key issues, such as how to circumvent government/military recalcitrance and the necessity to establish a bare minimum quality of life before engaging the deeply reified psychological conditions operating within and between groups (United Nations, “United Nations Approach”). In a sense, this is a fusion of conflict resolution, transitional justice, and psychology that could be useful provided that metrics were established prior to implementation, and taken during, and after the conflict in order to judge the effectiveness of the tool. One very good article by Ladan Boroumand in 2012 suggests an idea similar to this in the case of Iran (Boroumand).

Another gap in the literature that this study will address is the issue of organizational buy-in. Often times in transitional justice, there are actors that exist to either spoil the process, or refuse to participate in the new regime. Tools like lustration and de-Ba’athification were used to remove the government standpatters without full consideration as to the role that these individuals play after the transition occurs. In many cases, it is these people that have the
expertise and skills that a country with weak institutions needs in order to progress. Instead of excluding them from the process, this study will attempt to find a way to discover a means by which champions of democracy from within the military may exercise these skills towards the benefit of the transition as a whole. This serves the dual purposes of reintegrating and reusing the knowledge and skills they may have in order to help rebuild the society, as well as to mitigate extrajudicial punishments from the community at large that often result from programs of lustration (and recently de-Ba’athification in Iraq).

**Psychology of Ethnic Minorities**

Experts in the fields of inter-group psychology and transitional justice like Will Kymlicka and Fathali Moghaddam, have written extensively on the idea of multiculturalism and national minorities, the evolution of which grew predominantly out of the 1960s and 70s. Dr. Moghaddam’s *Multiculturalism and Intergroup Relations*, provides an excellent study into the behavior of group paradigms. Tajfel and Turner’s social identity theory, and Runciman’s relative depravation theory are particularly relevant in the case of the Rohingya.

Social identity theory, developed from the late seventies onwards by Tajfel and Turner (1979), “postulates that the need for a positive and distinct identity will lead individuals to want to belong to groups” (Moghaddam, 95). This manifests itself in different ways according to different scenarios—often dependent upon the power-relationship that the minority group has with the majority group. This point is made by Moghaddam when he writes that “to mobilize a minority group, leaders must persuade minority group members that their rights are being violated and it is legitimate for them to compare their situation upward with those who enjoy these rights” (97). Relative depravation theory, in concert with social identity theory, focuses on
how people or groups perceive themselves to the other—egoistic deprivation in terms of one’s position within a group, and fraternalistic deprivation in terms of a group’s position within society.

In his *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Kymlicka (1995, 2001) focuses on problems like xenophobic nationalism that has plagued the Rohingya without reprieve. Kymlicka further contributes to the literature of ethnic minority rights in psychology when he notes that “not all interests can be satisfied in a world of conflict interest and scarce resources” (107). “In other words,” he writes, “liberals should seek to ensure that there is equality *between* groups, and freedom and equality *within* groups. Within these limits, minority rights can play a valuable role within a broader theory of liberal justice” (194). These are points that reflect well in the broader theme of globalization, multiculturalism, and intergroup conflict established by Moghaddam.

Another valuable idea here that has wide-reaching ramifications, but is not studied to its necessary potential is the idea of psychological *enmification*. The current psychological studies, especially related to conflict, are quite good but are not integrated into a transitional justice framework. In a 2009 thesis (Funai) that Dr. Fathali Moghaddam acted as committee member by Go Funai, enmification is spelled out according to the four stages outlined by Dr. Alan Tidwell’s *Conflict Resolved?* (Tidwell). In this study, Dr. Tidwell notes that “the four stages of threat, distortion, rigidification and collusion combine to create a powerful force in conflict. Threat challenges identity, which begets defense, which becomes integrated into identity. The end result is that the conflict becomes profoundly embedded into the very essence of those engaged in it” (136). The consequences of enmification for the Rohingya are further reaching than it seems on the surface. They are called *kular* (Tutu) as well as “dogs, thieves, terrorists and various
expletives. Commentators urge the government to ‘make them disappear’ and seem particularly enraged that Western countries are highlighting their plight” (Fuller). One of the more troubling aspects of enmification is that when it is seeded deeply enough as it was in Rwanda, nominal differences between groups can be relatively perceived as existential threats. Cockroaches (inyenzi, during the Rwandan genocide), dogs, and thieves are dehumanizing epithets that make the effective parties easier to eliminate psychologically. This is already well under way in the case of the Rohingya.

CHAPTER 3: METHODOLOGY

The methodology of this research will judge normative theories of transitional justice and group theory psychology with three case studies, chosen to provide the necessary analytical context to discuss transitional justice in the case of the Rohingya. This methodology will establish theories of intergroup psychology and transitional justice. These theories will form the backdrop for the case studies, as well as provide established grounds on which to engage the new research.

The theories will be tested against the data of case studies where transitional justice methods were used in the wake of ethnic violence. Similarly, each of these case studies will be discussed in relation to the economic conditions that came before and after them. Given Burma’s economic liberalization, it is important to discuss the effects this trend may have on worst off group in the region. An analysis of each of the case studies will follow that will assess whether or not transitional justice had a positive or negative impact on the ethnic minority and economic conditions at the time. This data will then take into account aspects of both the conflict, and transitional justice methods chosen to alleviate the intergroup tensions, before applying the same
criteria on the Rohingya in the Rakhine. Judging from lessons learned in similar and different circumstances, a qualified assessment of transitional justice for the Rohingya will follow. The study will conclude with additional policy considerations for the United States and international actors within the region. Given that each transitional justice case is different, measuring the numeric effects of a proposed transitional justice plan on either the sentiment of the ethnic minorities or the economy will be difficult to measure. What works in one context may not in the next, no matter how similar the contexts seem. This is why a critical understanding of the psychological theories that underlie and explain many of the grievances that groups experience must be understood within the context of how the transitional justice methods attempt to address them. Further, a system of metrics and sample questions must be built into the transitional justice process—before, during, and after—so that errors may be assessed and corrected in real-time. The feedback loop of metrics into the system underlines the core idea that transitional justice is an often times messy, imperfect process aimed at palliative care over the search for a single prescribed solution, and must therefore be flexible enough to cope with an inevitable battery of unforeseen circumstances.

Theories of Intergroup Psychology

The grounded theories in intergroup psychology as applied to these cases studies will help describe the deeper natures of these conflicts, and the needs that transitional justice must address. They include social identity theory, and relative deprivation theory. Ethnic conflict tends to involve deep-seeded issues pertaining to identity, how an individual views themselves within a group, and once more how that group views itself in relation to other groups. The fields of psychology and transitional justice have many elements in common, namely their emphasis on
the individual/group point of view; that it is as important to take into account the forensic evidence, as it is to probe for the perceived histories, individual accounts, stories, myths, and narratives that may have no basis in established fact.

Abraham Maslow’s ‘hierarchy of needs’ pyramid is another model that is vital in recognizing the limitations of both this study and future transitional justice efforts to aid the Rohingya. There are two reasons why this is important in the discussion of the Rohingya in Burma. The first, is that the pyramid will help to inform many of the issues that a transitional justice model will have to address before engaging in some of the more traditional models such as truth and reconciliation commissions and working on the legal aspects of amnesty and reparations. The second, is to highlight the need for a moral and humanitarian perspective to be integrated into an international legal perspective.

*Illustration 2: Maslow’s Hierarchy*\\(^5\\)

Maslow’s theory was tested empirically by Clayton Alderfer, who redefined and grouped the needs into existence needs, relatedness needs, and growth needs—or the ERG model.

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5 http://blog.clarity.fm/wp-content/uploads/2013/01/Maslow3.jpg
Alderfer blurred the lines between each need on the hierarchy, postulating that more than one level could be active at one time. Probably the most significant difference is the integration of an individual’s perception of their condition. This indicates, more realistically, that an individual may be motivated to pursue lower needs once higher ones are satisfied and actually create an imbalance—such as overeating to compensate for lack of relatedness.

This international law is based off of a form of deontological moral imperative that, from the point of the lowest common denominator, assumes that each person born on this planet has certain inalienable rights. The legal document, the 1948 General Assembly resolution 217 A (III)—better known as A Universal Declaration of Human Rights—states in the following articles a list of rights that, because of systematic persecution, racism, enmification, poverty, and lack of security, the Rohingya cannot enjoy even the minimum requirements set forth by Maslow’s hierarchy specifically in reference to ‘higher’ rights such as the right to freely participate in the cultural life of the community and arts in Article 27.⁶

**Theories of Transitional Justice**

The theories in *transitional justice* will provide a practical framework by which to address the grievances brought about from considerations raised by field of intergroup psychology.

The actor most concerned with transitional justice is the International Center for Transitional Justice (ICTJ), an international non-profit organization that provides the capacity to help advise countries in periods of instability and transition. Their expertise in world-wide conflicts has helped to narrow and build on working definitions of transitional justice. While

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⁶ For the purposes of spacing, these rights will be listed in Appendix B, along with citations of public instances of their violation.
scholars and practitioners in the field of transitional justice have developed their own interpretations, methods, frameworks, and procedures—given the sensitive and specific nature of each conflict—the definition that this paper will draw upon is the one set by the ICTJ, which defines transitional justice as:

Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms (ICTJ, “Transitional Justice”).

Within the context of Myanmar, this definition is manifested as a less formal mandate given the nature of the persisting power-imbalances and governmental recalcitrance. The ICTJ has helped an organization called the Network for Human Rights Documentation – Burma (ND-Burma) to lay the groundwork for logging and tracking official records of human rights violations (HRVs) committed by the regime. While this organization’s work goes well beyond tracking HRVs perpetrated solely against the Rohingya, their detailed Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar has specifically called upon the government to “ensure that ethnic minorities are granted fundamental rights. This includes the Rohingya community” (Quintana).

The ICTJ, in coordination with the UK-based Islamic Human Rights Commission, has also taken the stand that a formal inquiry be conducted by to look at abuses committed by the regime, to fight governmental attempts towards the sanctioning of legal impunity, and to shed more light onto the situation in the Rakhine State. One such commission has already been formed.7

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The United Nations, in 2010—well before the latest spate of violence—called for the immediate cessation of violence against the Rohingya. A Resolution adopted by the General Assembly (A/RES/64/238), has “called upon the Government of Myanmar to take immediate action to bring about an improvement in their respective situations, and to grant citizenship to the Rohingya ethnic minority” (United Nations, “General Assembly”). Such efforts have been met half-heartedly at best.

Amnesty International has also released, more recently, a number of press briefs targeting the need for transitional justice measures to be carried out to the benefit of the Rohingya. Their efforts are concerned with one of the more important pillars of transitional justice, namely the legal efforts to integrate the Rohingya into the Burmese society at large, against the 1982 Citizenship Law that is keeping the Rohingya in the problematic stasis of statelessness. A press release in 2010 has noted that, in spite of recent efforts towards reform and democratization, the “attacks against minority Rohingyas and other Muslims in Myanmar,” represent a “‘step back’ in the country’s recent progress on human rights, citing increased violence and unlawful arrests following a state of emergency” (Singh).

Regardless of whether or not the democratic reforms conducted by the government of Myanmar are genuine, organizations have already been working on transitional justice issues with the Rohingya for nearly a decade and a coherent process must be established to exploiting the timing window of the current reforms.

**INTERSECTION OF PSYCHOLOGY AND TRANSITIONAL JUSTICE**

The contributions of psychology in the field of intergroup relations are summarized best by Christie, who notes that:
The top three contributions of psychology in terms of both practice and research to transitional justice have been: (1) clinical intervention as a means of healing from trauma, and other post-conflict recovery strategies (e.g., support groups), including political activism; (2) the impact of transitional justice mechanism on intergroup relations (groups and societies at large); and (3) the impact of transitional justice mechanisms themselves on victims who participate therein (Christie, 1132).

There are also a number of areas where the psychology may attend to transitional justice mechanisms that are as of yet unexplored—especially in terms of Social Identity Theory and Relative Deprivation Theory, as mentioned above. Victims of an atrocity may view themselves as now belonging to a ‘class’ of victims, and begin to identify themselves as such. This is particularly relevant in the psychology of rape or other traumatic events, where victims were asked whether or not they identified as a victim or a survivor (Skjelsbaek). These two narratives have psychological backgrounds that underpin the need for cognitive reframing of an issue. In the case of rape in Bosnia, gendered questions tended to result in victim identification whereas ethnic questions tended to result in survivor identification. In the case of the ICTY, “as survivors, the women have taken it upon themselves to testify voluntarily before the ICTY and thereby show that their rape experiences have rendered them neither passive nor silent” (Skjelsbaek, 15). Transitional justice would stand to benefit from understanding how groups of people identify themselves beyond their own ethnic ties, and into psychological categories in order to encourage either greater participation and promote positivity over negativity.

This understanding of trauma also works both ways, between survivor and perpetrator. In an article in the New York Times that was part of a broader series of studies that looked at the effects of drone warfare, it was reported that drone pilots often incur similar levels of post-traumatic stress disorder (PTSD) as soldiers on the ground (Dao). This is instructive—people committing acts of violence from thousands of miles away with no threat to themselves may become negatively impacted by the violence they witness or participate in. There needs to be
additional work done in the research of perpetrator trauma and an understanding of the psychological ramifications of carrying out some of the malignant regime’s policies. In some senses, perpetrators are doubly punished: if a process of lustration is favored over integration, perpetrators with psychological trauma may also face ostracism within their communities. This also eliminates a large portion of the society with institutional knowledge from helping to rebuild, and dismisses an opportunity for the perpetrator and society at large to bond once again. Cognitive reframing of both perpetrator and victim culture may also present interesting findings. While ‘victims’ may conduct cognitive reframing and transform into ‘survivors,’ the ‘perpetrators’ do not have a similar method by which they can transform themselves into an empowered group that works towards rebuilding social relationships. A final point of interest in social identity theory may involve a study that looks at positive reinforcement over negative punishments—or in the terms of transitional justice, positive reconciliation over negative prosecution.

The fields of psychology and transitional justice are intertwined and could stand to benefit each other greatly, especially in terms of understanding the psychological effects of truth-telling from both the survivor and perpetrator’s perspective. These perspectives may manifest as well in victim/survivor and perpetrator senses of justice relative to others within the society. Terror in one group may affect the society at large in hitherto unknown ways, including the association of similarly persecuted groups to feel themselves less-so in regards to more persecuted groups. This was the case when black soldiers during the United States Civil War, who were often treated poorly, felt more positive about their situation because their frame of reference was relative to the slaves in the South. The field of transitional justice would do well to note these undercurrents because unequal justice in one group may destabilize the entire process
as some people who have been wronged or left out may now identify themselves as part of a sub-
culture of victimhood, and perceive themselves as now worse off than before the process began.

What the Truth and Reconciliation Commission in South Africa employed better than
most other transitional justice mechanisms, was the emphasis on an individual’s account of
justice and injustice. It is interesting to see how individuals within the process perceived of their
situations during apartheid, and how they came to terms with forgiveness and reconciliation
later. A psychological study of the process of truth and reconciliation versus prosecutorial trials
or tribunals would be beneficial in this area for a number of reasons. First, ‘justice by law’ and
‘perceived justice’ are two different things. What may be just in accordance with the law may
still leave victims wanting, while what may be unjust in accordance with the law—like foregoing
Miranda Rights for a perpetrator of a crime—may feel or be perceived as just. A transitional
justice platform must take into consideration both sides of this situation, and make sure that the
parties involved have a psychological sense of feeling righted, while at the same time
maintaining rule of law and political legitimacy.

The ethical quandaries may be summed up as follows: is a transitional justice paradigm
effective only if it addresses the perceptions of justice, or does it also have to adhere to
international standards of justice in order to be effective. If the system is viewed of as legitimate,
but ultimately leaves either the perpetrators or survivors unfulfilled, new problems may arise
concerning the definition of justice. This is to say that if a society believes that executing
perpetrators is inherently just and leaves individuals fulfilled, are the next steps to commit to the
justice standards of the society or engage in a reframing effort to redefine justice? Further, if the
government is transitioning away from a period of violence, in a sense this involves a subsequent
change of values and standards that are as of yet undefined. Who chooses the new system of
values, and what tools are there to conduct a society-wide restructuring of a sense of justice? Is there a risk that victims will overcompensate once they regain a say in the affairs of their lives and attempt to monopolize the new cultural paradigm, or can there be nation-wide participation from all sectors of society to integrate a shared set of common beliefs? When one group is perceived of as bearing the brunt of the nation’s problems, like the Rohingya, should their say proportionally offset their historical silence or will they understand that the perpetrators may in turn need to voice their opinions as they go through a personal change in values?

These are extremely difficult questions that raise a number of exciting new avenues for study. The natural marriage of psychology and transitional justice may as of yet be understudied, but there is no short of common theories to substantiate these future efforts.

**Chapter 4: Case Studies**

There were ten case studies that were chosen in the larger constellation of countries that have undergone or considered some method of transitional justice since the 1950s. The cases (Rwanda, Burundi, Yugoslavia, Cambodia, South Africa, Indonesia, the Solomon Islands, Nepal, East Timor, and the Roma) were then screened for factors that included post-colonial upheaval, catalyst involving the military, regime’s misuse and eventual collapse of the economy, and a plan by the regime in power to either exclude or destroy the ‘other.’ The ‘other’ in this case was based upon ethnic lines, as the intractable conflict in western Myanmar involves a high degree of ethno-religious rhetoric. Finally, the case studies needed to provide a range of attempted transitional justice methods so that there would be an appropriate breadth to the survey. What remained was a cross section of methods in three case studies that were designed to shed light on the hitherto unorganized attempts at transitional justice for the Rohingya. The first case study,
the International Criminal Tribunal for the former Yugoslavia (ICTY), represents the litigious, Nuremberg-styled method in the form of an ad hoc tribunal. The second case study, the Extraordinary Chambers in the Courts of Cambodia (ECCC), fell somewhere in the middle with a hybrid tribunal of two chambers and an increased domestic presence aided by the international community. The final case study, the Truth and Reconciliation Commission in South Africa (TRC), presents a clear departure from the Nuremberg-styled attempts at justice and went so far as to use the cultural understanding of *Ubuntu* in order to frame the transitional justice conversations.

For the sake of clarity, each of the case studies is broken down and outlined into a similar structure, so as to provide historical and cultural context, discuss the transitional justice methods used in the context, analyze the arguments for the successes or failures of the methods, and finally, both discuss the findings in relationship to the current methods of transitional justice attempted with the Rohingya, and discuss gaps in the process. It is important to keep in mind that the role that intergroup psychology plays in how the courts, tribunals, and commissions deal with the perpetrator-victim relationship will have an impact on the results of the process. This is to say that factors such as the naming of perpetrators, amnesty, lustration, or programs to rehabilitate both perpetrator and survivor will need to be considered within the context of how the groups perceived their relationship with each other before, during, and after the process is conducted. This is especially relevant when judging local perceptions of the degree to which these programs succeeded or failed. This is why, beyond the Results section of these case studies, is an analysis of how these results were qualified by the people they were intended to assist. While some of the more nuanced aspects of the histories (both forensic and qualitative) may appear different in each of the examples provided, they share common treads that are well-
documented and grounded in the theories of group psychology provided earlier. This is why the emphasis on perceptions is so important and recognized as such in both fields of study.

Just as the South African model stressed the importance of diligently creating a learning process by which they would learn from the historical examples of the past, so too does this study attempt to divine similar lessons that might be applied and tailored to the case of the Rohingya in Burma. It would be unrealistic to assume that these conflicts will yield a single unifying theory that will describe a ‘best method’ or single explanation for how transitional justice might work in solving conflict in multi-ethnic states. There is still the hope, however, that by observing and analyzing some of the similarities and group-dynamics between the conflicting parties, one may begin to engage in a deeper conversation about what specific methods of transitional justice will be viable for the Rohingya.

There are three goals that this inquiry will attempt to reach: The first, is to establish that the group dynamics present with the Rohingya are similar to the psychological group dynamics in the case studies. The second, is to establish a model that will address the psychological needs of the Rohingya as informed by the pursuits of the past attempts at transitional justice, and takes into account the prerequisites for a formal transitional justice process to take place. The final goal, is to provide an argument for the evolution of this model through thoughtful criticism, which may eventually contribute to the sorely needed recognition that the Rohingya were promised under the Universal Declaration of Human Rights. Even if one would argue that the current regime is not yet in the position to engage in transitional justice with the Rohingya, so long as any population is marginalized, targeted, and attacked without recourse, sober discussion and a viable alternative to the bloodshed will always have its place in the pantheon of worthwhile options.
Background and Context

The background and context of the Yugoslav Wars of the 1990s was the most ethnically motivated of the conflicts studied. The origins of the conflicts (depending on how they are interpreted and who is doing the interpreting) may go as far back as the Battle of Blackbird’s Field in 1389 between the Ottoman Empire and the Serbian Principality under Lazar. For the purposes of this essay, the important points to take away from this section are that first, the ethnic conflicts are deeply rooted in the various perceived histories of the parties involved and are not necessarily the result of any one catalyst, and second, that especially in Bosnia there existed inter-ethnic tension as well as conflicts between ethnicities. These are relevant to the case of the Rohingya because, amongst the grievances, is a common distain and disagreement with foreign interveners due to the burden of colonial history, and because of the inter-ethnic conflict between the Rohingya, Muslims, and Buddhist majorities. In the case of Yugoslavia, loyalties split in the diverse communities during World War I. To compensate, the groups tended to become nationalized and act in tendencies that, upon the war’s end, put each ethnicity into disarray over how they would like to be governed:

The struggle between the Serbs (fighting for unity) and the Croats (fighting for more individual autonomy) became particularly fierce, and radical elements of both sides used intimidation and assassination. King Alexander tried to exert more control and bring stability to his nation, and in 1928 it was renamed ‘Yugoslavia’- the country of the Southern Slavs- to try to foster a better sense of cultural unity. He was assassinated in 1934, and the violence and instability grew worse (UNC-Chapel Hill).

World War II further intensified the divides and ethnic conflicts, and civil war broke out as communities divided over who to support. Josip Broz, known to most as Tito, eventually won out and helped unite groups in what became known as the Socialist Federal Republic of
Yugoslavia (SFY). After the war, the SFY was briefly aligned with the Soviets, but worked towards a different tract of communism that featured a federation “of six republics—Serbia, Croatia, Slovenia, Montenegro, Macedonia, and Bosnia-Herzegovina—and two autonomous regions—Kosovo and Vojvodina (both located in Serbia)” (UNC-Chapel Hill). This arrangement, along with Tito’s personal style of rule, stabilized the Balkans for the most part during the Cold War. After his death in May of 1980, however, disunity spread in the power vacuum. Slobodan Milosevic publicly intervened to reunite Yugoslavia but ended up, according to the prosecution in the ICTY, acting aggressively to assert Serbian nationalism.\(^8\) This was finally made clear in the early 1990s when extremely brutal action was taken against Croatia and Slovenia for their calls for independence, as well as later in Bosnia (which was ethnically divided principally by the Muslim Bosniaks and Orthodox Serbs, in addition to a smaller contingent of Croats). The violence culminated in of the most horrific incidents that had occurred during this period in the 1995 massacre in Srebrenica, which acting Secretary-General, Kofi Annan, called “the worst [crime] on European soil since the Second World War. Throughout the world, this date is marked as a grim reminder of man’s inhumanity to man” (Annan). Serbia later admitted to later killing more than 7,000 Bosnian men and boys. In the broader context of the conflict, “about 140,000 people were killed in the region during the conflicts, and almost 4 million others were displaced” (ICTJ, “Transitional Justice in the Former Yugoslavia”).

*Transitional Justice Methods Used*

There were a variety of legal implements used to address the violence that occurred in the early nineties in a variety of local courts, but the most popular was the International Criminal Tribunal for the former Yugoslavia (ICTY). This was proposed as United Nation Security

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\(^8\) Given the complexity of the history and scope of this paper, for additional resources, see: The Death of Yugoslavia. Free link provided here: [http://topdocumentaryfilms.com/death-of-yugoslavia/](http://topdocumentaryfilms.com/death-of-yugoslavia/); see: Serpent in the Bosom: the rise and fall of Slobodan Milosevic (Cohen).
Council Resolution (S-RES-808) and approved by S-RES-827 on May 25, 1993 as an ad hoc court to redress four groups of crimes (United Nations, “Security Council”). According to the ICTY mandate, “the tribunal has authority to prosecute and try individuals on four categories of offences: grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity” (United Nations, “Mandate”). Working along-side this court is the Court of Bosnia and Herzegovina (BiH) to handle local prosecution, which while aided by international lawyers and judges, was under national jurisdiction. Its relevance should be noted in the terms of the relationship between efforts to build the rule of law in national courts versus the limited, ad hoc jurisdiction of the international tribunal.

The structure of this court is divided into the three branches: the Chambers, the Registry, and the Office of the Prosecutor (OTP). The Chambers are designed to support three trial chambers and an appeals chamber, stocked with three and seven judges respectively. These bodies are designed to enforce an expanding list of Rules of Procedures and Evidence (United Nations, “Rules”). The President and Vice-President of the ICTY, acting judges Theodor Meron and Carmel Agius, presided over the body and were chosen by a peer-election process (United Nations, “The President”). The Registry served as the administrative hub of the tribunal by assisting the Chambers and OTP, but also translate the tribunal’s diplomatic contacts and relationship with the international community (United Nations, “Registry”). The final office, the OTP, acted as an independent investigating body taking neither instruction from the nation or the tribunal itself. The tendency of this body, however, has shifted towards assisting the prosecution in lieu of simply investigating (United Nations, Office).

Results
In terms of numbers of individuals prosecuted, the ICTY has a much better record than that of the Extraordinary Chambers in the Courts of Cambodia (ECCC). There have been 161 indictments and trials, the last of which concern the ‘four fugitives,’ Stojan Zupljanin, Radovan Karadzic, Ratko Mladic, and Goran Hadzic. Their capture, and recent sentence in the case of Zupljanin (BBC, “War Crimes”), is also a major success story for the ICTY and functions of the tribunal’s successor, the Mechanism for International Criminal Tribunals (MICT). This body was set up in order to follow through with the ICTY and ICTR’s ad hoc functions of tracking and prosecuting fugitives, fielding appeals, retrials, trials for contempt, as well as the continuing functions of protecting victims and witnesses, supervising the enforcement of sentences, assisting national jurisdictions, and preserving the MICT, ICTR, and ICTY archives (United Nations, “About the Mechanism”). One could also say that the result of the ICTY (and ICTR) was this MICT body to help preserve and continue the work and legacy of these tribunals at a decreased cost.

Analysis

Still, the ICTY is not without its criticism. A common theme throughout the exploration of transitional justice and the prosecutorial system that will have a dramatic impact on the Rohingya is that it is expensive. “Over the course of its first thirteen years, the ICTY alone (including the 2006—2007 budget) has been allocated over $1.2 billion” (Wippman). According to the ICTY’s budget sheet, the ICTY now employs 787 staff members with a 2012—2013 budget of $250,814,000, of which the “legal aid system accounts for… 11% of the Tribunal’s yearly budget” (United Nations, “The Cost of Justice”).

9 For a depiction of this, see info-graphic: http://www.icty.org/x/file/About/Infographics/Infographic_facts_figures_en.pdf
The likelihood that the government of Myanmar would consider investing in a program of this magnitude is unrealistic. Similarly, because of the prosecutorial nature of the legal system, the military in Myanmar (who has been the highest law in the land for over half a century) will not likely take to submitting itself before an independent tribunal. This case may speak to the value of a non-legal or tribunal method here. On the one hand the push for an international legal tribunal may motivate actions towards transitional justice by the military regime in Myanmar, but on the other, it may promote a culture of recalcitrance and in-group solidarity that is not conducive towards the minimum goal of recognizing the persecution of the Rohingya and granting them some status within society. An article by the Institute for War and Peace Reporting (IWPR) states well that the cases:

…raise numerous questions about how a complete reversal is even possible when Hague trials are supposed to not only establish a factual account of the wars in the former Yugoslavia, but also further truth, reconciliation and peace in the region. If a trial judgment of more than 1,000 pages, as in Gotovina’s case, can be abruptly reversed in a 50-page appeals verdict, what does that say about the tribunal’s overall credibility? (Irwin).

Gotovina and Mladen Markac, who were being charged for “ordering unlawful and indiscriminate attacks on Serb civilians during an operation to recapture the Krajina [Operation Storm]… for the deportation of at least 20,000 Serb civilians… the murder, persecution and cruel treatment of Serb civilians… and counts of plunder and wanton destruction,” were let off on a technicality by an overstated account of shell distances by the prosecution (Irwin). A comparatively similar incident occurred with many similar repercussions on the validity of the 003 and 004 cases in Cambodia’s ECCC. This may underline the importance of having extra-judicial methods for conflict resolution and transitional justice built into the structure of proceedings. Survivor participation is crucial on a number of levels (therapeutically and
psychologically, beyond legally providing firsthand accounts to backup witness statements), and was perhaps lacking in these instances. More will be discussed in the case of South Africa.

In a similar vein, another problem is that the truth-seeking initiatives were not given the same kind of priorities as the reparations were in terms of providing survivors with closure. The ICTJ 2009 report on the subject states that “none of the governments has made a comprehensive effort to investigate the causes of the war crimes committed against all ethnicities. Nor has any of the governments attempted to document all the events,” further proclaiming, “National efforts at truth-seeking in the region have failed” (ICTJ, “Former Yugoslavia”). While many such efforts were either attempted or promised, like the Yugoslav Truth and Reconciliation Commission and the Commission for Establishing Truth on the Fates of Serbs, Croats, Bosniaks, Jews, and Others in Sarajevo in the Period between 1992 and 1995, they have largely faltered. The Human Losses Project, headed by a more international effort, has attempted to perform a historical account of the period.\(^{10}\) Similarly, reparations and monuments have tended to fall along ethnic lines—which may have actually reified existing ethnic tensions.

From the social identity theory standpoint, it is clear that in-group solidarity was magnified by the negative perceptions of the other that Slobodan Milosevic helped to exploit. This resulted in the exploitation of history to foment hyper ethnic-nationalism, and increased fear on all sides of the conflict. A similar event occurred in Burmese history when the Rohingya were left out of the Panglong Agreement, and resorted to a nationalist insurgency movement. The role that this history has played in the national dialogue within Myanmar, which subsequently equated the Rohingya with terrorists, has been used to explain and justify the continued violence against thousands of innocent people. Although the insurgency movement has been all but pacified, there is still an active contingency of bloggers and agents provocateur that promote and

disseminate the terrorist narrative. In a transitional justice setting, it will be important to both combat the misinformation, and recognize the spoilers early on in the process.

**CAMBODIA—The Extraordinary Chambers in the Courts of Cambodia**

*Background and Context*

The background of Cambodia’s Kampuchea Communist party (commonly known as the Khmer Rouge), is in some ways similar to that of Burma. Peter Church, an expert in Southeast Asia, notes that “Cambodia has known peace, sometimes for extended periods, but always under rulers who enforce peace. French colonial rule achieved a kind of peace in Cambodia, as did King Sinhanouk in the 1950s and 1960s, (12-13). Replacing ‘French’ with ‘British’ and ‘King Sinhanouk’ with ‘Shwe Thaik,’ these histories have a number of similarities. Indeed a coup marked the beginning of military rule as Sihanouk’s controversial nationalization policies hurt the economy, topped with the brutal suppression of a peasant revolt. Lon Nol, the prime-minister and then leader of the Khmer Republic, much like Sao Shwe Thaik and U Nu, proved inept, making it easier for Pol Pot (Ne Win in the case of Burma) to seize power.

The Democratic Kampuchea state’s Khmer Rouge, under the leadership of Pol Pot, saw the murder, displacement, and disappearances of millions. These included any and all of Pol Pot’s enemies, which Church notes are “any foreign peoples who had degraded Cambodia… and any Cambodians who had colluded with them, which to the CPK (Communist Party of Kampuchea) meant all city folk” (26). During the period of 1975-1979, an estimated two million people were killed by the regime or starved to death because of the regime’s flawed economic policies.
In the wake of these atrocities, much of the infrastructure and even the basic rules of society were destroyed. During this period, it was estimated that one in four were murdered, and the economy lay in ruin. Even after Pol Pot fled, famine continued to ravage the nation until well into the 1980s. Eventually the war in Vietnam ended and the Cold War thawed, which allowed for international actors to begin playing a role in the physical re-stabilization of the country (Church, 29). The emotional healing would be met with later, in the late 1990s, when the government of Cambodia requested international assistance from the United Nations to set up a series of trials. Eventually there were two legal documents, one between the United Nations and the Government of Cambodia, and another domestic law ratifying the new courts (Bialek).

**Transitional Justice Methods Used**

The most important aspects of the court involved the matters of structure, jurisdiction, and victim participation and restitution, all of which link into the larger question: did these courts fulfill the emotional and psychological needs of the survivors? The structure of the courts would be that of a hybrid tribunal, and the staff would represent a cooperative domestic and international group of judges (The Extraordinary Chambers). The logic behind this was to pull out the cultural and familiar aspects of the Cambodian legal system and combine them with international expertise, especially involving crimes which may be international in nature (eg: crimes against humanity). In this capacity, the judges would sit on one of three courts outlining each phase of the trial: from Pre-Trial, to Trial, to Supreme Court—each with a different mandate. In addition there were two private investigation offices, and an Administration office that tended to the Victim Support Section (VSS). The VSS played an interesting intermediary role between the victims and the defendants—and stands in contrast to the methods used in the TRC.
Results

A telling population-based study by the University of Berkeley’s Human Rights Center that was conducted in June of 2011 noted that:

In 2010, 1% of the respondents reported that an organization had contacted them to participate in ECCC proceedings. This is an increase from 2008 when none of the respondents reported having been contacted. Similarly, 1% of the 2010 respondents indicated having participated in ECCC proceedings, mainly attending hearings or visiting the court. None of the respondents had applied to become a Civil Party at the Court, which is not surprising given the limited number of parties as a proportion of the total population. It also highlights that while factual knowledge has increased about the Court, much remains to be done in terms of informing Cambodians about such possibilities to participate if Case 003 or 004 take place (Pham, et al., 24-25).

These findings are somewhat alarming considering the wide-spread nature of the abuse that took place during those four years in Cambodia. In the same study, overall trust in the courts and judges remained at around 50 (39). The implications of ease of access and relevance to the victims as they pertain to the context of the Rohingya will be discussed in the Findings section of this study.

Analysis

The most significant challenge faced in the ECCC seemed to be overcoming the controversy over cases 003 and 004. This is relevant in the case of the Rohingya for two reasons: first, in an atmosphere fraught with mistrust between the powerful and powerless, it would not take a problem of the magnitude that the ECCC faced with 003 and 004 to derail the talks. On one hand, the possibility of regime interference in both the ECCC and a method within the current regime in Myanmar remains highly possible. This underlines the importance of transparency in any transitional justice process that would take place between Myanmar’s ruling regime and the Rohingya.
Furthermore, there is additional evidence that a trial or prosecutorial attitude may negatively impact the transitional justice process. In the case of the ECCC, the regime eventually decided to ask for assistance and request an intervention, presumably because the murder and destruction was so pervasive that the existing institutions could no longer be trusted to function capably in the aftermath of Pol Pot’s rule. In contrast, there is a sense amongst the tatmadaw that the military was justified in preserving national unity—and no independent court or tribunal would be met with respect and appreciation unless there was first a widespread admission of the destruction that they have caused the Rohingya.

There are many interesting aspects of the ECCC and its legacy that may play a useful role in informing transitional justice for the Rohingya. One similarity between the two cases is that the Khmer Rouge’s attempts to delay trials and work towards amnesties were also attempted by the government of Myanmar. In a paper by Ronald Slye on the Cambodian Amnesties, he notes first, that on a sliding scale of amnesties between the Chilean Amnesties of Pinochet on one side, and the conditional amnesties in South Africa on the other, “the Cambodian amnesties fall closer to the Chilean end of the spectrum as they are designed to entrench impunity and discourage even the most minimally-required investigation and accountability. Thus, they discourage, rather than further, justice” (99). Second, he summarizes well the role that some amnesties play as a way to highlight those accountable, but how “other amnesties—in fact, the vast majority of them—purposefully hinder accountability and entrench a culture of impunity, thus leading to a superficially peaceful order precariously built on a foundation of injustice” (103). Even a cursory look at the Constitution of Myanmar, shows that the regime is currently in the process of
choosing something much closer to the Chilean model, which could represent a major hurdle for transitional justice in terms of amnesty.¹¹

There is also the sense that as the ECCC courts have not been efficient tools at distributing sentences. The London-based Guardian newspaper noted that after five years and 150 million dollars, the court had tried just a single defendant, Kaing Guek Eav, for crimes against humanity (Adams). In addition to this failing, and the subsequent failure to allot the necessary amount of funds to proceed economically, there were a number of allegations put forth by the judges who worried about government interference. Human Rights Watch (HRW) called for the judges to resign given their inability to try the controversial cases 003 and 004. This incident highlights another important point. Transitional justice, when applied incorrectly, may become perceived of as illegitimate and the entire process may be called into question. Brad Abrams, the Asia director at HRW, said about 003 and 004 that “this would be shocking for an ordinary crime, but it’s unbelievable when it involves some of the 20th century’s worst atrocities. The Cambodian people have no hope of seeing justice for mass murder as long as these judges are involved” (Human Rights Watch). Even as the judges stepped down, there was no system put in place to check up on or guarantee the future legitimacy of the ECCC. In an nation where the rule of law and institutions have been so deeply destroyed or corrupted, such an atmosphere may likely cause additional damage and violate the ‘do no harm’ principle of conflict resolution.

¹¹ For additional reading, see http://ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf. The specific clause is found in Article 445 of the 2008 Constitution, which states that:

All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect to any act done in the execution of their respective duties.
It is therefore important that independent, well-funded, and self-correcting mechanisms that are built into the process should local governance fail, and that they are perceived of as transparent and legitimate enough to oversee the courts and procedures. These aspects of the transitional justice process in Myanmar will pose one of the greatest challenges to overcome. Similarly, victim and perpetrator participation in the process of creating a transitional justice platform will be vital in building credibility between the regime and the Rohingya. The ECCC was a good example of how the perceptions of justice and justice by law were mismatched.

One major difference between this case and the case of the Rohingya which illuminates a potential problem is that of safety. After the Khmer Rouge fell, and once the insurgency was terminated, there was not the same level of governmental control of the political system. The likelihood is that even with the presence of international judges and observers, security in the case of the Rohingya will weigh much stronger than it did with the Cambodian example.

**SOUTH AFRICA—THE TRUTH AND RECONCILIATION COMMISSION**

*Background and Context*

The South Africa Truth and Reconciliation Commission (TRC) represents in many ways the middle ground between the international-legal and local-cultural aspects of transitional justice. The ethnic conflict in South Africa also shares many of its roots with the colonial expansion into the region by the British and Dutch Boers. The Anglo-Boer Wars destroyed many of these Dutch colonies, and helped to solidify British rule with many of the same promises made to the Burmese population during World War II: promises of independence and self-rule that were never fully realized. The Union of South Africa was established in 1910 between the Dutch colonists and British, but primarily solidified Afrikaaner control mid-way through the
decade that strategically marginalized Blacks from larger political participation and left out poor blacks almost entirely (Encyclopedia Britannica, “South Africa Act”). In this period before the republic during NP majority rule, a number of acts were passed that further endorsed a policy of apartheid (from the Afrikaans word for ‘separateness’) including the Population Registration Act and Group Areas Act in 1950 (PBS).

Apartheid, much like during the Ne Win regime, was characterized by a rigid policy against protests and would impose extremely harsh punishments under the legal guise of declaring a ‘state of emergency.’ What predictably followed was a brutal crackdown of all dissent, divided along racial lines that resulted in massacres (Sharpeville), arbitrary arrests, beatings, and death from poor conditions in prisons. A good definition of the apartheid era came from the UN International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973, which defined apartheid as a series of “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them” (Dugard). Professor John Dugard goes on to note that these crimes included:

…murder, torture, inhuman treatment and arbitrary arrest of members of a racial group deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields… prohibition of interracial marriage; and the persecutions of persons opposed to apartheid.

The nature of targeted violence against youth and leaders of the anti-apartheid movement made the deaths and imprisonments that followed, such as in the case of ANC leader Nelson Mandela’s imprisonment in Pretoria, Robben Island, Pollsmoor, and finally Victor Verster (for another poignant case, see Stephen Biko) that much more personal for many of the communities.
The international context of apartheid also complicated matters more. The United States officially opposed the idea of apartheid\(^\text{12}\), but still maintained close ties with the regime for reasons detailed in the Truman Doctrine. South Africa was seen as a vital ally against Communism, and the idea of imposing rigorous economic sanctions and encouraging American companies to divest their assets (which occurred later anyways) when Margaret Thatcher still considered Nelson Mandela a terrorist (Daley) did not sit well for the promotion of capitalism. This may have also stripped the United States of some of its ability to pursue its policy of ‘constructive engagement,’ which “emphasized its common strategic interests with South Africa and insisted on unilateral rather than multilateral negotiations over South Africa’s future” (U.S. Library of Congress). Eventually political opportunism gave way to strong congressional efforts (see CAAA) to assist the economic boycotts by the townships and serious efforts to end apartheid. Before this time, however, and during the 34 year period considered by the TRC, tens of thousands of people were detained—including children—and thousands lay dead from the butcheries (see Bisho Massacre), imprisonment, and assassination.

One benefit to the TRC, though somewhat macabre, was that its emphasis on establishing a historical record of the crimes and injustices committed during the 1960 to 1994 period in question. There were still atrocities and disappearances that were unaccounted for, but the HRC was able to submit and judge its figures against those of the Truth Body of the TRC so that a more accurate count could be had. According to the manuscript, there were:

- Successive States of Emergency, covering a large number of magisterial districts, were in operation from 1985 to 1989.
- Over 80,000 people, including over 1,500 children were detained without trial, some for periods of up to two and a half years.
- According to human rights groups, over 10,000 detainees were tortured, assaulted or suffered other forms of abuse.
- Over 70 detainees died in detention during this period.

\(^{12}\) See 1964 Embargo, and Gramm Amendment Act
- At least 3,000 people were banned, restricted, and placed under house arrest.
- Hundreds of activists had their passports withdrawn.
- Over 500 people were gagged by the Consolidated List; they could not be quoted, even once deceased (O’Malley).

**Transitional Justice Methods Used**

In order to prevent the ruling regime from inoculating itself against the crimes it committed, the TRC attempted to establish an incentive whereby amnesty would be granted for truth telling in the cases of crimes that were political in nature. In regards to the importance of the Rohingya and other political prisoners in Myanmar, included were stipulations for the release of political prisoners and allowing the return of some of the exiles. Archbishop Desmond Tutu, who was appointed President of the TRC, put this eloquently when he stated that:

> We have been concerned, too, that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation (VOLUME ONE Truth and Reconciliation Commission of South Africa, 12).

Looking closely at the Archbishop’s words, one can see the roots of the TRC very clearly, and how dishearteningly far away the Rohingya and Buddhists are from this. *Justice*, as defined legalistically, may not be found with amnesty—especially unconditional amnesty—as it represents a form of exemption from the process of seeking legally corrective recourse. Yet both sides of the equation cannot be made whole if one side is too terrified to come forward for fear of reprisals (perhaps fearful that the TRC will execute a form of victor’s justice). Instead, by *broadening* the definition of justice to satisfy some of the victim’s deeper psychological needs, and by *narrowing* the idea of impunity to encourage truthfulness and satisfy some of the perpetrator’s psychological needs, the TRC is able walk a precious middle ground.
The structure of the TRC involves three committees: the Human Rights Violations Committee, the Reparation and Rehabilitation Committee, and the Amnesty Committee. The Human Rights Violations Committee (HRV) helped to define the range and scope of the time period covered, and the abuses that occurred within, specifically from March 1\textsuperscript{st}, 1960—the date of the Sharpeville Massacre, to December 5\textsuperscript{th}, 1993—the final day of the political negotiations (Campbell). The information gathered within, including the testimony of some 22,000 victims (South Africa: Overcoming Apartheid) and witnesses in regards to the gross violation of human rights, was then referred to the Reparation and Rehabilitation Committee (RRC) per the terms of section 26 of the final report. The official mandate of this body according to the Volume One Final Report was “the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights” (2). This body also provided a list of recommendations to the President of the TRC to further take into account when hearing testimony. The committee stressed the five principles of redress, restitution, rehabilitee, restoration of dignity, and the reassurance of non-repetition (4). Finally, and controversially at points, the Amnesty Committee was created per the Promotion of National Unity and Reconciliation Act No. 35 of 1995, Chapter 4 (5). The controversy, problems, and successes of this body and its relationship to the whole will be explored in the Analysis section.

Results

The results of the TRC are a little harder to judge, especially when one thinks beyond the numbers and takes into account both the possible successes of the process to ease the pressure between groups and preventing full-blown civil war, versus the additional pressure generated by its perceived failure by critics. Their criticisms range from the failure of the top politicians to
accept the validity of the TRC, to the failures in implementing the recommendations once they were submitted by the committees, to the controversial use of amnesty and suspended sentences, to the slow and troubled reparations program (Encyclopedia Britannica, “Truth and Reconciliation”). On the other hand, in a society that was by several accounts on the brink of a civil war—the TRC was credited with drawing back the fangs on each side, with a mandate to promote reconciliation and avoid war. The TRC in South Africa accomplished this. Given the circumstances, the international community correctly drew praise for the efforts of the TRC (Fullard, 2). The TRC also created a lasting precedent given the emphasis on learning from previous cases and building a clearer model, a quality which is now attempted in dozens of other cases, recently in the extremely difficult situation in Liberia (Long, 12).

Analysis

In spite of having an ingenious amnesty program that incentivized truth-telling, the figures tell a somewhat different story. “Out of 7,112 petitioners, 5,392 people were refused amnesty and 849 were granted amnesty. A number of applications were withdrawn” (South African History Online). Of those who applied for amnesty, 83% were not granted it. Counting those that were withdrawn, over 75% were refused, just under 12% were accepted, and over 12% were withdrawn. This means that over one in ten cases in the TRC were withdrawn. What is interesting in this case is that arguably one of the more sensitive TRC efforts had a disproportionate amount of perpetrators feel that this system was illegitimate—or at least discouraged participation for a tenth of those who began to see no positive recourse in terms of amnesty.

There are three reasons why this is so important in the case of the Rohingya. The first, is that the kind of amnesty that the de Klerk’s National Party (NP) attempted to pursue through a

13 For the list of figures, see: http://www.justice.gov.za/trc/amntrans/
legal route in the 1992 Further Indemnity Act (McDougall) is similar to Than Sein’s efforts in Article 445\(^{14}\) of the SPDC’s constitution. The second, is that if one does not deal with this issue of amnesty or offering a route for entrenched members of the military or politicians, few would be willing to pursue a constructive outlet as democratic change does occur. This may increase the risk of high-stakes spoilers. The third, has two parts. The first is that should the issue of amnesty remain vague or opaque, the legitimacy of the system that is responsible for granting or rejecting this amnesty will falter, undermining the efforts, and the second, is that without proper mechanisms in place to deal efficiently with amnesty, many of those that languor in jail are subject to health risks and vulnerability in the insecure environment (McDougall, 2).

There is also the sense that the TRC was actually a preventative measure against future violence. Indeed, with the help of visionaries like Archbishop Tutu, “engagement with South Africa’s painful past helped to prevent a return to the political violence of a few years earlier” (South Africa: Overcoming Apartheid). Using the process of transitional justice to prevent future, or recurring violence may be Myanmar’s key to helping to stem the violence against the Rohingya. Unlike the cases of Cambodia and Yugoslavia, South Africa was never fully torn apart by war—or at least not to the extent that it could have been had a process not been implemented to mitigate the violence. One question that must be dealt with is: did the South African society need to reach this point of no return in order to be able to turn back and weigh its options? This may be the key to uncovering some of the intransigence on behalf of the Than Sein regime towards the Rohingya—and why it feels very little pressure to actively engage in a peacebuilding process.

Another similarity between Myanmar and South Africa that may help future transitional justice attempts is the issue of amnesty written into the fabric of the constitution. One major flaw

\(^{14}\) See Page 43.
of the 2008 Constitution, beyond the somewhat inegalitarian method by which it was passed and enacted, is that it provides the State Peace and Development Council (SPDC) a blanket amnesty to what the Democratic Voice of Burma (DVB) have called “perpetrators of *jus cogens* crimes such as violations of the Geneva Conventions, crimes against humanity, and war crimes” (Htoo). The report further notes that similar methods of Constitutional manipulation were used by the South African regime and, as recorded in the thirty-ninth session of the General Assembly, was “declared it null and void” citing a breach in the Universal Declaration of Human Rights (G.A. res. 217A (III) (United Nations, “United Nations”).

It should be noted that while the TRC was similar to a court, it was not a court in the sense that the ECCC or ICTY was. In fact, when the TRC’s final report was due to be released, the ANC—backed by President Mandela and secretary-general Motlanthe—had to seek an outside court to halt the publication. Even theoretically speaking, the TRC was grounded more in the idea of *Ubuntu* than it was in any international legal tradition (Carver, 17). If one were to extend this idea further, one might come across two problems: can the TRC model be imported into the case of the Rohingya in Burma given the cultural specificity of the TRC’s theoretical underpinnings, and are there such cultural methods that exist in common in Burma that may be used to establish the foundation of a process in the service of transitional justice?

Psychologically, it was clear that a number of the victims of apartheid emerged bravely as survivors in front of the court to recount their stories. The volume and variety of these stories displayed varying levels of satisfaction with the process—although taken as a whole it was perceived as successful in at least mitigating bloodshed. Still, many perpetrators may have felt like the victims themselves when their attempts to claim amnesty were met with rejection or non-compliance. The sense that perpetrators may have undergone gross psychological trauma as well
was largely lost on the process. In the terms of psychology, for instance, perpetrators who participated in the TRC process may have felt relatively deprived given merely their willingness to participate over potentially attempting to hide in the background and escape prosecution. To them it may have appeared that they were taking a large emotional risk by confronting the victim, and perhaps the guilt they felt, and in taking that risk further opened themselves up to prosecution. Yet since many felt that the process was to be legitimate and amnesty would be granted in exchange for the whole truth of committed offences within the time period, when this expectation was not met—others who would have participated in the process felt relatively less deprived than those who had and opted to take their chances in absentia. By sacrificing a little bit of legal rigidity, there may have been a greater opportunity to enhance the perceived justice of the entire process—granting more net value in perpetrator buy-in.

**CHAPTER 5: FINDINGS**

**CONCEPTUAL FRAMEWORK**

This section is devoted to a conceptual framework that incorporates the analysis of the case studies into a tool that may help explain the transitional process for the Rohingya in Myanmar. The tool also challenges some of the traditional transitional justice methods that have been proposed already, the majority of which are not sensitive to the delicate prerequisites that such a transitional process requires.

*The Rohingya, Psychology, and Transitional Justice*

Considering the findings from the case studies, there are a number of important roles that psychology and transitional justice will have to play in resolving the ethnic disputes in
the Rakhine specifically, and Myanmar at large. The Rohingya are very much a persecuted minority, but do not have many of the characteristics that other ethnic minorities have—or are at least unable to express them given the gross power imbalances that exist between the Muslim minority and the overwhelming Buddhist majority. Any transitional justice exercise in Myanmar that seeks to address the Rohingya communal violence will have to take into account the burden of their history, and the fact that they have been a silent minority for so long as to not even be considered as part of the state. Internationally, there may be many predominantly Muslim countries that may help aid the capacity and voice of the Rohingya, but local change and internal motivation will be crucial in beginning to create ties of trust and understanding between the Rohingya and the society at large.

While the violence against the Rohingya mushrooms out of control, the international community is sending mixed messages. The BBC reported that the last of the EU sanctions were lifted (Keane) six hours after they reported this on the Burma riots: “In the sequence where policemen look on as a man rolls on the ground having been set on fire, someone in the watching crowd is heard to say: "No water for him - let him die”—a video goes on to show the police standing by as Monks participate in dragging a man from a nearby brush, and beating him to death (BBC, “Burma Riots”). If the Rohingya are not considered human, are enmified, and persecuted with tacit recognition from the state, it is unclear whether the psychological damage that perpetrators tend to undergo is even a factor. Transitional justice, as informed by the field of psychology mentioned throughout the paper, may play a crucial role in reversing some of the attitudes and actions of the regime—preventing further violence. As to whether or not the regime is ready to undertake such efforts: the sad state of affairs is that the political and psychological backlash from the violence against the Rohingya is not severe enough to prevent future violence.
If there is not a dramatic paradigm shift, which looks unlikely, the Rohingya will be systematically cleansed from Myanmar under the guise of communal violence, states of emergency, and national unity. This is the preemption of a genocide.

Physical Security:

Perhaps the most important aspect of transitional justice for the Rohingya, beyond establishing a fair and just method of holding those responsible for the massacres, is providing the immediate physical security. Larger structural injustices cannot be pursued without first addressing the existential threat faced by the victims and survivors. This is backed by a number of established theories, the most famous of which is Maslow’s ‘hierarchy of needs’ pyramid. First, Abraham Maslow posited in his book *Motivation and Personality* (1954) that without first addressing the needs that arise out of deficiency as physiological requirements for life and security, an individual cannot prioritize additional ‘growth’ needs. Physical needs in this sense are not simply limited to freedom from persecution or fear, but also freedom from starvation, exposure, immediate health risks, the ability to establish and maintain shelter and financial security.

An interesting project that has taken this into account when attempting to address the issue of homelessness and substance abuse in Washington, D.C. has met with great success. In order to prevent a recidivism cycle that leaves many people struggling to cope with addiction and substance abuse while finding housing, the Housing First project provides immediate physiological security before engaging in treatment plans. “The approach has consistently been shown to end and prevent chronic homelessness for 85-90% of individuals who have been traditionally seen as ‘noncompliant,’ ‘treatment resistant,’ and ‘not ready for housing’”
(Pathways to Housing). By addressing the needs lower on the pyramid, in terms of Maslow, the participants are then able to engage in larger social and esteem needs important in the fight against addiction.

From financial security down to exposure and starvation, all of these needs are in jeopardy for the Rohingya and must be addressed on humanitarian grounds, preferably by the regime in power to establish a modicum of trust between the disenfranchised and power-holding groups and failing that, the international community. It should be quickly noted that the provision of aid and physical security in this instance may have larger social ramifications in Myanmar because of the—perhaps well founded—lack of trust that the government has with international actors stemming from the perceptions founded in colonialism, World War II, and the recent charge that international actors and the Rohingya tried to convert or tarnish Buddhism.\textsuperscript{15} Therefore, security and aid, if provided from an outside source, must first take into account the conflict dynamics which exist and have persisted throughout the decades. Failure to take a conflict sensitive approach may negatively impact the international community’s ability to further assist Myanmar in its transition. Another way to look at this situation, is that there is a very good opportunity here to engage in mutual trust-building exercises between the military, the Rohingya, and international actors including Bangladesh, the United States, and foreign NGOs.

Further illustrative of this is a poignant quote by former president Jimmy Carter who said in a speech after a meeting with Than Sein, “everyone I asked, what is the biggest problem in Myanmar? You know what they answered ? A lack of trust” (Vrieze).

\textit{Physical Capacity:}

\textsuperscript{15} These fears are manifested in the 2008 Constitution of Myanmar, which does not allow religious actors to receive foreign funding of any kind. Issues regarding the constitution and constitutionality of such measures are addressed in greater depth in Appendix A.
There are a number of immediate concerns that are not currently addressed in terms of the current pursuits in transitional justice. A paper on this subject, which poses a number of good, well thought transitional justice methods, ends up failing to discuss the preparatory work that must precede reconciliation measures. This point is informed by the case studies of the ECCC and to a lesser extent ICTY, which had difficulty in reaching the public consciousness in a clear and widespread manner. One such problem that few commissions have had to face is the issue of the diversity of language and lack of capacity for some groups to represent themselves. This speaks to two problems: language, and public record.

The Rohingya speak in a dialect that some have called an offshoot of Bengali, or Chittagonian, both under the subset of the Bengali-Assamese language group of the Indo-Aryan classification that covers virtually all of Northern India. There is also Arabic spoken, but the extent of this is not well studied given extremely low literacy rates. Even though the dialect is distinct to the region, and may even contain regional differences within the Rakhine, there are currently over 13,000,000 people who speak Assamese in the region, and just under 84,000,000 who speak Bangla which may offer some promise (Encyclopedia Britannica, “Indo-Aryan”). The primary language spoken in Burma is Burmese. Burmese is of the Sino-Tibetan language family under the Tibeto-Burman and Lolo-Burmese subdivision further to the South (Encyclopedia Britannica, “Burmese Language”). Given this rift between the language roots, there is no easy way to linguistically overcome the gaps save for direct translation. Further, language will play a pivotal role in a transitional justice process, and independent translators of both the Burmic and Bengali-Assamese offshoots will be valuable to the process and should be identified immediately.
Added to this are problems of illiteracy. The UNHCR has noted that ten international agencies have aimed to improve development for the Rohingya living in Cox’s Bazaar, 50% of whom “live in extreme poverty, 75% of children under 5 are underweight,” and “literacy rates in some areas are as low as 16.8% and do not exceed 21.9%” (UN High Commissioner for Refugees, 15). While these conditions are unacceptable for any human to persist in, for the purposes of transitional justice they pose barriers that must be overcome with great difficulty. In tandem with the issue of immediate physical security from either physical harm or the elements, the issue of raising the capacity of international, transparent, and credible translators deserves attention.

Another issue that must be addressed is that of public record, and the ability to translate the findings of the proceedings into a format that will reach the communities—many of which are spread out across Myanmar, Bangladesh, and Indonesia. International participation will be difficult. The inclusion of all communities involved has been shown in the case studies to be an important aspect in the relative success of a transitional justice program. Without the resources to even afford food much less education, un-subsidized travel will be difficult if the forum is to take place either in Naypyidaw or even in Yangon (Rangoon). Given the recent technological innovations that connect people around the world, much less in neighboring countries and states, this should not be viewed as an impossible task, but as one technological hurdle which will be more easily overcome with adequate planning and resources. This requires the allocation of funds to the people or organizations linked in with the transitional process either by using technology to connect and disperse the information, or to ensure safe travel to and from the physical location of the discussions.
Even when the broad dissemination of information was treated with success in the case of South Africa, there were still rumors and allegations of backdoor amnesty deals that threatened to challenge the legitimacy of the process. By making the process public, transparent, multilingual, and inclusive, some of the problems that tend to arise in transitional justice efforts may be headed off in advance.

Political Capacity

Building the local political capacity can be just as logistically difficult as promoting the physical capacity. Since many of the ethnic groups are still vying for their place within the transition, especially amongst the Kachin and Karen, efforts to pursue transitional justice must take place in the larger context of ethnic and religious tolerance. The current methods used by the regime exclude Rohingya participation entirely. This is not a good precedent to set for enriching the political capacity of those on all sides of the conflict—if such a similar agreement last time, at the Unification of Burma, had left out the Rohingya population altogether. Religious tolerance, and those political actors who seek to promote it, should have champions on all sides willing to discuss the future of an ethnically diverse and democratic Myanmar. Without sufficient political will, and the capacity to express this both on the side of the Rohingya and of the ruling party, there can be no transitional justice. With international pressure and economic incentives primed to assist the transition, champions of democracy and reformers from within the regime need to have an outlet to express this safely. Reports of fractures within the Burmese military (Selth) coupled with a reduction of funds going into the tatmadaw (Boehler), there may come a time soon when stronger advocates from within the military make themselves heard. There needs to be a channel by which this is possible.
One way to grant political capacity is to grant the Rohingya citizenship either by repealing the 1982 Citizenship Act, amending the act to include the Rohingya, or amending the 2008 Constitution to include the Rohingya as citizens. For a time, even the reformist elements and their most powerful leader, Aung San Suu Kyi, were silent over the issue of the Rohingya. When asked about the Rohingya in Burmese society, she said “I don’t know… there are no-clear [sic] cut rules regarding who qualifies as a citizen” (Sparks). That is not entirely true. During Operation Naga Min which sought to remove ‘illegal immigrants’ from the Burmese soil, thousands of Rohingya were murdered and displaced. Even when the Burmese government succumbed to international pressure and engaged in repatriation efforts with Bangladesh following the displacement, not four years later they instituted the 1982 Citizenship Act, which created “three categories of citizens, and the Rohingya did not fit in any of them… thirty years after the 1982 Citizenship Act was passed, the Rohingya remain a stateless people (Constantine). Later, after much pressure, Aung San Suu Kyi responded that “we should listen to and learn from what foreign scholars say… and, finally, we have to make a decision by ourselves if what they say is appropriate in our country’s situation” (Htet).

Citizenship alone will not bring about a power-balance, but may raise the capacity of the Rohingya to an as of yet unattained level of participation before engaging in transitional justice. Citizenship should not be used as a political tool or counterweight in discussion. As Dr. Steinberg notes on the subject, “In August 2008, however, the government announced it would issue identity cards to some 37,000 Rohingya as a first stage in their registration, although whether this would give them improved status is questionable” (108). The events of the last month alone answer that.16

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16 See Appendix B
Pre-Transitional Justice Committee

The method of transitional justice chosen to integrate the qualitative and forensic elements that accompany truth-telling, commissions, amnesty, reparations, and reconciliation must fit the political transition paradigm they are operating under. The case studies show that this process often takes years, is logistically difficult, fraught with unpredictable elements and spoilers, and is exceedingly expensive. The transitional justice method, whether it be a truth commission or tribunal, must have respected people on all sides buying into the process. While some on the outside might suggest a TRC over a tribunal, it is more important to first establish a group that will decide for themselves what they think is best, and ensure that this group has the expertise, political will, connections within their communities, and ability to speak openly without fear of reprisals. If the proposition for a transitional justice program emanates from within this group, there will be a greater sense that this is a popular, home grown effort that is worthy of the full participation of the society. This is confirmed by an ICTJ report, noting that:

many recent truth commissions have failed to conclude their mandates, or have done so in a substandard manner. Many commissions emerge from governmental decision [sic] without adequate consultation or civil society buy-in, and some commissions are created without sufficient political will to clarify facts, provoking strong resistance and even rejection from victims (ICTJ, “Transitional Justice in Post-Conflict,” 2).

As such, the interaction of foreign actors must be welcomed, but only from the standpoint of providing capacity and institutional assistance. In order to make sure that each side will stick with the process, and through an unknown series of challenges and difficulties that will inevitably beset the communities involved, there must be local buy-in.

The structure of the transitional justice method must also reflect the relative power imbalances and actors involved. Perhaps the safest way to do this is through an international court tribunal that has independent judicial oversight and regularly publishes its reports. The
downsides to this, as were shown in the case studies, are that they are often extremely expensive, may not be entirely effective when dealing with the Rohingya who have a very low level of legal wherewithal, can be drawn out through an appeals process, and may actually reify existing ethnic cleavages based upon the alleged guilt or innocence of the perpetrator—especially if the decision is reached over a legal technicality (as both the ICTY and ECCC have experienced). On the other hand, the relative merits of the TRC in South Africa are offset by the lack of political will, lack of local capacity, and a dearth of trusted, impartial figures in the community that both sides may look upon with legitimacy and trust. As a result of these failings, the issue of amnesty becomes much more difficult. Should there be an amnesty program for perpetrators on both sides? Who has the legal authority to provide such amnesty, and can this authority be challenged and verified independently? Is it enforceable? Will amnesty build trust in the judicial system, or expose the failings of it?

These questions must all be considered by a transitional justice committee, and must further be agreed to or modified by the members involved. Given the difficulty of discussing these issues candidly across groups who distrust each other on a profoundly psychological level, it is all the more important to make sure that these individuals are committed to the transitional justice effort, that there is buy-in from all of the sides, and that the committee works towards the psychological fulfillment of the perpetrator and victim, and not just focused on the political ramifications for the society. While the political aspects of any transitional justice endeavor must be considered, the focus must not shift from trying to make both parties whole again through reconciliation, trust-building, and dialogue. Political impacts may hang these efforts on issues, and polarize the conversation instead of pursuing a route focused on common values.
Another issue, more theoretical than the considerations proposed thus far, is that of the constant emphasis on looking back, and dealing with the past grievances in a society that is on the brink of a democratic transition that is by its very definition concerned with the future. This point is summarized well by Karl Marx, who in the second chapter of The Eighteenth Brumaire of Louis Bonaparte, writes that “men make their own history, but they do not make it just as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brain of the living” (Marx). This group must be able to create a mechanism by which the society deals with the past in a constructive way, and all the while be future-oriented. This is something that the TRC did quite well: it provided an immediate tourniquet to stop the bleeding. This may perhaps be explained by its emphasis on stories: stories, unlike court cases, tap into the deep psychological hurt that changes both the audience and the storyteller in the present. This balance, especially in the case of the Rohingya, will be extremely difficult to achieve because, in Marx’s understanding, this is a nightmare that none have woken up from for decades.

This pre-transitional justice group’s aim should ultimately be to engage the warring groups on the basis of common values, establish equal Buddhist and Muslim perspectives through strong champions within the communities, and pursue concrete policy goals that will guarantee both groups an equal footing in the larger quest for democratic transition. All of the parties, from the regime, to the Rohingya and Rakhine Buddhists have a history of deep repression, hurt, and violence, and share many of the psychological traumas associated with loss. Constructive engagement by working together to create a transitional process may allow those involved a chance to deal with these past transmissions in a similarly constructive way—
providing them with a better sense of what to expect if the transitional justice initiative is to be broadly implemented. Once more, international pressure and capacity building may be of great use here, but without the process originating from such a group representing at least these three major elements, the legitimacy of the entire operation may be called into question with negative consequences for any future endeavors in transitional justice.

CHAPTER 6: IMPLICATIONS

“In a political transition process there is an early optimism that sweeps reforms along very rapidly at the beginning, but then as the transition continues and new challenges arise, the reform process slows down… In order to ensure continued success of the reform process it’s important for everyone to speak honestly and directly about the serious challenges that still exist” (Vrieze).

Jimmy Carter speech in Myanmar, 4/5/2013

ADDITIONAL CONSIDERATIONS

From an international security standpoint, ignoring the Rohingya during the period of transition could mean increased threats from sympathetic Muslim groups. The conflict has drawn interest across some 2000 miles along India’s northern border from the Pakistani military and Taliban. The Tehreek-e-Taliban Pakistan (TTP) spokesperson Ehsanullah Ehsan, in a somewhat rare address, vowed to “not only attack Burmese interests anywhere but will also attack the Pakistani fellows of Burma one by one” (AFP, “Tehreek-e-Taliban”). The credibility of threats like these and others is anyone’s guess. One of the worries, however, is that the Taliban will use the sense of injustice and desperation of young Muslim men in the Rakhine to help recruiting efforts, as they have done previously in Pakistan and Afghanistan. These security concerns may
be mitigated by first, addressing the concerns directly (a total reversal of the current strategy), and second, providing a political and social outlet for addressing grievances that may alleviate tensions nonviolently.\(^\text{17}\)

The intersection between transitional justice and security sector reform (SSR) is also worth noting. Laura Davis has provided a good look at this in a joint effort by the Initiative for Peacebuilding (IFP), and the ICTJ. In her paper, *Transitional Justice and Security Sector Reform* (12), she advocates for “justice-sensitive” approaches to SSR and with disarmament, demobilization, and reintegration (DDR).\(^\text{18}\) Davis includes four main points to be integrated within the process of SSR: “building the integrity of the security system; establishing effective accountability; strengthening its legitimacy; and empowering citizens,” each working to the support and benefit of the others. One of the more important points Davis makes, when applied to the context of the Rohingya, is telling. “Meaningful SSR will not be possible where a culture of impunity prevails. The Burundi study found that not only has no correlation been established between SSR and transitional justice, but that no opportunity is foreseen to create such linkages” (12).

Thus, it is extremely important to undertake constitutional reform on both the domestic and international level that would remove this major blockage of impunity, which is as of the writing of this paper, legally bound within the constitution. Given that the current state of the Constitution is a virtual anathema to democratic progress and the rights of the minority, change in its structure will be inevitable.\(^\text{19}\) Given that the constitution must undergo change, and that

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\(^\text{17}\) For a very good model of this, see the Staircase to Terrorism: A Psychological Exploration, by Dr. Moghaddam: http://www-vip.sonoma.edu/users/s/smithh/psy326/moghaddam.pdf

\(^\text{18}\) While beyond the scope of this paper, the USIP’s special report on the linkages between SSR and DDR are worth noting: http://www.usip.org/files/resources/SR238McFate_DDR_SSR_Conflict.pdf

\(^\text{19}\) A line-by-line list of the constitutional abnormalities this author found within the constitution may be found in Appendix A.
there may be additional space created for more reforms, it follows that SSR and transitional justice as a process by which the change will occur will become increasingly relevant. The hallmark of this change, both in the security sector with both of the major belligerents within the military (the tatmadaw and border guard force [BGF]), will be how the treatment, or mistreatment, of the Rohingya is treated. The importance of securing justice and accountability for the nation’s most vulnerable from the security sector themselves is of paramount importance. This cannot be overstated.

Two final threats concern the stability of the nation as a whole if measures are not put in place to integrate the Rohingya into society. First, there is the danger of “conflict contagion” getting in the way of the Burmese transition, as the conflict spread elsewhere outside of the Rakhine State. This is already occurring with the recipients of the refugee Rohingya population in Bangladesh and in Indonesia. This has strained the relationships between these two countries and Myanmar. Second, there is the danger of the upcoming monsoon season. The situation as it stands as of the writing of this thesis is unacceptable given the upcoming rains. There is little doubt that the monsoons will devastate the Rohingya, especially after the communal unrest and ethnic conflict has forced thousands more into temporary living conditions. The physical risk due to the volume of water, and the additional after effects of disease, food scarcity, and exposure will amplify the deaths in camps that are already unfit for the Rohingya. It is possible that hundreds or thousands may die as a result of this event, the after effects of which may have untold international repercussions.
APPENDIX A: THE 2008 CONSTITUTION OF MYANMAR, TRANSITIONAL JUSTICE CONCERNS

An article-by-article legal overview of the constitution of Myanmar is outside the scope of the body of this thesis. Yet should the Rohingya be granted any legal status in terms of citizenship where the Constitution may apply, it will undoubtedly have dramatic effects on the livelihood and security of the people. If the topic of transitional justice is to be taken seriously, considerable time and effort must at some point be spent examining this matter—even if many doubt the sincerity of the Constitution’s reform efforts. Below is the best efforts of my examination, which may be of some benefit should a formal legal scholar take interest in pursuing the study further.

The format is as follows:
Page# in 2008 Constitution (English)\textsuperscript{20}, Article in Constitution, Notes.

Chapter 1: Basic Principles of the Union

p.3 6.f the nature of ‘leadership role’ needs to be defined.

p.4 11.a ‘to the extent possible’ should be omitted or redefined perhaps allowing for a bureaucratic breach of the tripartite system (eg: executive oversight via the military in the Hluttaw).

11.b grants to self-administered regions, but no mention of ethnic regions/groups. If caveats still exist when ratifying UN Charters\textsuperscript{21} offers no protection.

p.5 17.b are there limitations or published codes of conduct for such Defense Service members?
by what method are they discharged?

p.6 18.a-d vague, powers here are not clearly defined.

20.e powers vague, room for abuse without language adding anything meaningful to the Defense Service’s mandate.

p.7 21.a discrimination of citizenship without protection or rationale voids 21.

21.b vague, no mention of judiciary, trials, due-process, etc.

21.c “National races” must be defined more clearly, and should they exclude a minority group, do so explicitly.

p.8 28.d additional language seems suspect.

p.9 33 ‘the correct way of thinking’ seems bizarre.

34 qualification of freedom of religion is at the hands of the subjective criteria of ‘public order’ – which had previously been abused to arrest protestors.

p.10 37.a land rights have been abused contrary to 6.e, see Tatmadaw land grabs.


\textsuperscript{21} http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en#EndDec
37.c what is the criteria of ‘national solidarity’; also see Commander in Chief (C.I.C.) criteria.
40. no provision listed to suggest when government would withdraw, maybe violation of 39.
p.12 46 method by which this is chosen may be problematic, see: Ch. 9

**Chapter 2: State Structure**
p.14 50.b reword—‘special situations’ too vague for the acquisition of territories, also vagaries with the word ‘economy.’

**Chapter 3: Head of State**
p.19 58 may include a possible breach of 11.a.
59.e ‘his’ to ‘their’; worrisome because of imprisonment of exiles.
59.f ‘he himself’ to ‘they’; does this eliminate Aung San Suu Kyi because of British husband?
p.20 60.b.iii applies reserve domain for defense, which extends de facto control of executive into legislative.
p.21 60.f ‘necessary’ undefined, may be exploited to the detriment of 39, is there a way around this?
64. Than Sein and Shwe Mann may be at helm of the party unconstitutionally.
p.23/4 71 looks as though legislative branch handles impeachment over judiciary, may be problematic inre: reserve domains with military and trumped charge against president.
p.24 72 ‘his’ to ‘their.’

**Chapter 4: Legislature**
p.28 76 reserve domain for military, extending de facto executive into legislative (see. 342).
77.d note role in committee for National Defense and Security Council (NDSC) (see. 201).
p.30 85.a with reserve domain, any party with support of military need only 25% to validate session—which even if intensely divided, could have easily; validates session.
85.b spelling error: ‘extented’ to ‘extended.’
p.31 89 methods by which these resolutions are passed must be disclosed.
p.38 106.c ‘he’ to ‘the president.’
107 ‘him’ to ‘the president.’
p.40 112.d (see 77.d).
p.43 121.a weakness of judiciary makes this dangerous if such a sentence could disqualify a rival? Flagging this.
p.44 121 Many problems and used throughout document.
121.g this puts people in a bind who require aid, but also want to run for office. Discriminatory.
121.h/i may violate 6.e, so long as freedom of speech is qualified, this may be problematic.

67
121.i reserve domain
121.k clear up, in terms of 121, these rules need to be written in the affirmative; eg: state what *does* include instead of what it doesn’t—this seems unjust.

p.45 121.l ‘him’ to ‘them.’
p.48 132 further disclosure needs to be discussed, eg: under what criteria is something deemed secret.
p.52 141.b reserve domain same as lower house, (see p.28, art.76).
p.55 152.c (see 102).
p.58 161 .1% seems okay (6,000 in smallest Kayah State of ~250,000—flagging anyways). Still reserve domain.
p.61 169.b (see 121).
p.73 198.b flagging. Especially creating hierarchy between State and Region and Self-Administered.

Chapter 5: Executive
p.75 201 power imbalance (see C.I.C.).
p.76 204.b anything requiring a check against the NDSC does *not* have an effective check.
p.76/7 206 flagging NDSC oversight.
p.78 212.b ‘he’ with ‘the President.’
p.79 213.a ‘he’ with ‘the president.’
215 strike this, does not add any rights.
216 is this saying that the *power* of the legislative branch flows from the executive?
218 s/n: a lot of executive power is made fair only by a legitimate and independent check from the Pyidaungsu—of which both Than Sein’s party (acting as char) and the house speaker’s acting as vice chair of the USDP—control.
p.85 232.aiii see 206 and 213, as well as problems with the C.I.C. appointment.
p.88 235.aiii see 216.
p.91 237.aiii see 216.
p.99 276.bii see 216.
p.117 276.hii reserve domain.

Chapter 6: Judiciary
p.125 294 Constitutional Tribunal and Courts Martial are not independent.
p.126 295.d is there a check here? If there is no real independent judiciary, this could be abused.
p.127 299.cii Proven to who, and how is this judged?
p.129 301.dii Flagging. What is the effect of this on the semi-autonomous regions?
p.130 301.e loyalty is a subjective quality, and fulfilling this quality is not spelled out.
p.130 302.b given the structure of the constitution, it is likely that the speakers will be aligned with the president and the majority party, which is not sufficient; is also most likely conflict of interest.
again, since there is a reserve domain, $2/3$ or $66\% - 25\% = 41\%$. Since reserve domain drops $2/3$ majority to not even a simple majority, anyone who controls the military has a major leg-up in the judiciary.

In line with article 71, the reigning party with military support need only 10% of the Hluttaw to avoid impeachment. Eg: $100\%-25\%$ (military) = $75\%$, $66\%$ required to impeach leaves $9\%$, $1\%$ buffer = $10\%$ party support and judge is free of impeachment.

President has too much authority on adjudicating regional justices, especially when paired with legal override from the higher tiers with even more presidential authority.

Grammar. Add ‘must be’ after ‘charge.’

What is manner and composition of investigation committee, is it multi-partisan, and where are the results displayed?

Unfair conditions for stacking the Constitutional Tribunal of the Union—also hand-picks Chairperson.

Further problems about executive reach into the Judiciary.

Some problem with direct executive interference, this time with the Judiciary given the existence of prevailing power imbalances in the Legislature.

Chapter 7: Defense Services
Given the extent of the military’s influence in Burmese affairs, this section is conspicuously short (the Preamble is over twice as long).

NDSC is not a suitable check, its approval largely symbolic.

C.I.C. Note

What does ‘singly’ refer to in this context?

Chapter 8: Citizen, Fundamental Rights and Duties of the Citizen

Excludes ethnic minorities.

Is there a similar clause for women and how is this determined?

Are there already laws that hamper this.

Human rights record says otherwise—still problem of child soldiers.

With this caveat, there appears to be a weakness in the protection of religion.

Flagging this, some violence in the past would have been legal under some interpretations of this article.

See private property.

Define ‘precautionary measures,’ vague for arrest without charge or trial.

This has been abused in the past, tighten language.

Power of defense services to arbitrarily suspend legal rights.

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22 The circular logic of the approval and selection of the Commander in Chief (CIC) is worth noting. By Art.342, the CIC is appointed by the President with approval from the NDSC, which is led by: the President (p.75 201), formed with the Vice President who is elected among the 3 Hluttaws—one of which is nominated by the CIC (p.20 60.biii), Speaker of both houses (of which a majority selects (p.39 110.a), and deputies of three cabinets which the CIC has a hand in approving (p.85/6 232.bii-biii). In short, 25% of the Legislature is overseen by the CIC, chosen by the president, and approved by the president, their coalition, and the members tied in loyalty to the CIC.
more emphasis on ‘non-disintegration’ given multiethnic society and history is perhaps a larger theme that should be remedied; eg: does a protest, rally, or demonstration fall under the umbrella of ‘non-disintegration.’

Chapter 9: Election
p.157 391 all rights granted to citizens exclude the Rohingya.
392 change ‘insolvent’ to ‘insolvency,’ larger issue of prohibiting members of religious orders from voting—can this be abused to exclude citizens from the democratic process?
p.160 398.dd presidential overreach into the election commission, preserves ruling power status-quo - is this a legal matter or a social one; eg: this position is almost de facto going to be held by an upper-class, vetted judge who now has the power to postpone elections or amend rules that Than Sein now violates (head of party/member of gov’t).

Chapter 10: Political Parties
p.163 404 another loyalty clause—speaks to greater mistrust; theme of Constitution looks more and more like a system to preserve status-quo than guarantee rights.
407 see 404.
p.164 407.c does this exclude NGOs from delivering assistance?
p.164 note this chapter is disconcertingly short considering that Than Sein is now president in part because he declared the NLD illegal.

Chapter 11: Provisions on State of Emergency
p.165 – 172 this whole section, while necessary, does appear to codify what the ruling government of Myanmar has been doing to maintain its control over the population; eg: instigate violence and then call a state of emergency to exercise extrajudicial power. This requires someone with more expertise in law to both secure the defense of the state, but also to impose some form of punishment should an independent jury or body contest the state of emergency—of which there is no mention.

Chapter 12: Amendment of the Constitution
p.173 436.a there is no rationale provided for why some matters of this constitution are subject to amendment only with the calling for a national referendum—included in this list is this article, stipulating qualifications for the amendment of the constitution.
p.174 436.b any vote of more than 75% must include the military, which has a 25% representation under the constitution.
Chapter 14: Transitory Provisions

p. 178 445 this may be the most problematic act in terms of transitional justice within the constitution. The phrase *no proceeding shall be instituted against he said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties*, infers a blanket amnesty on the crimes committed by the regime in the past.

The DVB’s article on the constitutional rights\(^23\), as well as the ICTJ’s article\(^24\) on impunity are worth considering.

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APPENDIX B: UNIVERSAL DECLARATION OF HUMAN RIGHTS

The following are a list of rights afforded to, but not recognized by, the Rohingya in Burma as stated by the 1948 General Assembly resolution 217 A (III) Universal Declaration of Human Rights. Cited beside are recent and public citations of some of these violations. The document has been edited by this author for gender neutrality, which appears [in brackets].

Article 1: “all human beings are born free and equal in dignity and rights” (Singh).
Article 2: “everyone is entitled to all the rights and freedom set forth… without distinction of any kind” (ABC/Wires).
Article 3: “everyone has the right to life, liberty and the security of person.”
Article 4: “no one shall be held in slavery or servitude” (ABC/Wires).
Article 5: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
Article 6: “everyone has the right to recognition everywhere as a person before the law” (Stoakes).
Article 7: “all are equal before the law and are entitled without any discrimination to equal protection of the law.”
Article 8: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him [them] by the constitution or by law.”
Article 9: “no one shall be subjected to arbitrary arrest, detention or exile” (Agence France-Presse).
Article 10: “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.”
Article 11: “1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he [they] has [have] had all the guarantees necessary for his [their] defense. 2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense” (Kaladan Press).
Article 12: “no one shall be subjected to arbitrary interference with his [their] privacy, family, home or correspondence, nor to attacks upon his [their] honour and reputation.”
Article 13: “1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his [their] own, and return to his [their] country” (Agence France-Presse).

25 See above.
26 See above.
27 See above.
28 See above.
29 See Article 21.
30 See Article 11.
Article 14: “1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

Article 15: “1. Everyone has a right to a nationality. 2. Nobody shall be arbitrarily deprived of his [their] nationality nor denied the right to change his [their] nationality.”

Article 16: “1. Men and women of full age, without any limitation due to race… have the right to marry and to found a family.”

Article 17: “1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his [their] property.”

Article 18: “everyone has the right to freedom of thought, conscience and religion; … freedom, either alone or in community with others and in public or private, to manifest his [his] their religion or belief.”

Article 19: “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to receive and impart information and ideas through any media and regardless of frontiers” (Gayathri).

Article 20: “1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association.”

Article 21: “1. Everyone has the right to take part in the government of his [their] country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of authority… this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.”

Article 22: “everyone, as a member of society, has the right to social security and is entitled to realization… of the economic, social and cultural rights indispensable for his [their] dignity and the free development of his [their] personality” (Safvi).

Article 23: “1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work… 2. Everyone… has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself [themselves] and his [their] family an existence worthy of human dignity.”

Article 24: “everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”

Article 25: “1. Everyone has the right to a standard of living adequate for the health and well-being of himself [themselves] and his [their] family, including food, clothing, housing and medical care… 2. Motherhood and childhood are entitled to special care and assistance” (Safvi).

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31 None found or brought to the court’s attention in the case of the Rohingya killed on February 22nd in the Andaman Sea, denied by the Thai military, alleged by the survivors, those allegations corroborated by Thai villagers.

32 See Appendix A.

33 See Appendix A.

34 See Article 15

35 ibid

36 ibid

37 See Appendix A.

38 See Page 57.
Article 26: “1. Everyone has the right to education… 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedom.”

Article 27: “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement… 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production of which he [they] is [are] the author” (BBC, “Burma Riots”).

Article 28: “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (AFP, “Refugee Shot”).

Article 29: “1. Everyone has duties to the community in which alone the free and full development of his [their] personality is possible. 2. In the exercise of his [their] rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order, and the general welfare in a democratic society.”

Article 30: “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

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39 Ibid.
40 See Article 27.
41 Evidence abundant, see: http://www.bbc.co.uk/news/world-asia-22243676
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