

MYANMAR'S GENOCIDE AND THE LEGACY OF FORGETTING

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I. INTRODUCTION: AUNG SAN AND THE LEGACY OF FORGETTING

In the dying days of the British Empire, after the Second World War, the Governor of Burma faced the problem of what to do about a young Burmese lieutenant called Aung San. Early in the war, Aung San led the Burma Independence Army (BIA), fighting on the side of the Japanese Imperial Army to drive the British from Burma.¹ When the tide of war turned against the Japanese, Aung San joined the British forces, contributing to the success of the Allied military strategy in the Far East.² After the war, as leader of the Anti-Fascist People's Freedom League, Aung San negotiated with the British to achieve Burmese independence.³ To the British, Aung San was a powerful political actor and the key to ensuring that Burma transitioned peacefully from British colony to loyal member of the Commonwealth.⁴

Aung San was also, in likelihood, a war criminal. In 1942, he killed a local Muslim headman, Abdul Rashid, who had been appointed by the British to manage a village on the country's southern coast.⁵ Rashid's widow and several eyewitnesses claimed that Aung San threw Rashid into a locked cart with a pig and starved him for eight days,⁶ before crucifying him to a goalpost in a public stadium and bayoneting him to death.⁷ Aung San did not deny that he had carried out the killing, but he claimed that it had taken place after a court

¹ Nicholas Tarling, *Lord Mountbatten and the Return of Civil Government to Burma*, 11 J. IMP. COMMONW. HIST. 197, 197–99 (1983). In 1988, the government changed the English-language name of the country from “Burma” to “Myanmar.” Throughout this Article, I use “Burma” when referring to events before 1988, and “Myanmar” for the post-1988 period. This usage reflects accepted academic practice in Burmese Studies. See CATHERINE RENSHAW, *HUMAN RIGHTS AND PARTICIPATORY POLITICS IN SOUTHEAST ASIA* (2019).

² See AUNG SAN SUU KYI, *My Father*, in *FREEDOM FROM FEAR AND OTHER WRITINGS* 22 (Michael Aris ed., 1991) [hereinafter *FREEDOM FROM FEAR*].

³ S. R. Ashton, *Burma, Britain, and the Commonwealth, 1946–56*, 29 J. IMP. COMMONW. HIST. 65, 68 (2001).

⁴ See Hugh Tinker, *Burma's Struggle for Independence: The Transfer of Power Thesis Re-Examined*, 20 MOD. ASIAN STUD. 461, 462 (1986); J. S. Furnivall, *Twilight in Burma: Reconquest and Crisis*, 22 PAC. AFF. 3 (1949); Hugh Tinker, *Burma: Power Transferred or Exacted? Reflections on the Constitutional Process*, in *BRITISH POLICY AND THE TRANSFER OF POWER IN ASIA: DOCUMENTARY PERSPECTIVES* 24 (R.B. Smith & A.J. Stockwell eds., 1987).

⁵ CHRISTOPHER BAYLY & TIM HARPER, *FORGOTTEN WARS: THE END OF BRITAIN'S ASIAN EMPIRE* 378 (2008).

⁶ *Id.* at 382.

⁷ The Humble Petition of Ma Ahma, Wife of the Late Abdul Raschid, Residing at Paung, No. 452 IOR: M/5/102 (Apr. 8, 1946), in HUGH TINKER ET AL., *BURMA: THE STRUGGLE FOR INDEPENDENCE 1944–1948: DOCUMENTS FROM OFFICIAL AND PRIVATE SOURCES* 728 (1983) [hereinafter *BSI*].

martial that found Rashid guilty of pro-British activities, cruelty and corruption.⁸ On Aung San's account, the context of the killing was the mass looting and murder which accompanied the BIA's entry into southern Burma in 1942 and that in any regard, "in such slave countries as Burma, it cannot be said that conformity with the law is justice."⁹ Aung San declared that his conscience was clear: "To confess the truth, however, though this measure is not at all regular, yet it was rough and ready justice to suit the time and the conditions prevailing in the country."¹⁰

The prevailing conditions included violent reprisals by Aung San's BIA against largely Christian ethnic groups who remained loyal to the British, such as the Chin, Kachin and Karen minorities.¹¹ In September 1945, for example, a group of Karen leaders wrote to Leopold Amery, Secretary of State for India and Burma, detailing what the Karen had suffered at the hands of the BIA:

While Burma was under the military administration of the Burma Independent Army . . . they branded the Karens as rebels, and persecuted and tortured them in all possible ways and in certain districts resorted to wholesale massacre, not even leaving babies, and set the Karen villages on fire. In Myaungmya District alone, the Official Report reveals that about 400 villages were set on fire in this way, and more than 1,800 Karens were slaughtered . . . Karens of the Salween Hill District, Papun, fared worse. All of the leading men were slaughtered, and their wives and daughters before being massacred were subjected to a moral degradation in the presence of their husbands and fathers . . . At that time no influential Burmese leader raised his hand and called a halt to such senseless massacre. Were it not for the timely intervention of the Nippon Imperial Armies, we could not imagine how far the matter would have gone.¹²

The British vacillated on whether to prosecute Aung San. Originally, Admiral Louis Mountbatten, Supreme Commander South East Asia Command,

⁸ Translation of Extract from Hanthawaddy Newspaper (Apr. 7, 1946), No. 451 IOR: M/5/112, in BSI, *supra* note 7, at 726; *see also* FREEDOM FROM FEAR, *supra* note 2, at 26.

⁹ Aung San's rejoinder to the charges in the Legislative Council was printed in the Hanthawaddy newspaper. Translation of Extract from Hanthawaddy Newspaper (Apr. 7, 1946), No. 451 IOR: M/5/112, in BSI, *supra* note 7, at 726 c. (Apr. 4, 1946); *see* BAYLY & HARPER, *supra* note 5, at 381–84.

¹⁰ Translation of Extract from Hanthawaddy Newspaper (Apr. 7, 1946), No. 451 IOR: M/5/112, in BSI, *supra* note 7, at 726.

¹¹ *See* PAUL H. KRATOSKA, *The Karen of Burma Under Japanese Rule*, in SOUTHEAST ASIAN MINORITIES IN THE WARTIME JAPANESE EMPIRE 27 (Paul H. Kratoska ed., 2002).

¹² The Humble Memorial of the Karens of Burma to His Britannic Majesty's Secretary of State for Burma, No. 286 IOR: M/4/3023 (Sept. 26, 1945), in BSI, *supra* note 7, at 494.

was entirely opposed to any general amnesty for the BIA: "They must be told that their present actions were appreciated but that their past offenses have not been forgotten."¹³ Governor Dorian Smith regarded the prosecution of Aung San as a test of the government's willingness to allow the law to take its course: "[n]ot to act was to impugn the law and bring it into contempt."¹⁴ Deputy Governor John Wise noted that others had been hanged for similar offenses and thought it "deplorable" that Aung San's status would exempt him.¹⁵ By 1946, however, the views of the British had evolved. Mountbatten wrote:

Aung San's antics may be disturbing, but there is no doubt in my mind that he played the game by me . . . He is bound to be a leading figure for some years to come . . . We would do better to concentrate on showing him and his friends the paths in which we think the true future of Burma lies.¹⁶

Mountbatten advised the Governor that to arrest Aung San would be "the greatest disservice which could be done towards the future of Burma within the British Empire" and to bring Aung San to trial for what was essentially an act of wartime justice, when cooperation with Aung San's forces was proving so effective, would be a "gross act of disloyalty."¹⁷ Mountbatten noted that the murder of Rashid "appears to have occurred during the period immediately following our retreat; in the heat of the moment, and in the unsettled conditions which must have existed, it was only to be expected, I suppose, that summary justice would rule, and that old scores would be paid off."¹⁸

Eventually, *realpolitik* prevailed. In a letter to the Prime Minister, Dorian Smith wrote of a "new approach" to Aung San. He suggested that rather than prosecute, the British should adopt a Burmese characteristic trait "to forgive and forget."¹⁹ In 1946 the British parliament passed the War-Time Crimes (Exemption) Act 1946 (Burma Act No. XLVII of 1946).²⁰ The Act did not

¹³ Headquarters, Supreme Allied Commander, South East Asia SAC (Misc.) 5th Meeting, 27 March, 1945, No. 107 PRO: WO 203/4404, in BSI, *supra* note 7, at 196.

¹⁴ Sir Reginald Dorman-Smith to Arthur Henderson, No. 464 IOR: M/5/102 (Apr. 26, 1946), in BSI, *supra* note 7, at 743.

¹⁵ Minutes of a Meeting held at Government House, Rangoon, on 27 March 1946, No. 435 IOR: M/5/102, in BSI, *supra* note 7, at 704.

¹⁶ Letter from Supreme Allied Commander, South East Asia to Governor of Burma (Mar. 26, 1946), Document 431, in BSI, *supra* note 7, at 698.

¹⁷ William Crawley, *Britain in Burma: The Last Act*, 16 ASIAN AFF. 308, 310 (1985).

¹⁸ Lieutenant General G. W. Symes to Sir Reginald Dorman-Smith, in BSI, *supra* note 7, at 543.

¹⁹ Letter from Dorman-Smith to Clement Attlee (May 7, 1946), Document 490, in BSI, *supra* note 7, at 773.

²⁰ Robert Cribb, *Burma Trials of Japanese War Criminals 1946-1947*, in WAR CRIMES TRIALS IN THE WAKE OF DECOLONIZATION AND COLD WAR IN ASIA, 1945-1956: JUSTICE IN

provide a pardon for Aung San and his soldiers for their treason or wartime atrocities, nor did it grant a general amnesty. It simply required the Governor's consent before a court could accept a criminal case involving offenses committed in Burma from December 8, 1941 to May 5, 1945. After the war, the British held a relatively small number of war crimes trials in Burma to prosecute Japanese officers,²¹ but in delicate matters such as that of Aung San, cases were permitted to languish and fade away. With Burma's independence, a line was drawn under the crimes of the Second World War.

Aung San is Myanmar's most important political symbol.²² To the Burmese, he is the father of independence.²³ Aung San Suu Kyi, the daughter of Aung San, describes her father as "the man who had come in their hour of need to restore their national pride and honour [sic]"²⁴ and calls his memory "a reservoir of national strength and pride."²⁵ Aung San is revered not only for his heroism on the battlefield and for negotiating Burma's exit from the British Empire, but also for uniting the country's deeply divided and heavily armed ethnic armies at the end of the Second World War.²⁶ The assassination of Aung San in 1947 is regarded as a national tragedy that deformed the shape

TIME OF TURMOIL 130 (Kerstin von Lingen ed., 2016) (citing War-Time Crimes (Exemption) Act 1946 (Burma Act No. XLVII of 1946)).

²¹ *Id.* at 133–34 ("The first British war crimes trial in Rangoon, which opened in March 1946, prosecuted 13 Japanese soldiers and their commander, Major Ichikawa Seigi, on charges of carrying out at massacre at Kalagon, a predominantly Muslim village near Moulmein. An estimated 600 villagers were killed on 7 July 1945 because some of them had collaborated with British special forces operating in the region behind Japanese lines.").

²² Josef Silverstein, *The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi*, 69 PAC. AFF. 211 (1996).

²³ Matthew J. Walton, *Ethnicity, Conflict, and History in Burma: The Myths of Panglong*, 48 ASIAN SURV. 889 (2008); Tin Maung Maung Than, *The Essential Tension: Democratization and the Unitary State in Myanmar (Burma)*, 12 SOUTH EAST ASIAN RES. 187 (2004); LIAN H. SAKHONG, IN SEARCH OF CHIN IDENTITY: A STUDY IN RELIGION, POLITICS AND ETHNIC IDENTITY IN BURMA 208–210 (2003); FREEDOM FROM FEAR, *supra* note 2, at 3–38.

²⁴ FREEDOM FROM FEAR, *supra* note 2, at 37.

²⁵ Aung San Suu Kyi, *The True Meaning of BOH*, 31 ASIAN SURV. 793 (1991); FREEDOM FROM FEAR, *supra* note 2, at 191.

²⁶ At that conference, the country's leaders agreed to shape their new democracy as a federal union that respected the rights of religious and ethnic minorities. Alan Smith, *Burma/Myanmar: The Struggle for Democracy and Ethnic Rights*, in MULTICULTURALISM IN ASIA 268 (Will Kymlicka & Baogang He eds., 2005); MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY 78–89 (1991); KYAW YIN, UNFORGETTABLE SPEECHES OF BOGYOKE AUNG SAN 115 (1969); see *The Constitution of the Union of Burma, with amendments*, in TIN MAUNG MAUNG, BURMA'S CONSTITUTION (1959); E Burke Inlow, *The Constitution of Burma*, 17 FAR EASTERN SURV. 257, 264–67 (1948); Benegal Narsing Rau, *The Constitution of Burma*, 23 J. WASH. L. REV. 288 (1948); David I. Steinberg, *Myanmar's Perpetual Dilemma: Ethnicity in a "Discipline-Flourishing Democracy"* (East West Ctr., Working Paper No. 22, 2011), <http://www.eastwestcenter.org/system/tdf/private/pswp022.pdf?file=1&type=node&id=32834>.

of Burmese history and led to half a century of civil war and authoritarian rule.²⁷ In Yangon today, Aung San's family home—where Aung San Suu Kyi spent some of her childhood—is preserved as a museum. The artifacts of Aung San's life depict the young general as a simple, modest, thoughtful man, driven by a fierce desire for freedom. On the walls of the museum are descriptions of Aung San's bravery on the battlefield and his cunning as a statesman. There are no references to the brutality of events that led up to Burmese independence. The murder of Rashid is not registered—it is an occlusion in the fabric of social memory.

The killing of Abdul Rashid took place in circumstances of anarchy and the suspension of ordinary rule under the tide of conflict. At different periods in modern Burmese history these circumstances have reoccurred in northwest Myanmar.²⁸ Freed from the constraints of civil law, the military has perpetrated atrocities against the country's minority Muslim population, the Rohingya.²⁹ *Bloodlands* is the name given by one author to the ungoverned spaces in Poland which became sites for genocide during the Second World War.³⁰ The name is apposite for some of Myanmar's outlier states, where the central civilian authority exercises incomplete power, where powerful ethnic armies vie for control of parts of the state, and where minority groups such as the Rohingya, without citizenship, suffer at the hands of both. The lesson of history, it seems, is that in places such as these things happen for which historical justice is not possible, and that afterwards, political pragmatism and public forgetting is an appropriate response.

²⁷ Aung San Suu Kyi dedicated her book *Freedom from Fear and Other Writings* to the memory of her father. FREEDOM FROM FEAR, *supra* note 2, at v (“When I honour my father, I honour all those who stand for political integrity in Burma.”).

²⁸ Maung Zarni & Alice Cawley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683 (2014).

²⁹ In this Article, I focus on the Rohingya. However, as the UN International Fact Finding Mission made clear in its report of September 2018, Myanmar's military have also carried out crimes against humanity and war crimes against other ethnic and religious minorities, such as the Kachin, Karen, and Shan peoples, in the period since the end of the Second World War. See UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64 (Sept. 12, 2018) [hereinafter IFFM 2018]; and UN Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/42/50 (Aug. 8, 2019) [hereinafter IFFM 2019].

³⁰ TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 6 (2012).

Sceptics of transitional justice caution against extravagant claims about what can be achieved by trials or truth commissions in the aftermath of administrative massacre.³¹ Sceptics argue that institutions and processes of transitional justice can impede political settlements necessary for peace³²; that they do not produce reliable historical records about the context of international crimes³³; that they do not provide all victims with a voice, healing or closure³⁴; that there is scant evidence they deter future leaders from committing other atrocities³⁵; and that there is no convincing causal link between criminal trials in transitional contexts and the rule of law, democratic consolidation, or the advancement of liberal values.³⁶ Sceptics would argue that the British were right to stay the hand of justice in the case of Aung San.

The trial of Aung San for the murder of Rashid, had it taken place, would probably not have bought comfort to Rashid's widow or dissuaded General Ne Win from violating the constitution and orchestrating a military coup fourteen years later. The trial's legitimacy, as a process established by Burma's colonial rulers against one of the country's war heroes, would almost certainly have been impugned. Public sentiment would have run with Aung San: the argument that his cause was just and that his actions were extenuated by the larger historical context would have been very well received by key sections of the public.³⁷

When juxtaposed with the pragmatic arguments of sceptics, the arguments marshalled by proponents for transitional justice can appear comparatively vague and difficult to support with empirical evidence. Professor Mark Osiel, for example, argues that criminal trials have utility because of their potential to uncover complex histories and explain the motivations of individuals involved, and in the process of legal argument and counter-argument there is

³¹ Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 468 (1995) ("Administrative massacre" is the phrase used by Mark Osiel to mean "large scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war – civil or international, real or imagined.")

³² Nick Grono & Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 13–20 (Nicholas Waddell & Phil Clark eds., 2008).

³³ Anna Bryson, *Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with the Past*, 39 HASTINGS INT'L & COMP. L. REV. 299 (2016).

³⁴ Anna Macdonald, *From the Ground Up: What Does the Evidence Tell Us About Local Experiences of Transitional Justice?*, 1 TRANSITIONAL J. REV. 72 (2015).

³⁵ Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUSTICE 434 (2013).

³⁶ Oskar N.T. Thoms, James Ron and Roland Paris, *State-Level Effects of Transitional Justice: What Do We Know?*, 4(3) INT'L J. TRANSITIONAL J. 1 (2010).

³⁷ More than 500 people watched Rashid's murder, yet the British could find only five witnesses—all Indians—who were prepared to give evidence against him. See Lieutenant General G. W. Symes to Sir Reginald Dorman-Smith, in BSI, *supra* note 7, at 543.

potential for awakening or deepening the kind of inter-personal understanding that is fundamental to a tolerant society.³⁸ Osiel argues that at the societal level, post-conflict trials are forums where debate concerning basic understandings about the relationship between the individual and the state can be rehearsed and reflected upon. In circumstances where “the need for a new beginning is widely felt, the very process of critical reassessment—to which the dramatic power of liberal show trials can contribute—may itself be symbolically treated (and later commemorated) as a decisive moment of collective refounding.”³⁹ Scholars like Osiel might argue that the trial of Aung San and the publicity, public debate, and historical record that it left, would have raised questions about the moral complexity of Aung San’s act, about political violence, about the virtues of civil tolerance; and about the equal moral worth of all individuals, including those who, like Rashid, were outsiders or “others” to society. These questions, simmering in political consciousness over a long period of time, might have contributed to creating a political culture that was more sensitive to the perspectives and experiences of minorities.

In this article I examine Myanmar’s troubled transition towards a limited form of constitutional democracy in the period 2008–2018 as a case study of what can happen when “forgetting” is adopted as a political response to atrocity. Before 2008, in the decades that followed independence from Britain, Burma experienced the collapse of democracy, single party rule, and military dictatorship. During the periods of military governance, the country’s people experienced the massive and grave violations of human rights that accompany rule by fiat. Compounding the suffering was ongoing civil war between the armed forces of the central government, the *Tatmadaw*, and ethnic minority armies in the borderlands. In relation to the country’s minority Muslim population, the Rohingya, there was widespread public antipathy. The causes of animosity were various: historical enmity associated with the colonial period; religious prejudice against Muslims among the country’s deeply Buddhist majority; perceptions that Muslims contributed to economic scarcity. At the public policy level, prejudice manifested in the 1982 Citizenship Law, which restricted the right of Rohingya to claim citizenship;⁴⁰ in public discourse which labelled the Rohingya as outsiders and “others;” and in periodic efforts to drive the Rohingya over the border to Bangladesh through military operations which aimed to clear Rohingya villages of insurgents.

In 2008, the country began a transition from military rule toward a limited form of constitutional democracy.⁴¹ The transition was engineered by the mil-

³⁸ Osiel, *supra* note 31, at 493 (“Through this process,” writes Osiel, “dangerous misconceptions about ‘the other’ can be overcome.”).

³⁹ *Id.* at 481.

⁴⁰ See 1982 Citizenship Law (Myan.).

⁴¹ Kyaw Yin Hlaing, *Setting the Rules for Survival: Why the Burmese Military Regime Survives in an Age of Democratization*, 22 PAC. REV. 271 (2009); Ashley South, *Political*

itary itself and eventually supported by the country's main democratic political party, the National League for Democracy, led by Aung San Suu Kyi.⁴² Transition took place without national measures to deal with the legacy of massive human rights abuses—without criminal prosecutions, truth-telling, or reparations.⁴³ There appeared to be sound practical reasons for this. The military was in control of the transition: threatening it would destabilize the political situation and risk a coup d'état.⁴⁴ In many parts of the country, civil war and accompanying violations of international humanitarian law and international human rights law continued; amassing evidence of what happened in the past was problematic while conflict was ongoing.⁴⁵ Myanmar's legal system was overburdened and its judges ill-equipped to deal with dispensing ordinary justice: the vast and complex caseload that would result from efforts to address historical justice was beyond its capacity.⁴⁶ The country's complex history was dark and tangled: Myanmar was not the first country to move towards the future by drawing a line under the past.⁴⁷ To a significant extent, the United Nations and key members of the international community, including the United States and Great Britain, supported the pursuit of demi-democratization without accountability.⁴⁸ In the early years of the transition, long-

Transition in Myanmar: A New Model for Democratization, 26(2) CONTEMP. SOUTHEAST ASIA 233, 234 (2004); Khin Zaw Win, *2010 and the Unfinished Task of Nation-Building*, in RULING MYANMAR: FROM CYCLONE NARGIS TO NATIONAL ELECTIONS 19–31 (Nick Cheesman et al. eds., 2010); Yash Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment*, BURMA LIBRARY (2008); Nick Cheesman, *Thin Rule of Law or Un-Rule of Law in Myanmar*, 82 PAC. AFF. 597, 599 (2009).

⁴² Hlaing, *supra* note 41, at 288.

⁴³ Ben Rhodes, *What Happened to Aung San Suu Kyi?*, ATLANTIC (Sept. 26, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/what-happened-to-aung-san-suu-kyi/594781/>.

⁴⁴ *Id.*

⁴⁵ Rhodes, *supra* note 43.

⁴⁶ Cheesman, *supra* note 41.

⁴⁷ Joxerramon Bengoetxea, *Transitional Justice Versus Traditional Justice: The Basque Case*, 12 JEMIE 30, 33 (2013); Landon E. Hancock, *The Northern Irish Peace Process: From Top to Bottom*, 10 INT'L STUD. REV. 203 (2008); Amaia Alvarez Berastegi, *Transitional Justice in Settled Democracies: Northern Ireland and the Basque Country in Comparative Perspective*, 10 CRITICAL STUD. ON TERRORISM 542 (2017); Patricia Lundy, *Paradoxes and Challenges of Transitional Justice at the "Local" Level: Historical Enquiries in Northern Ireland*, 6 CONTEMP. SOC. SCI. 89 (2011); Andrew Rigby, *Amnesty and Amnesia in Spain*, 12 PEACE REV. 73 (2000); Shane Alcobia-Murphy, *Lest We Forget: Memory, Trauma, and Culture in Post-Agreement Northern Ireland*, 39 CANADIAN J. IRISH STUD. 82 (2016).

⁴⁸ Jonathan T. Chow & Leif-Eric Easley, *Myanmar's Democratic Backsliding in the Struggle for National Identity and Independence*, ASAN FORUM (June 25, 2019), <http://www.theasanforum.org/myanmars-democratic-backsliding-in-the-struggle-for-national-identity-and-independence/>.

standing sanctions against Myanmar were lifted,⁴⁹ and the United Nations Special Rapporteur on the Human Rights Situation in Myanmar suspended calls for the establishment of a UN Commission of Inquiry into crimes against humanity carried out by the military.⁵⁰

Instead of establishing institutions to pursue historical justice, the architects of Myanmar's transition sought to transform political culture, foster civic trust and signal an end to impunity and arbitrary rule by gradually strengthening the rule of law. The hope was that acts of contemporary justice would ground the belief that norms associated with democratic governance now played a meaningful role in guiding the behaviour of power-holders. The new government established institutions (a Human Rights Commission, a Rule of Law Committee, an Electoral Commission) and prosecuted some members of the military who carried out extra-judicial killings.⁵¹ In relation to the circumstances of the Rohingya, however, transition presaged little change.⁵² The 1982 Citizenship Law was not amended, and in the general elections of 2015, the National League for Democracy did not field a single Muslim candidate.⁵³ In 2016, Aung San Suu Kyi's long-time friend and legal adviser, the Muslim constitutional lawyer U Ko Ni, was assassinated.⁵⁴ Suu Kyi did not attend his funeral nor, in the immediate aftermath of the incident, did she make any public comment in relation to his murder.⁵⁵ Finally, in 2016 and 2017, in response to attacks by a Muslim terrorist organization on several border guard posts in

⁴⁹ Catherine Renshaw, *Top-Down Transitions and the Politics of US Sanctions*, in *THE BUSINESS OF TRANSITION: LAW REFORM, DEVELOPMENT AND ECONOMICS IN MYANMAR* 228 (2017).

⁵⁰ Reports calling for the Commission of Inquiry include: UN Human Rights Council, Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Progress Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶122, U.N. Doc. A/HRC/13/48 (Mar. 10, 2010) ("United Nations institutions may consider the possibility to establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes"); UN Human Rights Council, Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶¶ 68–72, U.N. Doc. A/65/368 (Sept. 15, 2010).

⁵¹ Niki Esse de Lang, *The Establishment and Development of the Myanmar National Human Rights Commission and Its Conformity with International Standards*, 13 *ASIA-PAC. J. ON HUM. RTS. & L.* 1 (2012).

⁵² *Rohingya Crisis in Myanmar*, COUNCIL ON FOREIGN REL. (Nov. 22, 2019), <https://www.cfr.org/interactive/global-conflict-tracker/conflict/rohingya-crisis-myanmar>.

⁵³ *Discrimination in Arkan*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/2000/burma/burm005-02.htm> (last visited Jan. 20, 2020).

⁵⁴ Tom Lasseter, *In a Muslim Lawyer's Murder, Myanmar's Shattered Dream*, REUTERS (Dec. 13, 2018), <https://www.reuters.com/investigates/special-report/myanmar-murder-politics/>.

⁵⁵ *Id.*

northwest Myanmar, the military orchestrated “clearance operations” that resulted in extreme violence against the Rohingya.⁵⁶ 750,000 Rohingya fled across the border to Bangladesh.⁵⁷ Across Myanmar, thousands of people marched in the streets in support of the military’s actions.

In this article I explain why Myanmar’s political leaders eschewed recognizing or accounting for the injustices of the past and I argue that this failure was one of the factors that made possible the genocide perpetrated on the country’s minority Muslim population, the Rohingya. I argue that after almost half a century of military rule, political consciousness within Myanmar required radical readjustment; a dramatic shift in the contours of understanding about the past and the appropriate relationship between the individual and the state. The prosecution of one of the country’s generals for well-documented⁵⁸ crimes against humanity might have achieved this, in the same way that the prosecution of Aung San might have achieved it during the country’s transition from colonial rule. A trial would not necessarily have created an authoritative record of history from which lessons could be taken to build an imagined democratic future. But what it might have achieved—and what is still urgently required—is the foundation for what Osiel describes as “the solidarity embodied in the increasingly respectful way that citizens can come to acknowledge the differing views of their fellows.”⁵⁹ What is required in Myanmar is broad public debate about the morality of the military’s actions during the years of dictatorship, wide-scale deliberative reflection about society’s existing political culture, and a period of deep national self-examination about the effects of long-term repression.⁶⁰

It is a relatively straightforward matter to point to concrete examples of cases where justice has been pursued in the wake of conflict and the result, for individuals and societies, has fallen well short of the promise. It is a more

⁵⁶ Stephanie Nebehay, *Brutal Myanmar Army Operation Aimed at Preventing Rohingya Return: U.N.*, REUTERS (Oct. 11, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-un/brutal-myanmar-army-operation-aimed-at-preventing-rohingya-return-u-n-idUSKBN1CG10A>.

⁵⁷ Ishaan Tharoor, *The Rohingya Crisis Can’t Stay Bangladesh’s Burden, Prime Minister Says*, WASH. POST (Sept. 30, 2019), <https://www.washingtonpost.com/world/2019/09/30/rohingya-crisis-cant-stay-bangladeshs-problem-prime-minister-says/>.

⁵⁸ There are many reports into war crimes and crimes against humanity committed in Myanmar. The report published by the International Human Rights Clinic at Harvard Law School is an example of the careful reporting and analysis on Burma/Myanmar that universities, NGOs and various bodies within the United Nations have carried out. See THE INT’L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., *CRIMES IN BURMA* 8 (2009).

⁵⁹ Osiel, *supra* note 31, at 478.

⁶⁰ Instead, in the decade following the 2010 elections, the words “transitional justice” were taboo in Myanmar. A workshop I organized in 2016 in Kachin state with Professor Adam Czarnota, titled “Justice During Times of Transition” was shut down half-way through the first session on the orders of the Office of the State Prosecutor (Aung San Suu Kyi’s office).

uncertain and hazardous task to attempt to argue that the absence of justice measures resulted in a political culture that is intolerant, illiberal, and prone to political violence. It is doubly hazardous to make the attempt while events are still unfolding and cannot yet be seen through the longer lens of history. The simplest explanation for what happened to the Rohingya in 2016 and 2017 is that Myanmar's military remained unconstrained by new democratic institutions and continued to set its own objectives, pursuing them with familiar strategies of force and terror. What this article attempts to show is that in addition to this, at a deeper level, among a great majority of ordinary people, there was continuity of the distrust, suspicion, and the malaise that afflicts societies that have lived under terror and repression—a normality dominated by personal and communal suffering, overladen with grief, fear, anger and disregard for the rights of others and outsiders.⁶¹

In her 1991 essay "Freedom from Fear," Aung San Suu Kyi wrote that the "quintessential revolution is that of the spirit, born of an intellectual conviction of the need for change in those mental attitudes and values which shape the course of a nation's development."⁶² By birthright and ambition, Aung San Suu Kyi should have championed the "revolution of the spirit" that her country needed. Suu Kyi possessed, in her own words, "a historical sense that despite all setbacks the condition of man is set on an ultimate course for both spiritual and material advancement."⁶³ Suu Kyi recognized that Burmese society was wracked by distrust and uncertainty and that *saddha* (confidence in moral, spiritual and intellectual values)⁶⁴ needed to be rebuilt, drawing on what she describes as "the Burmese capacity for the sustained mental strife and physical endurance necessary to withstand the forces of negativism, bigotry, and hate."⁶⁵ The impetus for struggle, according to Suu Kyi, is a genuine respect for individual liberty, freedom, peace and justice.⁶⁶ One of the tragedies of Myanmar is that Suu Kyi did not demonstrate this respect for the Rohingya when she was put to the test. She remained part of a political culture where genocide of the country's archetypal outsiders, the Rohingya, was possible.

⁶¹ ANNA BURNS, *MILKMAN: A NOVEL* 89 (2018).

⁶² FREEDOM FROM FEAR, *supra* note 2, at 183.

⁶³ *Id.* at 184–85.

⁶⁴ H. Saddhatissa, *The Saddha Concept in Buddhism*, 11 EASTERN BUDDHIST J. 137 (1978).

⁶⁵ Aung San Suu Kyi, *Burma's Quest for Democracy*, in WORLD RELIGIONS AND DEMOCRACY 84 (Larry Diamond et al. eds., 2005).

⁶⁶ *Id.*

II. TRANSITION WITHOUT JUSTICE

A. *Ethnic Conflict and Military Rule*

Myanmar's transition toward a limited form of constitutional democracy, after two decades of direct military rule, began in 2008, with a successful referendum on the 2008 Constitution of the Republic of the Union of Myanmar.⁶⁷ The Constitution preserves a key role for the military in the political life of the state.⁶⁸ Twenty five percent of members of the parliament in both chambers must be serving army officers appointed by the military commander-in-chief.⁶⁹ The commander-in-chief has a decisive say in the appointment of the President and two vice-presidents;⁷⁰ certain key cabinet positions (such as

⁶⁷ *Timeline: Myanmar's Slow Road to a New Constitution*, REUTERS (Feb. 9, 2008), <https://www.reuters.com/article/us-myanmar-elections-constitution/timeline-myanmars-slow-road-to-a-new-constitution-idUSBKK26169420080209>.

⁶⁸ CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYAN., May 29, 2008, art. 6 (stating that the Union's objectives are: "(a) non-disintegration of the Union; (b) non-disintegration of National solidarity; (c) perpetuation of sovereignty; (d) flourishing of a genuine, disciplined multi-party democratic system; (e) enhancing the eternal principles of Justice, Liberty and Equality in the Union and; (f) enabling the Defence Services to be able to participate in the National political leadership role of the State"); see also Si Thu Aung, *To Service as Balancing Weight*, N. LIGHT OF MYAN. (Mar. 21, 2008), <http://burmalibrary.org/docs4/NLM2008-03-21.pdf> (Si Thu Aung argues that the presence of the military in parliament serves as a "balancing weight", or a system of checks and balances, within the fledgling parliamentary democracy).

⁶⁹ Under Chapter IV of the Constitution, in the states and divisions, as in the national legislature, twenty-five percent of seats are reserved for the *Tatmadaw*. Thus, Military representatives occupy 110 seats in the 440-seat Pyithu *Hluttaw*, or lower house; fifty-six out of 224 seats in the *Amyotha Hluttaw* or upper house, and more than 200 seats in the fourteen state and regional *hluttaws*. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYAN., May 29, 2008, art. 13, 14, 109, 141.

⁷⁰ The President is elected by a meeting of the Pyihtaungsu *Hluttaw* (both chambers of parliament) meeting in plenary session after three candidates have been nominated by the two chambers and the army members meeting separately. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYAN., May, 29, 2008, art. 60. The Constitution provide exclusionary provisions relating to the position of President and Vice-President: the President must be at least forty-five years of age and born of parents who were both citizens, and must be acquainted with the political, administrative, economic, and military affairs of the state. *Id.* at art. 59. He or she must also have no allegiance to, citizenship of, or rights and privileges availed by a foreign power, nor can his or her parents, spouse, children, or their spouses. *Id.* In addition, like members of the *Hluttaw*, he or she has to have lived in Myanmar for the previous twenty years unless abroad with government permission, free from convictions, of sound mind, not destitute, and not in receipt of support from foreign governments or religious organizations. *Id.* The Presidential term of office is five years and he or she may serve for only two terms. *Id.* at art. 61. The President can be impeached if charged by twenty-five percent of either house of the *Hluttaw*. *Id.* at art. 71. For his removal, a two-thirds vote is required. Reasons for impeachment include: high treason; breach of the provisions of the Constitution, misconduct; disqualification; inefficiency. *Id.*

Home Affairs, Border Affairs and Defence) are confined to active military personnel;⁷¹ and the army is fiscally and administratively autonomous.⁷² During states of emergency, which are declared by the President, the legislative, executive, and judicial powers of the Union are transferred to the Commander-in-Chief of the Defence Services.⁷³ Article 445 of the 2008 Constitution provides immunity for members of the former military government in relation to any act done in the execution of duty;⁷⁴ the Defence Service has the right to independently administer and adjudicate all affairs of the armed forces.⁷⁵ In the adjudication of military justice, the decision of the Commander-in-Chief of the Defence Services is final and conclusive.⁷⁶ Amendment of key provisions of the Constitution requires the support of more than 75 percent of members of parliament, followed by approval in a referendum.⁷⁷ This means that the support of the military is necessary in order to change the Constitution.

In 2010, the military withdrew from power to make way for elections and a nominally civilian government. The leading democratic opposition party, the National League for Democracy (NLD), boycotted the elections because the party's leader, Nobel Peace Prize laureate and former political prisoner Aung San Suu Kyi, was not permitted to stand for election.⁷⁸ The election was won by the military-backed Union Solidarity and Development Party (USDP). There was deep skepticism in the immediate aftermath of the 2010 elections about whether the military intended to allow genuine democratic reform. But, between 2010 and 2015, under President Thein Sein, the new government undertook a program of liberalisation, releasing political prisoners, legalizing trade unions, allowing public political gatherings, easing press censorship, and permitting the teaching of ethnic minority languages in schools.⁷⁹ The government also accelerated efforts to end ongoing civil conflict with the

⁷¹ *Id.* at art. 232(a)(ii).

⁷² *Id.* at ch. VII.

⁷³ *Id.* at art. 418(a).

⁷⁴ *Id.* at art. 445.

⁷⁵ *Id.* at art. 20(b).

⁷⁶ *Id.* at art. 343.

⁷⁷ *Id.* at art. 436(a).

⁷⁸ *Myanmar Bars Suu Kyi's Election Participation*, CNN (Mar. 10, 2010), <https://www.cnn.com/2010/WORLD/asiapcf/03/10/myanmar.election.law/index.html> (reporting that electoral law prohibited Suu Kyi from standing for election because she had been convicted of offences); see also Randy James, *John Yettaw: Suu Kyi's Unwelcome Visitor*, TIME (May 20, 2009), <http://content.time.com/time/world/article/0,8599,1899769,00.html> (reporting that one conviction related to an incident in which an American, John Yettaw, swam across a lake and entered unexpectedly into Ms Suu Kyi's house. Ms Suu Kyi was charged with violating the terms of her house arrest (by permitting Yettaw to stay for a short period). She was convicted and sentenced to three years gaol, a sentence that was later reduced to eighteen months home detention).

⁷⁹ Catherine Renshaw, *Human Rights Under the New Regime*, in CONSTITUTIONALISM AND LEGAL CHANGE IN MYANMAR 215–34 (Andrew Harding & Khin Khin Oo eds., 2017).

country's many armed ethnic organizations, who had been struggling for independence or a greater degree of autonomy since the end of colonial rule.⁸⁰ An editorial in the *The New Light of Myanmar* contrasted the "violent conflicts, protests and bloodshed" that have marked other countries' transitions to democracy, with Myanmar's "rapid, peaceful transition with mutual understanding and trust and negotiations as directed by its former rulers." The editorial asked: "Can there be a more efficient, correct way? Hence, the Myanmar government can daringly disclose that there is no way to deviate from its democratic transition. The President and other responsible leaders have reassured the international community that they will never turn back from the country's changes and reforms."⁸¹

In 2010 Aung San Suu Kyi was released from house arrest and in 2011 she declared that she trusted President Thein Sein to further democratization.⁸² "The Lady", as she is known within Myanmar, told foreign diplomats that she is "confident about the future and optimistic about the possibility of genuine change" and that "Thein Sein can be trusted, he is genuinely trying to reform the country, and needs international support."⁸³ The new government's strongest claim to credibility—both internally and externally—was Aung San Suu Kyi's endorsement of the government's path of reform.⁸⁴ In 2012, the NLD contested seats in federal by-elections and Aung San Suu Kyi herself

⁸⁰ The government signed an official ceasefire with the Shan State Army-South (SSA-South) at the end of 2011. Aung Naing Oo, "Give Peace in Burma a Chance", *IRRAWADDY* (Dec. 13, 2011). On January 12, 2012, the government signed a ceasefire with the 19-member Karen National Union, to end hostilities between the military and the Karen National Liberation Army. Marte Nilsen, *Will Democracy Bring Peace to Myanmar?*, 16 *INT'L AREA STUD. REV.* 115 (2013). The government also continued negotiations with the Chin National Front and, in 2015, the government signed a Nationwide Ceasefire Agreement with eight armed ethnic organizations, including the Arakan Army. *Myanmar Signs Historic Cease-Fire Deal with Eight Ethnic Armies*, *RADIO FREE ASIA* (Oct. 15, 2015), <http://www.rfa.org/english/news/myanmar/deal-10152015175051.html>. However, peace was very uncertain. In Kachin state, in the country's North, a ceasefire with the Kachin Independence Army which had been in place since 1994 came to an end in 2011. Tin Maung Maung Than, *Dreams and Nightmares: State Building and Ethnic Conflict in Myanmar (Burma)*, in *ETHNIC CONFLICTS IN SOUTHEAST ASIA* 65–108 (Kusuma Snitwongse & W. Scott Thompson eds., 2005).

⁸¹ Yangyi Aung, *A New Nation with New Strength*, *N. LIGHT OF MYAN.* (Jan. 4, 2012), <http://www.burmalibrary.org/docs12/NLM2012-01-04.pdf>.

⁸² *Id.*

⁸³ Joshua Kurlantzick, *Is Myanmar's Reform Real?*, *ATLANTIC* (Apr. 3, 2012), <https://www.theatlantic.com/international/archive/2012/04/is-myanmars-reformreal/255386/>.

⁸⁴ Steven Lee Myers, *In Myanmar, Government Reforms Win over Some Skeptics*, *N.Y. TIMES* (Nov. 29, 2011), <https://www.nytimes.com/2011/11/30/world/asia/in-myanmar-government-reforms-win-over-countrys-skeptics.html> (Daw Cho ChoKyaw Nyein, opposition leader and former political prisoner, said that: "What has happened in these last few months is a miracle for us To be frank, in the very beginning, I didn't believe a word of what they were saying [N]ow I believe what is happening is for the good of the people.").

was elected to parliament.⁸⁵ In the general elections of 2015, the NLD swept to power. Barred from becoming President by a special provision in the Constitution, Suu Kyi appointed herself Special Counsellor of State, a role which she said was “above the President.”⁸⁶

Myanmar’s transition is “liberation from above” or “regime-initiated liberalisation.”⁸⁷ It is the result of a decision on the part of the military to withdraw from direct rule and affect an orderly transfer of power to a civilian government. From the military’s perspective, the success of transition depends on preserving the constitutional guarantees about military autonomy and a role for the military in the political life of the state, including a guarantee that there would be no prosecution of military officers for crimes committed while the military was in power. The military’s primary justification for a continuing political role was ongoing civil conflict and the potential for the disintegration of the Union.⁸⁸ Praetorianism and the failure of representative democracy, which are the themes of Myanmar’s post-colonial history, both derive from the core problem of attaining national unity in the face of ethnic diversity.⁸⁹ Burmese leaders trace the origins of disunity to British rule (1825–1948) and to the British “divide and conquer” strategy, which (they claim) led to intractable divisions between Myanmar’s majority Buddhist Bamar population, and ethnic minorities (the Arakanese, Chin, Kachin, Shan, Karenni, Karen, and Mon peoples) who inhabit Myanmar’s outlier regions.⁹⁰ Myanmar’s Deputy Minister for Foreign Affairs, U Khin Maung Win wrote in 2004:

Myanmar is a Union composed of more than one hundred different national races, each with its own culture and traditions.

⁸⁵ Kurlantzick, *supra* note 83.

⁸⁶ Andrew R.C. Marshall & Timothy McLaughlin, *Myanmar’s Suu Kyi Says Will Be Above President in New Government*, REUTERS (Nov. 5, 2015), <https://www.reuters.com/article/us-myanmar-election/myanmars-suu-kyi-says-will-be-above-president-in-new-government-idUSKCN0SU0AR20151105>.

⁸⁷ SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); Samuel P. Huntington, *How Countries Democratize*, 106 *POL. SCI. Q.* 591 (1991); Samuel P. Huntington, *After Twenty Years: The Future of the Third Wave*, 8 *J. DEMOCRACY* 3, 3–12 (1997).

⁸⁸ Nicholas Farrelly, *Discipline Without Democracy: Military Dominance in Post-Colonial Burma*, 67 *AUSTL. J. INT’L AFF.* 312, 313 (2013) (Farrelly notes that “anxiety about the potential for territorial fragmentation is the principle motivation for those who consider the military’s role essential to national survival”).

⁸⁹ Alan Smith, *Burma/Myanmar: The Struggle for Democracy and Ethnic Rights*, in *MULTICULTURALISM IN ASIA* 262–66 (Will Kymlicka & Baogang He eds., 2005) (According to Smith, the British treated the ethnic Burmese majority—which became part of India—differently to the non-Burman minorities, playing a “divide and rule” game, favoring certain minorities in the army, as well as migrant Indians in the economy, at the expense of the ethnic Burmese majority); see also Robert Taylor, *Burma’s National Unity Problem and the 1974 Constitution*, 1 *CONTEMP. SOUTHEAST ASIA* 232 (1979).

⁹⁰ *Id.* at 262.

Politically, there cannot be lasting peace and stability in the country without national unity. Unfortunately, the divide and rule policy practiced by the British colonialists resulted in suspicion and discord among the national races. This subsequently led to armed insurgency that spread to various parts of the country for decades. The question of achieving national unity and bringing to an end the armed insurgency are vital issues for any government, past, present and future.⁹¹

While there was a prospect that conflict could lead to the secession of some ethnic states, the military would preserve its political independence and power to ensure the country remained unified. During the decades of military rule, the imperative of maintaining unity justified extreme military tactics, including the abuse of civilians. Military operations under General Ne Win, for example, who ruled Burma from 1962–1988, were based on the “Four Cuts” strategy, *Pya Ley Pya*, designed to cut the main links (food, funds, intelligence, recruits) between insurgents, their families and local villagers.⁹² The British had used a similar strategy to defeat the communist insurgency in Malaysia after the Second World War and the United States used a similar strategy in the Second Vietnam War. The terrorization of local civilian populations was an inherent part of the strategy: abuse of civilian’s human rights was essential to its success. Operations designed to clear areas of insurgents were cordoned off; villagers were ordered to move to new military-controlled locations and villagers who remained were treated as insurgents and risked being shot on sight.⁹³ The military then confiscated food and destroyed crops.⁹⁴ From 1992, successive United Nations Special Rapporteurs, the Office of the High Commissioner for Human Rights and domestic and international non-governmental organizations reported on war crimes and crimes against humanity carried out in pursuit of *Tatmadaw* suppression of ethnic insurgencies.⁹⁵

⁹¹ H-E. U Khin Maung Win, *Myanmar Roadmap to Democracy: The Way Forward*, BURMA TODAY (Jan. 27, 2004), burmatoday.net/burmatoday2003/2004/02/040218_khinmgwin.htm.

⁹² SMITH, *supra* note 26, at 258–59 (1999).

⁹³ *Id.* at 259.

⁹⁴ *Id.* at 260; ANDREW SELTH, *BURMA’S ARMED FORCES: POWER WITHOUT GLORY* (2002).

⁹⁵ *The UN Human Rights Special Rapporteur – Reports to UN Human Rights Council*, BURMA CAMPAIGN, <http://burmacampaign.org.uk/useful-resources/reports-by-the-special-rapporteur-on-the-situation-of-human-rights-in-myanmar/> (last visited Feb. 26, 2020) (From 1993–2018, there have been 30 Special Rapporteur reports); *see e.g.*, U.N. Human Rights Council, Rep. of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018) <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session39/Pages/ListReports.aspx>; Tomás Ojea Quintana, (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. of the Special Rapporteur on the*

The Nationwide Ceasefire Agreement, signed in 2015 by the government and representatives of some ethnic insurgent groups, did not include provisions for the establishment of criminal proceedings in relation to crimes committed by the military (or crimes committed by ethnic armies); nor did it refer to the establishment of truth commissions; nor to reparations.⁹⁶ It did, however, refer to the pursuit of social and economic goals: protecting the environment, improvements to health and education, and addressing the chronic drug problem that exists in many ethnic states.⁹⁷ The view shared by many among the military, leaders of ethnic armies, and the NLD, was that focusing on retribution—or even calling for recognition of the crimes committed by the former military regime through the establishment of a truth commission—would destabilize the political situation and undermine prospects for democratic consolidation and peace.⁹⁸ Renowned Myanmar scholar Dr. Tim Maung Maung Than said, “There are certain red lines in Myanmar for the military. Transitional justice is one of the red lines.”⁹⁹

B. *The Shadow of the 1990 Elections*

There was a clear historical precedent for what might happen if the democratic opposition crossed the red line. In general elections held in 1990, the NLD, led by Aung San Suu Kyi, won a sweeping victory, securing more than 50% of the popular vote. The military, however, refused to transfer power to the NLD. The reason for this—in popular legend at least—was an offhand comment from U Kyi Maung, chairman of the NLD, who in a post-election press conference referred to “Nuremberg-style tribunals” while explaining to

Situation of Human Rights in Myanmar, U.N. Doc. A/HRC/25/64 (Apr. 2, 2014); *The Rohingya Muslims: Ending a Cycle of Exodus?*, HUMAN RIGHTS WATCH (Sept. 1, 1996), <https://hrw.org/report/1996/09/01/rohingya-muslims-ending-cycle-exodus>; AMNESTY INT'L, MYANMAR/BANGLADESH: ROHINGYAS—THE SEARCH FOR SAFETY (1997), <https://www.refworld.org/docid/3ae6a9931f.html>; AMNESTY INT'L, MYAN. (BURMA): CONTINUING KILLINGS AND ILL-TREATMENT OF MINORITY PEOPLES (1991), <https://www.amnesty.org/en/documents/ASA16/005/1991/en/>; AMNESTY INT'L, MYANMAR: “NO LAW AT ALL”: HUMAN RIGHTS VIOLATIONS UNDER MILITARY RULE (1992), <https://www.amnesty.org/en/documents/asa16/011/1992/en/>.

⁹⁶ The Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations, Oct. 15, 2015, *available at* https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_151510_NCAAgreement.pdf.

⁹⁷ *See id.*; INST. FOR SEC. & DEV. POL'Y, MYANMAR'S NATIONWIDE CEASEFIRE AGREEMENT (2015), <http://isdp.eu/content/uploads/publications/2015-isdp-backgrounder-myanmar-nca.pdf>.

⁹⁸ Tin Maung Maung Than, *The Tatmadaw and Myanmar Reforms Conference at the ISEAS—Yusof Ishak Institute* (Oct. 7, 2012), *cited in* Andrew Harding, *Law and Development in its Burmese Moment: Legal Reform in an Emerging Democracy*, in LAW, SOCIETY, AND TRANSITION IN MYANMAR 377–401 (Melissa Crouch & Tim Lindsey eds., 2017).

⁹⁹ *Id.*

a foreign journalist that the NLD did *not* intend to seek accountability for what the army had done to the people during its period of rule. “Here in Burma,” said Kyi Maung, “we do not need any Nuremberg-style tribunals.”¹⁰⁰ Many people in Myanmar believe that one of the primary reasons why the Burmese military refused to relinquish power after the 1990 elections was because the generals feared they would be tried for crimes committed during the period of dictatorship.¹⁰¹ A quarter of a century after their first abortive attempt to take power, the NLD was determined to ensure that history would not repeat itself and that the generals would not once again be frightened into retreating from reform.¹⁰² Through public statements and gestures of support for the *Tatmadaw*, Aung San Suu Kyi continually reassured the military that the NLD would not seek retribution for acts committed during the years of military rule.¹⁰³ When she discussed mechanisms for accountability, which was rarely and reluctantly, it was in the form of a truth and reconciliation commission, similar to the South African commission, which might be established at some distant point in the future.¹⁰⁴ Suu Kyi said that she followed in the footsteps of leaders such as Desmond Tutu, who preached forgiveness and reconciliation rather than vengeance and retribution: “Whoever [committed wrongs], we will show them how forgiving we are. No one needs to be afraid of the NLD forming government. We have no plan to seek revenge.”¹⁰⁵ After 2012, Suu Kyi pointedly embraced the *Tatmadaw* as “her father’s army” and declared that she was “very fond” of the army.¹⁰⁶ She asked the people to reconcile with the military and move forward hand-in-hand.¹⁰⁷

C. *Setting the Junta Free*

Suu Kyi’s views on non-retribution were in line with those of her colleague and mentor U Tin Oo, who founded the NLD with Suu Kyi in 1988 and who

¹⁰⁰ Ba Kaung, *Heroes and Villains*, IRRAWADDY, http://www2.irrawaddy.com/article.php?art_id=6883&page=5 (last visited Feb. 25, 2020).

¹⁰¹ *Burma: Military Commits Crimes Against Humanity*, HUMAN RIGHTS WATCH (Sept. 25, 2017), <https://www.hrw.org/news/2017/09/25/burma-military-commits-crimes-against-humanity>.

¹⁰² *Burma: 20 Years After 1990 Elections, Democracy Still Denied*, HUMAN RIGHTS WATCH (May 26, 2010), <https://www.hrw.org/news/2010/05/26/burma-20-years-after-1990-elections-democracy-still-denied>.

¹⁰³ *Id.*

¹⁰⁴ Saw Yan Naing, *Burma ‘Not Ready’ for Truth Commission*, IRRAWADDY (June 15, 2012), <https://www.irrawaddy.com/news/burma/burma-not-ready-for-truth-commission.html>.

¹⁰⁵ Kyah Phyo Tha, *NLD Not Seeking “Revenge” for the Past, Says Suu Kyi*, IRRAWADDY (Oct. 11, 2015), <http://www.searchmyanmar.com/link/comment/cid/54597>.

¹⁰⁶ Kirsty Young, *Aung San Suu Kyi Tells of Fondness for Burma Army*, BBC (Jan. 27, 2013), <https://www.bbc.com/news/uk-21217884>.

¹⁰⁷ See Tha, *supra* note 105.

was at various points in time the party's Vice President and President. Tin Oo said:

Our policy from the beginning was to renounce violence or any armed struggle as an instrument of policy . . . if we are burning for some sort of revenge, we will achieve nothing. The people will only say that the NLD is the same as the military people. We have suffered great loss, but we do not seek any retribution. Victims should be compensated, but we seek no revenge . . . we never think about it. People must work harmoniously, all together, whatever their past . . . I feel happy, as long as I can see the liberty of my country again. We want peace and harmony restored for our people.¹⁰⁸

Tin Oo served for a time as Commander in Chief of the Armed Forces and as Defence Minister while Burma was under the rule of General Ne Win.¹⁰⁹ Tin Oo used the Four Cuts strategy to wipe out ethnic militias in Rakhine state and, in the process, destroying Rohingya villages and driving villagers across the border to then East Pakistan.¹¹⁰ From one perspective, therefore, the NLD's approach to retributive justice was a pragmatic one. Attempts to uncover and explain the past would not only have destabilized the political situation, they would have led to uncomfortable questions for some members of the National League for Democracy. In her famous 1988 speech at Shwedagon Pagoda, given in the wake of the student uprising and its violent suppression by the *Tatmadaw*, Suu Kyi asked the people to "try to forget what has already taken place" and "not to lose their affection for the army."¹¹¹

¹⁰⁸ RICHARD COCKETT, *BLOOD, DREAMS AND GOLD: THE CHANGING FACE OF BURMA* 188–89 (2015).

¹⁰⁹ Tin Oo was Defence Minister between 1974 and 1976. See *Biography of CRPP Members*, BURMA LIBR. (May 17, 1999), <http://www.burmalibrary.org/reg.burma/archives/199905/msg00281.html>.

¹¹⁰ See *Rohingya Condemn Recent U Tin Oo's Statement*, KALADAN NEWS (Oct. 11, 2011), http://kaladanpress.org/v3/index.php?option=com_content&view=article&id=3389:rohingya-condemn-recent-u-tin-oos-statement-&catid=141:october-2011&Itemid=2; Penny Green et al., *Genocide Received, Genocide Continues: Myanmar's Annihilation of the Rohingya*, INT'L STATE CRIME INITIATIVE (Apr. 11, 2018), <http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf>; Andrew Selth, *Myanmar's Armed Forces and the Rohingya Crisis*, U.S. INST. OF PEACE (Aug. 17, 2018), <https://www.usip.org/sites/default/files/2018-08/pw140-myanmars-armed-forces-and-the-rohingya-crisis.pdf>.

¹¹¹ Aung San Suu Kyi, "Speech to a Mass Rally at the Shwedagon Pagoda", in *FREEDOM FROM FEAR*, *supra* note 2 (The Shwedagon Pagoda speech, which launched Suu Kyi's political career, was delivered at a mass rally at the Shwedagon Pagoda. For background information on the 1998 uprising, see *RRT Research Response: Myanmar*, AUSTL. REFUGEE REV. TRIBUNAL (July 29, 2009), <https://www.refworld.org/docid/4f42061b2.html>).

In 1991, Samuel Huntington set out the considerations, which new democratic regimes must take into account in deciding how to address crimes committed by officials of the predecessor regime.¹¹² In Huntington's view, the decision to prosecute and punish, or forgive and forget, did not turn on moral or legal arguments about societal obligations to truth, justice and the rule of law. Instead, the decision was determined by the nature of the democratisation process and the distribution of political power during and after transition. Huntington argued that in circumstances where democratic transformations were initiated and guided by leaders of the existing authoritarian regime, assurances regarding non-prosecution—amnesties—were essential to prospects of democratic consolidation. Put simply, no authoritarian leader would enable transition if they anticipated being prosecuted as a result. Amnesty was the price of peaceful transformation. Some academics expressed support for avoiding the issue of accountability during Myanmar's transition. "Set the Junta Free," wrote Ian Holliday and Roman David¹¹³

III. TIME, SUFFERING, AND MEMORY

A. *Buddhism and Transitional Justice*

Implicit in the argument for deferring justice was the understanding that the preservation and consolidation of democracy required peace and stability. Development, to improve the health, education, and living standards of the people, also required peace. Therefore, ran the argument, those who were genuinely interested in protecting human rights must support peace and political stability at all costs. If justice (in the sense of accountability for past acts of the military) stood in the way of peace, then justice should be deferred or sacrificed.¹¹⁴ The forward-looking constitutional project of democratic consolidation was pitted against the backward-looking project of retributive justice.

¹¹² SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

¹¹³ See generally Roman David & Ian Holliday, *Set the Junta Free: Pre-Transitional Justice in Myanmar's Democratisation*, 41 *AUST'L J. POL. SCI.* 91 (2006); Trevor Wilson, *Strategic Choices in Myanmar's Transition and Myanmar's National Security Policies*, 3 *ASIA & PAC. POL'Y STUD.* 62 (2016).

¹¹⁴ "Peace or justice" has been called the "devil's choice" for new transitional governments. LUCIEN HUYSE, *YOUNG DEMOCRACIES AND THE CHOICE BETWEEN AMNESTY, TRUTH COMMISSIONS AND PROSECUTIONS* 11–12 (Instituut Recht en Samenleving, 1998); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425 (1992) (referring to "peace or justice" as the "traditional justice dilemma"); Neil J. Kritz, *The Dilemmas of Transitional Justice*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* xix–xxx (Neil J. Kritz ed., 1995); see also BERBER BEVERNAGE, *HISTORY, MEMORY, AND STATE-SPONSORED VIOLENCE* 20 (2013) (Bevernage

Official discourse in the early years of transition sought to emphasise unity and political progress rather than division and historical grievances. Strengthening institutions was the focus of transition, not punishing individuals.¹¹⁵ Yet, to cast the problem of transitional justice in Myanmar as “peace versus justice,” the well-known devil’s choice of transitioning countries, would be to view the issue through too narrow a lens. Suu Kyi’s emphasis on forgiving and forgetting was consonant with deeply held and widely understood Buddhist understandings about the nature of suffering, time and punishment.¹¹⁶

Like many people in Myanmar, Suu Kyi had suffered grave injustice at the hands of the military. She spent eighteen years under house arrest, was separated from her children, and endured slander and humiliation. Her husband died alone in England because the military would not guarantee Suu Kyi’s entry back into Burma if she left the country to be with him. But for Suu Kyi, the law of *karma* was a more appropriate response to suffering than retribution. In *The Voice of Hope*, she said that Myanmar’s military dictators might be able to avoid the repercussions of breaking human laws, but that:

They are not above the law of karma, because the law of karma is actually very scientific. There is always a connection between cause and effect. It’s like the light of a star isn’t it? The light that we see now was initiated so many light years ago, but there it is. In science too there can be a seemingly long gap between cause and effect. But there’s always the connection between them.¹¹⁷

The Buddhist understanding of time is at odds with the linear conception of time in Western thought. Western thinking is preoccupied with the future

puts the problem as: “to repair historical injustice and thereby risk social dissent, destabilization, and return of violence; or to aim at a democratic and peaceful present and future to the ‘disadvantage’ of the victims of a grim past?” *Id.* at 7); see Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 7 (A. James McAdams ed., 1997) (to the dilemma as “one of the hardest choices that any democracy has to make.”).

¹¹⁵ See Pablo De Greiff, *Trial and Punishment: Pardon and Oblivion*, 22 *PHILOS. & SOC. CRITICISM* 93 (1996).

¹¹⁶ See Peter Sagar, *Aung San Suu Kyi: The Influence of Buddhism on Her Beliefs and Actions*, A LIVING TRADITION (Aug. 2009), https://www.alivingtradition.org/uploads/1/1/3/8/11381120/aung_san_suu_kyi.pdf; William McGowan, *Aung San Suu Kyi’s Buddhism Problem*, *FOREIGN POL’Y* (Sept. 17, 2012), <https://foreignpolicy.com/2012/09/17/aung-san-suu-kyis-buddhism-problem/>; Aung San Suu Kyi, *My Country and My People*, in *FREEDOM FROM FEAR*, *supra* note 2, at 66 (In Suu Kyi’s words, Theravada Buddhism is the “one single factor which has had the most influence on Burmese culture and civilization”); MELFORD E. SPIRO, *ANTHROPOLOGICAL OTHER OR BURMESE BROTHER?: STUDIES IN CULTURAL ANALYSIS* 75 (1992).

¹¹⁷ Suu Kyi, *supra* note 111, at 87.

(a better age that lies ahead) and the past (which provides lessons for the future). The present, however, is devalued in Western thought: “We do not rest satisfied with the present . . . [f]or the present is generally painful to us.”¹¹⁸ The Buddhist experience of the present is entirely different.¹¹⁹ In Buddhist philosophy, the past and future do not exist. Nor does the present, in the sense that Westerners commonly understand it as something distinguished from the past and future. The Buddhist conception of temporality is a challenge to retributive justice because it sits uneasily with a focus on the past (establishing guilt) and the future (promoting deterrence).

In Buddhist thought, all that exists is eternity, without an individual fixed self, an “I”, at the core of it.¹²⁰ One of the central goals of Buddhism is to realize that the ego or the self—understood as a stable, localizable, and autonomous instance of control, which governs our decisions—is illusory. The Buddhist conception of the self presents another challenge to core tenets of transitional justice because it stands at odds with the individualistic focus of much Western legal theory about transitional justice (individuals as perpetrators and victims).¹²¹ In terms of victims, the claim that transitional justice processes promote healing for individual victims¹²² is, from a Buddhist perspective, based on a profoundly simplistic view of how psychotherapy works. Catharsis may have short-term benefits for some, but healing is a long-term, culturally determined process that involves more than emotional abreaction.

¹¹⁸ BLAISE PASCAL, PASCALÉ 20, 49 (1958).

¹¹⁹ DAVID LOY, LACK & TRANSCENDENCE: THE PROBLEM OF DEATH AND LIFE IN PSYCHOTHERAPY, EXISTENTIALISM AND BUDDHISM 43, 46–47 (2000) (“The Buddha said of his disciples: ‘they do not repent of the past, nor do they brood over the future. They live in the present. Therefore they are radiant. By brooding over the future and repenting the past, fools dry up like green reeds cut down’”).

¹²⁰ LUDWIG WITTGENSTEIN, PHILOSOPHICAL REMARKS 85 (1975).

¹²¹ See generally Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 69, 71–72 (André Nolkaemper & Harmen van der Wilt eds., 2009).

¹²² See e.g., HOLLY L. GUTHREY, VICTIM HEALING AND TRUTH COMMISSIONS 15 (2015) (“I contend that the process of reconciliation plays a role in helping victims to restore their lives, and thus heal.”); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 4 (2010) (“It is also often suggested that digging into the truth and giving victims a chance to speak offers a healing or ‘cathartic’ experience”); *Reparations*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Jan. 21, 2020) (“Symbolic reparations—such as apologies, memorials, and commemorations—can be just as beneficial, healing, and meaningful as material reparations”); see also *Public Hearings: Platforms of Truth, Dignity, and Catharsis*, INT’L CTR. FOR TRANSITIONAL JUST. (Mar. 23, 2017), <https://www.ictj.org/news/public-hearings-platforms-truth-dignity>.

B. Truth

While Buddhism does not countenance retribution, there is a role for truth.¹²³ In Suu Kyi's view, "truth and reconciliation go together. Once the truth has been admitted, forgiveness is far more possible. Denying the truth will not bring about forgiveness, neither will it dissipate the anger in those who have suffered."¹²⁴ Suu Kyi said that suffering had to be acknowledged:

You can't just wipe away the past. If you try, there will always be this ocean of festering resentment within those who have truly suffered. They will feel that their sufferings have been pushed aside, as though they've suffered for nothing; as though they've undergone torture for nothing; as though their sons and fathers had died for nothing.¹²⁵

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

I think in every country which has undergone the kind of traumatic experience that we have had in Burma, there will be a need for truth and reconciliation. I don't think that people will really thirst for vengeance once they have been given access to the truth. But the fact that they are denied access to the truth simply stokes the anger and hatred in them. That their sufferings have not been acknowledged makes people angry. That is one of the great differences between SLORC and ourselves. We do not think that there is anything wrong with saying we made a mistake and that we are sorry.¹²⁶

Yet once transition was underway, Suu Kyi's language and actions betrayed profound unease at the prospect of any sustained process of truth-telling—of remembering, mourning, or acknowledging the traumas of the past. The precarious political balance of power, the complex history implicating current heroes of democracy, the profoundly Buddhist conceptions of time, suffering and being, which affected ordinary understandings of appropriate forms of acknowledgement and redress, augured against the pursuit of truth—

¹²³ ROMAN DAVID & IAN HOLLIDAY, *LIBERALISM AND DEMOCRACY IN MYANMAR* 156 (2018).

¹²⁴ *We Are Still Prisoners in Our Own Country: An Interview with Aung San Suu Kyi*, HUMANIST (Nov. 1, 1997), <https://www.thefreelibrary.com/We+are+still+prisoners+in+our+own+country%3A+an+interview+with+Aung+San.+.-a019989932>.

¹²⁵ Alan Clements, *Conversations with Aung San Suu Kyi*, LIONS ROAR (Sept. 1, 1997), <https://www.lionsroar.com/conversations-with-aung-san-suu-kyi/>.

¹²⁶ Suu Kyi, *supra* note 111, at 32.

telling processes. Ultimately, Suu Kyi did not make it a condition of her cooperation in the transition that Myanmar's military rulers acknowledge or apologize for the years of terror endured by the people. The attitude of many people in the country was that if Suu Kyi, "Mother Suu," was content to wait for acknowledgement of the past, then they too should be content to wait.

C. *Burmese Exceptionalism*

In relation to long-standing external critics of military rule in Myanmar, including political leaders in the United States and Great Britain, Suu Kyi reminded them that they could never be as familiar as she was with the particularities of Myanmar's transition and that it was for the people of Myanmar to decide what to do about the past.¹²⁷ This argument was largely accepted by leaders in the USA, Great Britain and Canada. Suu Kyi's position was not, after all, unusual for the leader of a country transitioning from oppression and civil war. Historically, most countries undergoing transition opt for a combination of "amnesia and amnesty" as the response to a painful past wrought by violent internal conflict.¹²⁸ In 1975, Spain made its transition to democracy with a conscious policy of forgetting;¹²⁹ twenty years later, the Irish peace process gave token recognition to the significance of memory and history, whilst placing greater emphasis on the desirability of "a new beginning":

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.¹³⁰

Suu Kyi joined the military in constructing a political process of forgetting rather than remembering.¹³¹ Suu Kyi's aim was to build reconciliation, tolerance, and mutual trust by means *other* than grappling with the trauma of a complex past. The alternative means for achieving important transitional

¹²⁷ BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 72–73 (1992).

¹²⁸ BEVERNAGE, *supra* note 114, at 8.

¹²⁹ Timothy G. Ash, *The Truth About Dictatorship*, 45 N.Y. REV. BOOKS 35 (1998) (reviewing NEIL KRITZ, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES STUDIES* (1995)).

¹³⁰ See Agreement Reached in the Multi-Party Negotiations, Ir.-U.K.-N. Ir., Apr. 10, 1998, ¶ 2.

¹³¹ Colin Graham, *'Let's Get Killed': Culture and Peace in Northern Ireland*, in *IRISH POSTMODERNISMS AND POPULAR CULTURE* 180 (Wanda Balzano et al. eds., 2007).

goals was to be an intense focus on the rule of law as the new lodestar for relations between the military, the government, and the people.

IV. THE RULE OF LAW AND TRANSITIONAL JUSTICE

A. *The Rule of Law in Myanmar*

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.¹³² The rule of law requires fairness in the application of the law, the separation of powers, popular participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.¹³³ The rule of law is valued because it positively affects an individual's ability to live and function in society without fear and with greater freedom, dignity, and confidence.¹³⁴ For Aung San Suu Kyi, during the long years of dictatorship, the rule of law stood in opposition to the arbitrary exercise of state power by the military. Suu Kyi understood the rule of law to mean the impartial enforcement of just laws, which were enacted with the authority of a democratically elected legislature and interpreted by an independent judiciary.¹³⁵ She distinguished the rule of law from law and order: “[t]here is no intrinsic virtue to law and order unless ‘law’ is equated with justice and ‘order’

¹³² See Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?* 50 *NOMOS* 64 (2010) (defining the rule of law a complex process). The description I provide is an uncontroversial one. It is a distillation of Lon Fuller's eight characteristics of legal rules, with the addition of “international human rights norms and standards” to signal a “thick” conception of the rule of law—one that requires that the laws comply with substantive ideals. LON L. FULLER, *THE MORALITY OF LAW* (1964); see MICHAEL TREBILCOCK & RONALD DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008).

¹³³ See ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 207–323 (8th ed. 1915); Robert Stein, *Rule of Law: What Does it Mean?*, 18 *MINN. J. INT'L L.* 293, 302 (2009); Judith N. Shklar, *Political Theory and The Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987); *What is the Rule of Law?*, UNITED NATIONS, <https://www.un.org/ruleoflaw/wh-at-is-the-rule-of-law/> (last visited Jan. 21, 2020); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

¹³⁴ Krygier, *supra* note 132, at 16, 19, 20.

¹³⁵ See NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER* 20–21 (2015) (Cheesman provides an illuminating study of the conflation of the rule of law with law and order in Myanmar. His argument is that law and order is neither consonant with the rule of law, nor a negative of the rule-of-law ideal; it is, in fact, what he calls “asymmetrically opposed” to the rule of law).

with the discipline of the people satisfied that justice has been done.”¹³⁶ She noted that “law as an instrument of state oppression is a familiar feature of totalitarianism.”¹³⁷ In speeches and statements she drew on Buddhist concepts of *dhamma*—righteousness or virtue—to explain the meaning of the rule of law.¹³⁸ Her writing conveys her sensitivity to the debilitating consequences of being forced to live in continual fear of the arbitrary exercise of power.¹³⁹ In Suu Kyi’s view, one of the many damaging effects of fear was that it deformed—“warped”—reason and conscience.¹⁴⁰

At the beginning of Myanmar’s democratic transition, the rule of law was in a state of grave disrepair. In the period from 1962 to 2010, governance in Burma/Myanmar was characterized by the arbitrary exercise of power, the extra-judicial and systematic use of violence to suppress dissent, and widespread corruption.¹⁴¹ Part of the military’s strategy of control involved the exercise of random acts of oppression and deliberate violence against the civilian population in ethnic states and regions.¹⁴² It was common for *Tatmadaw* soldiers to round up men, women and children in entire villages.¹⁴³ Some of the men would then be randomly selected, accused (without evidence) of being collaborators with ethnic insurgents, tortured and killed.¹⁴⁴ The purpose was

¹³⁶ Aung San Suu Kyi, *Burma’s Quest for Democracy*, in WORLD RELIGIONS AND DEMOCRACY 82 (Larry Diamond et al. eds., 2005).

¹³⁷ *Id.*

¹³⁸ See FREEDOM FROM FEAR, *supra* note 2, at 184.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 182.

¹⁴¹ Human Rights Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 100, 220, 1588, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018).

¹⁴² HUMAN RIGHTS WATCH, WE ARE LIKE FORGOTTEN PEOPLE (2009), https://www.hrw.org/sites/default/files/reports/burma0109webwcover_0.pdf

¹⁴³ *Id.*

¹⁴⁴ TA’ANG WOMEN’S ORG., TRAINED TO TORTURE: SYSTEMATIC WAR CRIMES BY THE BURMA ARMY IN TA’ANG AREAS OF NORTHERN SHAN STATE (2016), https://www.burmalink.org/wp-content/uploads/2016/06/Trained-to-Torture-English_for-Web.pdf; NETWORK FOR HUMAN RIGHTS DOCUMENTATION BURMA (ND-BURMA), YOU CANNOT IGNORE US: VICTIMS OF HUMAN RIGHTS VIOLATIONS IN BURMA FROM 1970–2017 OUTLINE THEIR DESIRES FOR JUSTICE (2018), <https://nd-burma.org/wp-content/uploads/2018/10/reportupdateOct.pdf>; ASIA JUST. AND RTS., BRIEFING PAPER: THE LEGACY OF MASS TORTURE AND THE CHALLENGE FOR REFORM IN MYANMAR (2016), <https://www.burmapartnership.org/wp-content/uploads/2016/06/Myanmar-Briefing-Paper-English.pdf>; INT’L FED’N OF HUMAN RIGHTS LEAGUE, BURMA: REPRESSION, DISCRIMINATION AND ETHNIC CLEANSING IN ARAKAN (2000), <https://www.fidh.org/IMG/pdf/arakbirm.pdf>; HUMAN RIGHTS WATCH, *supra* note 138; CRIMES IN BURMA, *supra* note 58, at 65; *Shan Refugees: Dispelling the Myths*, SWAN (2003), http://www.shanwomen.org/tai/images/reports/dispelling_the_myths.pdf; HUMAN RIGHTS WATCH, “THEY CAME AND DESTROYED OUR VILLAGE AGAIN”: THE PLIGHT OF INTERNALLY DISPLACE PERSONS IN KAREN STATE (2005), <https://www.hrw.org/reports/2005/burma0605/burma0605.pdf>; AMNESTY INT’L, MYANMAR: ETHNIC MINORITY RIGHTS UNDER ATTACK (1997), <https://www.amnesty.org/download/Documents/160000/a>

to dissuade others from collaborating.¹⁴⁵ Political opponents of the regime were commonly arrested, imprisoned and subjected to torture.¹⁴⁶ The general population of Myanmar lived in a continual state of fear.

In democratizing societies, transitional justice measures are held to facilitate adherence to the rule of law by establishing that the law does not exempt those who wield power (demonstrating the generality of law) and by demonstrating the ways in which legal systems failed to protect the rights of citizens in the past (providing the basis for future reform).¹⁴⁷ Transitional justice processes also often involve vetting and dismissing those who abused their positions, increasing the integrity of rule of law systems.¹⁴⁸ The problem for Suu Kyi and for other transitional leaders was how to signal transformative politics to a traumatised population in the absence of criminal trials or truth commissions demonstrating the end of arbitrary rule and a commitment to principles of justice.

B. The Rule of Law During Transition

The rule of law emerged as the standard-bearer for justice in the transitioning regime. After 2012, both the military and Suu Kyi extolled the rule of law as a panacea for the ongoing abuses of power that accompanied military action in ethnic conflict zones, and as a remedy for the mistrust that existed between the military and the people. Instead of grand gestures of justice for historical wrongs, such as trials or truth commissions, the new order set about building trust through everyday demonstrations that the military was no longer unaccountable and that public officials were subservient to the law. The new re-

sa160201997en.pdf; HUMAN RIGHTS WATCH, SOLD TO BE SOLDIERS: THE RECRUITMENT AND USE OF CHILD SOLDIERS IN BURMA (2007), <https://www.hrw.org/reports/2007/burma1007/burma1007web.pdf>; THE WOMEN'S LEAGUE OF CHINLAND, UNSAFE STATE: STATE-SANCTIONED SEXUAL VIOLENCE AGAINST WOMEN IN BURMA (2007), <http://burmacampaign.org.uk/media/UnsafeState.pdf>; KAREN WOMEN'S ORG., STATE OF TERROR: THE ONGOING RAPE, MURDER, TORTURE AND FORCED LABOUR SUFFERED BY WOMEN LIVING UNDER THE BURMESE MILITARY REGIME IN KAREN STATE (2007), <https://karenwomen.files.wordpress.com/2011/11/state20of20terror20report.pdf>; Chizom Ekeh & Martin Smith, *Minorities in Burma*, MINORITY RIGHTS GRP. INT'L (Oct. 30, 2007), <https://minorityrights.org/publications/minorities-in-burma-october-2007/>.

¹⁴⁵ CRIMES IN BURMA, *supra* note 58, at 65.

¹⁴⁶ ASSISTANCE ASS'N FOR POL. PRISONERS (BURMA), ANNUAL REPORT 2009: AAPP POLITICAL PRISONER REVIEW (2009), http://aappb.org/wp-content/uploads/2014/03/AAPP_2009_Annual_Report.pdf; ALL BURMA STUDENTS DEMOCRATIC FRONT, TORTURED VOICES: PERSONAL ACCOUNTS OF BURMA'S INTERROGATION CENTRES (1998), http://aappb.org/wp-content/uploads/2014/03/tortured_voices.pdf.

¹⁴⁷ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

¹⁴⁸ *Id.*

gime created institutions designed to monitor government behaviour, including a National Human Rights Commission and a Lower House Committee for the Rule of Law, Peace and Tranquillity,¹⁴⁹ and permitted the prosecution of several low-ranking members of the military.¹⁵⁰ In 2016, for example, seven Burmese soldiers were brought before a military court, charged with the murder of ethnic villagers in Myanmar's Northern Shan state, and convicted and sentenced to five years in jail with hard labor.¹⁵¹ Announcing the prosecution, the Chief of Military Intelligence said that members of the armed forces who violated military laws and procedures would be prosecuted according to the rule of law.¹⁵²

The protest at the Letpadaung copper mine was an early test case for the rule of law's potential to bring justice, end impunity, and establish trust between the government and the people. The case concerned land-grabbing, a

¹⁴⁹ See *About-Formation of Myanmar National Human Rights Commission*, MYAN. NAT'L HUMAN RIGHTS COMMISSION, <http://www.mnhrc.org.mm/en/about/> (last visited Feb. 25, 2020) (In 2011, "the Myanmar National Human Rights Commission was formed with the . . . aim of uplifting and protecting the fundamental rights of citizens included in the constitution of the Republic of the Union of Myanmar."); DONALD M. SEEKINS, *HISTORICAL DICTIONARY OF BURMA (MYANMAR)* 155 (2017) ("The Committee for the Rule of Law and Tranquility (or Stability) was established as a 15-member committee in the lower house" in 2012); see also U.N. Secretary-General, *Situation of Human Rights in Myanmar*, ¶ 24, U.N. Doc. A/65/367 (Sept. 14, 2010) (In 2010, the government enacted "the Law establishing the Union Electoral Commission, which will administer the conduct of the elections."); Nan Tin Htwe, *Myanmar Forms Anti-Corruption Committee*, MYAN. TIMES (Jan. 14, 2013), <https://www.mmtimes.com/national-news/3773-anti-corruption-committee-formed.html> ("The government formed the 'action committee against corruption' under a presidential order on January 8").

¹⁵⁰ Roseanne Gerin, *Myanmar Government Ends Security Lockdown in Volatile Northern Rakhine State*, RADIO FREE ASIA (Feb. 16, 2017), <https://www.rfa.org/english/news/myanmar/myanmar-government-ends-security-lockdown-in-volatile-northern-rakhine-state-02162017134335.html>. In early 2017, a group of police officers caught on video abusing Rohingya civilians in a village in Maungdaw township during a security operation in November 2016 were sentenced to two months in prison. *Id.*

¹⁵¹ Kan Thar, *Shan State Villagers Arrested by Myanmar Military Turn up Dead Near Lashio*, RADIO FREE ASIA (June 30, 2016), <https://www.rfa.org/english/news/myanmar/shan-state-villagers-arrested-by-myanmar-military-turn-up-dead-near-lashio-006302016160757.html>; Lawi Weng, *Burma Army Soldiers Sentenced to Five Years with Hard Labor For Killing Civilians*, IRRAWADDY (Sept. 16, 2016), <https://www.irrawaddy.com/news/burma/burma-army-soldiers-sentenced-to-five-years-with-hard-labor-for-killing-civilians.html>; Wa Lone, *In Rare Move, Myanmar Military Admits Soldiers Killed Five Villagers*, REUTERS (July 20, 2016), <https://www.reuters.com/article/us-myanmar-military-massacre/in-rare-move-myanmar-military-admits-soldiers-killed-five-villagers-idUSKCN10016W>; Andrew R. C. Marshall & Wa Lone, *Myanmar's Military Investigates War Crime in an Era of Reform*, REUTERS (July 20, 2016), <https://www.reuters.com/article/us-myanmar-military-massacre-insight-idUSKCN0ZZ2EV>.

¹⁵² Wa Lone, *supra* note 151.

common complaint during the years of military rule.¹⁵³ In 2010, a company owned by the military confiscated a large parcel of farmland in the Sagaing region to develop a copper mine in partnership with a Chinese industrial and arms manufacturer. Local farmers and Buddhist monks began a peaceful protest on the disputed land, demanding the return of the land and an end to environmentally disastrous copper mining. In the early morning of November 29, 2012, as protesters and their families slept, security forces entered the campsite and dispersed the protest using teargas, smoke bombs, and fire.¹⁵⁴ In the wake of the incident, President Thein Sein formed a Parliamentary Commission, chaired by Aung San Suu Kyi, to establish the facts and inquire whether mining should continue. In March 2013, the Commission handed down its report.¹⁵⁵ The report did not recommend the closure of the copper mine, nor did it expose the perpetrators of the violence carried out on November 29. Instead, it advised protesters to desist and the company to maintain the environment and provide jobs and education to the local community. In a meeting with farmers, Suu Kyi said that Myanmar could not afford to shut down the mine and risk turning away foreign investors, and that in any regard their protest was illegal: “[Y]ou all have to ask permission from the government if you protest as our country has the rule of law now. Those who do not respect the rule of law, they could get punished.”¹⁵⁶

Distorted understandings of the rule of law were repeated in the years that followed. From 2012 the rule of law was regularly invoked by the military, by Aung San Suu Kyi, by the Office of State Counsellor, and by the President’s office, to shut down criticism of the government and the military.¹⁵⁷ Colonial era laws such as the Official Secrecy Act and the Unlawful Assembly Act were used numerous times against citizens and members of community-

¹⁵³ Tom Kramer, *Ethnic Conflict and Land Rights in Myanmar*, 82 SOC. RES. 355 (2015); Emel Zerrouk & Andreas Neef, *The Media Discourse of Land Grabbing and Resistance During Myanmar’s Legal Reformation: The Monywa Copper Mine*, 7 L. & DEV. REV. 275 (2014).

¹⁵⁴ Thomas Fuller, *Myanmar Police Used Phosphorus on Protesters, Lawyers Say*, N.Y. TIMES (Jan. 30, 2013), <https://www.nytimes.com/2013/01/31/world/asia/myanmar-troops-used-phosphorus-on-protesters-lawyers-say.html> (“A group of lawyers investigating a violent crackdown in Myanmar in November that left Buddhist monks and villagers with serious burns contends that the police used white phosphorus, a munition normally reserved for warfare, to disperse protesters”).

¹⁵⁵ Lawi Weng & Thet Swe Aye, *Activists, Locals Reject Letpadaung Inquiry*, IRRAWADDY (Mar. 12, 2013), <https://www.irrawaddy.com/news/burma/activists-locals-reject-letpadaung-inquiry.html>.

¹⁵⁶ Lawi Weng & Thet Swe Aye, *Stop Protests Against Copper Mine, Suu Kyi Tells Communities*, IRRAWADDY (Mar. 13, 2013), <https://www.irrawaddy.com/news/burma/stop-protests-against-copper-mine-suu-kyi-tells-communities.html>.

¹⁵⁷ Linda Lakhdhir, *“They Can Arrest You at Any Time” The Criminalization of Peaceful Expression in Burma*, HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2016/06/29/the-y-can-arrest-you-any-time/criminalization-peaceful-expression-burma> (last visited Nov. 20, 2019).

based organizations.¹⁵⁸ In 2014, a team of journalists reported that chemical weapons were being produced in a secretive army installation in Pakokku Township.¹⁵⁹ The three reporters, the journal's editor, and its chief executive officer were charged under the Official Secrets Act and sentenced to ten years imprisonment with hard labor.¹⁶⁰ In January 2015, two Kachin school-teachers, Maran Lu Ra and Tangbau Hkawn Nan Tsin, were raped and murdered in a small village in Shan state.¹⁶¹ The suspected perpetrators were members of the military's Light Infantry Battalion 503,¹⁶² which had been stationed in the village at the time of the crimes. Shortly after the discovery of the bodies, the military published a statement denying military involvement and stating that the *Tatmadaw* would take action based on the rule of law against anyone who alleged soldiers were involved in the crimes.¹⁶³ The President's Office supported the *Tatmadaw's* position, claiming that an accusation against an individual soldier was an accusation against the *Tatmadaw* as an institution, and warning that the *Tatmadaw* had a right to defend itself by prosecuting those who make unfounded accusations.¹⁶⁴ The government passed press-related laws, such as the Telecommunications Law, introduced in 2013, which

¹⁵⁸ *Id.*

¹⁵⁹ Zarni Mann, *Journalists Detained for Reporting Alleged Burmese Chemical Weapons Factory*, IRRAWADDY (Feb. 2, 2014), <https://www.irrawaddy.com/news/burma/journalists-detained-reporting-alleged-burmese-chemical-weapons-factory.html>.

¹⁶⁰ *Id.*; Zarni Mann & Samantha Michaels, *Burma Govt Rejects Report of Secret Chemical Weapons Factory*, IRRAWADDY (Feb. 4, 2014), <https://www.irrawaddy.com/news/burma/journalists-detained-reporting-alleged-burmese-chemical-weapons-factory.html>; Zarni Mann, *Unity Journalists Sentenced to 10 Years Imprisonment with Hard Labour*, IRRAWADDY (July 10, 2014), <https://www.irrawaddy.com/news/burma/unity-journalists-sentenced-10-years-imprisonment-hard-labor.html>.

¹⁶¹ Throughout the chapter, the term "Burma" is used when the text refers to the country and "Burmese" for the people, before 1990. "Myanmar" is used for the country after this date, as the country was officially renamed in 1990. The same applies to "Rangoon" and "Yangon." "Myanmar" refers to citizens of the country as a whole. "Bamar" is used to describe the ethnic group that has dominated governance of the country and is the most numerous in the country.

¹⁶² Nyein Nyein, *Four Years on, Justice Yet to be Found for Kachin Teachers Raped and Murdered*, IRRAWADDY (Jan. 18, 2019), <https://www.irrawaddy.com/news/burma/four-years-justice-yet-found-kachin-teachers-raped-murdered.html>.

¹⁶³ Lawi Weng, *Army Statement Warns Against Linking Teachers' Murders to Troops*, IRRAWADDY (Jan. 29, 2015), <https://www.irrawaddy.com/news/burma/army-statement-warns-linking-teachers-murders-troops.html> ("A Burma Army-owned media outlet has warned against linking government troops to the recent murder of two Kachin teachers, saying that the army would take legal action against anyone who alleges that soldiers were involved in the crimes.").

¹⁶⁴ *Id.* ("Zaw Htay, director of the President's Office, said in a reaction on Thursday that the army had the right to publicly defend itself against accusations against its troops, adding that the army would not issue idle threats.").

were used by both the Military and the NLD to stifle criticism of the government on social media.¹⁶⁵ The Telecommunications Law was used to prosecute twenty-five year-old Chaw Sandi Tun, who posted a comment on Facebook likening the colour of Aung San Suu Kyi's dress to the colour of the military's uniforms.¹⁶⁶ Tun was charged with defamation under Article 34(d) of the Act, which carries a penalty of up to five years in prison.¹⁶⁷

A deformed understanding of the rule of law was particularly patent in the events surrounding the massacre at Inn Dinn. In February 2018, Reuters published a story about a grave containing the bodies of ten Rohingya men, found in a village in north-western Rakhine state.¹⁶⁸ The men had been hacked to death or shot.¹⁶⁹ Witnesses told reporters that soldiers plucked these ten men at random from among hundreds of men, women, and children who were seeking safety from fighting on a nearby beach.¹⁷⁰ In April 2018, seven *Tatmadaw* soldiers were convicted of the murders of the men and sentenced to ten years imprisonment with hard labour. But the two Reuters journalists who investigated the murders were also arrested, charged, and found guilty of breaching

¹⁶⁵ U.S. DEP'T OF STATE, 2016 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE—BURMA (2018), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/burma/> (for example, government authorities arrested and issued activist Patrick Kum Jaa Lee with a six-month sentence under the 2013 Telecommunications Law, for “sharing a photograph on Facebook that the military deemed was defamatory”); *Freedom of the Press 2017 - Myanmar: Profile*, FREEDOM HOUSE (Apr. 15, 2017), <https://freedomhouse.org/report/freedom-press/2017/myanmar> (“There was a substantial increase in authorities’ prosecution of online speech under the 2013 Telecommunications Law, which was frequently invoked against people who purportedly insulted or defamed the military, the president, or NLD leader Aung San Suu Kyi.”).

¹⁶⁶ San Yamin Aung, *Chaw Sandi Tun Sentenced to Six Months in Jail over Facebook Post*, IRRAWADDY (Dec. 28, 2015), <https://www.irrawaddy.com/news/burma/chaw-sandi-tun-sentenced-to-six-months-in-jail-over-facebook-post.html>.

¹⁶⁷ *The Case of Chaw Sandi Htun*, GLOB. FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/case-chaw-sandi-htun-myanmar/> (last visited Nov. 11, 2019) (“It was reported that Chaw Sandi Htun was initially charged under Section 34(d) of the Electronic Transactions Law, which states that ‘creating, modifying or alternating of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person will be punished with imprisonment for a maximum of five years or with fine or both.’” Chaw Sandi Htun was eventually charged and sentenced to six months imprisonment under Section 66(d) of the Telecommunications Law, “which stipulates that extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network is an offense punishable by a maximum of three years imprisonment or fine or both”).

¹⁶⁸ Wa Lone et al., *Massacre in Myanmar: One Grave for [Ten] Rohingya Men*, REUTERS (Feb. 8, 2018), <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/>

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

the Official Secrets Act¹⁷¹ for possessing documents which had been provided to them by a policeman acting under orders to entrap the journalists.¹⁷² The police officer who revealed the set-up to the court was also detained on charges of violating the Official Secrets Act and the Police Disciplinary Act.¹⁷³ He was sentenced to a year in prison.¹⁷⁴ British Ambassador Dan Chugg, speaking on behalf of EU members, said the verdicts of the journalists had “dealt a hammer blow for the rule of law.”¹⁷⁵

The everyday application of the rule of law could not sustain transformation from authoritarian rule to democracy. Its foundation, shape, and implementation was fundamentally “warped” by a cast of minds formed by decades of oppressive rule, by the absence of any public symbol of disjuncture with the past, and by a constitution—a founding legal document—which was unjust, which did not reflect the will of the people, and which was used as a vehicle for ongoing abuse and impunity. Suu Kyi herself subverted the Constitution by avoiding Article 59(f), which prevents her from becoming President, by engineering her appointment as the Special Counsellor of State, a role which she said was “above the president.”¹⁷⁶ Suu Kyi’s legal advisor, U Ko Ni, explained the reason why this extra-constitutional role was legitimate:

We cannot talk about the rule of law. Matters relating to rule of law must be initially enacted fairly and justly by the parliament. Then, all people need to start obeying those laws. The present constitution is not fair to the people, and so, it has nothing to do with the rule of law.¹⁷⁷

¹⁷¹ The Burma Official Secrets Act (India Act XIX, 1923) (Myan.).

¹⁷² Shoon Naing & Aye Min Thant, *Myanmar Court Jails Reuters Reporters for Seven Years in Landmark Secrets Case*, REUTERS (Sept. 3, 2018), <https://www.reuters.com/article/us-myanmar-journalists/myanmar-court-jails-reuters-reporters-for-seven-years-in-landmark-secrets-case-idUSKCN1LJ09E>.

¹⁷³ *Myanmar Police Officer Tells Court Reuters Journalist Were Set Up*, RADIO FREE ASIA (Apr. 20, 2018), <https://www.rfa.org/english/news/myanmar/myanmar-police-officer-tells-court-reuters-journalists-were-set-up-04202018172712.html>.

¹⁷⁴ *Timeline: Reuters Journalists Detained in Myanmar*, REUTERS (July 10, 2018), <https://www.reuters.com/article/us-myanmar-journalists-timeline/timeline-reuters-journalists-detained-in-myanmar-idUSKB1K00AZ>.

¹⁷⁵ *Myanmar Verdict in Reuters’ Reporters Case ‘Deeply Troubling’: U.S. Ambassador*, REUTERS (Sept. 3, 2018), <https://www.reuters.com/article/us-myanmar-journalists-envoy/myanmar-verdict-in-reuters-reporters-case-deeply-troubling-u-s-ambassador-idUSKCN1LJ0BG>.

¹⁷⁶ *Myanmar Parliament Approves Aung San Suu Kyi ‘PM-like’ Role*, BBC (Apr. 5, 2016), <https://www.bbc.com/news/world-asia-35967763>.

¹⁷⁷ *Myanmar’s NLD Could Submit Proposal to Suspend Constitution for Suu Kyi: Legal Adviser*, MAINICHI, (Feb. 5, 2016), <https://mainichi.jp/english/articles/20160205/p2a/00m/0na/003000c>.

U Ko Ni was assassinated at Yangon airport on January 29, 2017. The headline in the *Myanmar Times* read “The Death of the Rule of Law.”¹⁷⁸

During the first decade of transition, the rule of law was extolled but its effects in developing a society where people lived without fear and with greater freedom, dignity, and confidence were difficult to discern. The decade was marked by a preoccupation with the rule of law, with deep confusion about its meaning and application, and ongoing mistrust of the government’s conception of the rule of law. For most people in Myanmar, including the country’s leaders, the rule of law was still what those who held power exercised in relation to others who had none. Like concepts such as truth and justice, the rule of law was distorted by the occlusions of history and by the failure to speak the truth about past oppression. These are the circumstances in which the tensions of transition and shifting possibilities of power give rise to new acts of barbarism; where the oppressed become the oppressors; where there is heightened fear and lawlessness; and where ancient grudges break to new mutiny.

V. THE ROHINGYA IN MYANMAR: BEYOND THE LAW

A. *The Rohingya as Outsiders*

The early years of transition were marked by deep uncertainty. The old order was changing. Aung San Suu Kyi, for decades a staunch opponent of military rule and an icon of democracy, now shared power with the military and occupied a position that was “above the President.” Increasing freedom of speech included increasing levels of racially motivated hate speech. Commitments to ending civil war were matched by increasing levels of conflict in ethnic states. The military acted with a heightened sense of danger from multiple fronts: instability due to new ethnic insurgencies; the potential of losing power to new political actors; the threat of losing economic wealth to new mechanisms of oversight. Other actors had new space in which to operate and new motivation for seeking power. Political actors who had suffered during the dictatorship, such as the Generation 88 leaders who fought in the 1988 uprising, looked for opportunities to claim their political due; democratic leaders who held power, such as the National League for Democracy and Aung San Suu Kyi, labored under the weight of expectations. The large diaspora returned home to find that there was not always room for them in the new regime. In much of Myanmar, the rule of law failed to constrain the actions of new and old actors. And there were some areas of the country beyond the

¹⁷⁸ Ei Ei Toe Lwin & Shoon Naing, ‘*The Death of the Rule of Law*’: *Coming to Terms with the Loss of U Ko Ni*, MYAN. TIMES (Feb. 2, 2017), <https://www.mmtimes.com/national-news/24784-the-death-of-the-rule-of-law-coming-to-terms-with-the-loss-of-u-ko-ni-html>.

scope of law, vulnerable to extreme political action and reaction. In these areas, the strategy of ruling a line under history, forgiving and forgetting, moving forward, leaving truth for later, and gradually strengthening the rule of law, came radically undone. The attempted destruction of the country's archetypal outsider, the Rohingya, was the final result of this.

The Rohingya—identified by their dark skin, Chittagonian dialect, and Islamic faith practices—maintained a precarious existence in Rakhine state, in north-west Myanmar, for at least 200 years. The Rohingya live mainly in the north of Rakhine, a religious and ethnic minority among the predominantly Buddhist population. The history of their presence there is deeply contested. The Rohingya claim their ancestors lived in Rakhine many centuries before British colonization.¹⁷⁹ Rakhine Buddhists (and many others in Buddhist majority Myanmar) claim that the British brought the Rohingya to Rakhine from India during the period of colonial rule.¹⁸⁰ Among the Burman majority who have held power in Myanmar since the end of the Second World War, and among Rakhine Buddhists, the belief that the Rohingya do not belong in Myanmar and should not be permitted to remain is widely held.¹⁸¹

The question of who belongs in Rakhine and who does not is acute because of widespread landlessness, and lack of food, healthcare, and basic resources. Rakhine's poverty rate is almost double the national rate;¹⁸² child mortality is among the highest in the country;¹⁸³ immunization coverage is among the lowest;¹⁸⁴ adult illiteracy is 50 percent higher than the national average;¹⁸⁵ one third of Rakhine children are underweight, and thirty-eight percent are stunted. In the North of Rakhine, where the majority of Rohingya live, there have been multiple outbreaks of vaccine-preventable diseases.¹⁸⁶ When they can, the people of Rakhine subsist on agriculture and fishing.¹⁸⁷ But with a long coastline along the Bay of Bengal, Rakhine is susceptible to cyclones,

¹⁷⁹ Mohammed Ali Chowdhury, *The Advent of Islam in Arakan and the Rohingyas*, ROHINGYA.ORG (Oct. 22, 2006), <https://www.rohingya.org/the-advent-of-islam-in-arakan-and-the-rohingyas/>.

¹⁸⁰ See, e.g., Aye Chan, *The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)*, 3 SOAS BULL. BURMA RES. 396 (2005).

¹⁸¹ *Human Rights Council Opens Special Session on the Situation of Human Rights of the Rohingya and Other Minorities in Rakhine State in Myanmar*, UNITED NATIONS HUMAN RIGHTS COUNCIL (Dec. 5, 2017), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22491&LangID=E>.

¹⁸² KOFI A. ANNAN, RAKHINE COMMISSION, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE: FINAL REPORT OF THE ADVISORY COMMISSION ON RAKHINE STATE 20 (2017), http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf.

¹⁸³ *Id.* at 42.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 40.

¹⁸⁶ *Id.* at 42.

¹⁸⁷ See *id.* at 20.

natural disasters, and the effects of climate change. Former UN Secretary-General Kofi Annan, who was commissioned by the government of Myanmar to write a report on the problems of Rakhine in the wake of deadly conflict between Rohingyas and ethnic Rakhine in 2012, identified lack of development and poverty as a major contributing factor to inter-ethnic tension.¹⁸⁸ Rakhine is home to other minorities, such as Hindus and Muslims Kamans, but ethnic Rakhine Buddhists predominate.¹⁸⁹ Ethnic Rakhine have long demanded a fairer federal union from the centralist Burman government and the Arakan Army has pursued this demand with continuous insurgency.¹⁹⁰ Ongoing conflict exacerbates poverty and discourages investment, leading to further conflict over scarcity.

The foundational calamity for the Rohingya was British colonial rule. The Rohingya fought with the British in the Second World War in return for a promise that when the war ended, the British would create a Muslim National Area in Northern Arakan.¹⁹¹ The majority of the region's Buddhists followed General Aung San and his "thirty comrades" in the Burma Independence Army (BIA), which fought with the Japanese.¹⁹² The Japanese victory over the British in Burma in 1942 had brutal consequences for the Muslims of Arakan. They were denounced by the BIA as British collaborators and traitors, and the BIA sought to drive them from the country.¹⁹³ British victory, the end of the Second World War, and Burmese independence did not restore land or property to the returning Muslims of Arakan.¹⁹⁴ The Rohingya petitioned unsuccessfully for the creation of an Islamic state and for integration of areas of Northern Arakan into what was then East Pakistan.¹⁹⁵ Until 1961, there was conflict between Rakhine nationalists, who were pressing for the creation of their own state within Burma; Muslims, who were also pressing for their own independent state; and the army of Burma's first independent government, which was committed to national unity. Between 1958 and 1961, a series of ceasefire agreements were signed between the central government and both the Rakhine nationalists and the Rakhine Muslims.¹⁹⁶ The final ceasefire

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *See id.* at 18–19.

¹⁹⁰ *Id.* at 14–16.

¹⁹¹ *See* HUMAN RIGHTS WATCH, BURMESE REFUGEES IN BANGLADESH: STILL NO DURABLE SOLUTION 6 (2000), <https://www.hrw.org/report/2000/05/01/burmese-refugees-bangladesh/still-no-durable-solution>; *see also* MOSHE YEGAR, THE MUSLIMS OF BURMA: A STUDY OF A MINORITY GROUP 96 (1972).

¹⁹² Donald Seekins, *Japan's "Burma Lovers" and the Military Regime* (Japan Policy Research Inst., Working Paper No. 60, 1999), <http://jpri.org/publications/workingpapers/wp60.html>.

¹⁹³ HUMAN RIGHTS WATCH, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ HUGH TINKER, THE UNION OF BURMA: A STUDY OF THE FIRST YEAR OF INDEPENDENCE 357 (4th ed. 1967).

¹⁹⁶ Martin Smith, *The Muslim "Rohingya" of Burma*, ROHINGYA.ORG (Oct. 11, 2006), <http://www.rohingya.org>

agreement between the central government and the Muslim guerrillas in Northern Arakan recognized the “Rohingya” as a separate ethnic group.¹⁹⁷

This brief period of peace came to an end with the coup d'état of General Ne Win in 1962.¹⁹⁸ As leader of the Burma Socialist Programme Party (BSPP), Ne Win presided over the drafting of the 1974 Constitution of the Socialist Republic of the Union of Burma,¹⁹⁹ which provided for a one-party system of government with nominally autonomous states for the non-Burman nationalities, including the Rakhine.²⁰⁰ The Rohingya were not recognized. Ne Win militarized the state under a nationalist ideology of “one blood, one voice, one command.”²⁰¹ Ne Win's regime perpetrated forced relocations of Muslims, forced labor and severe human rights abuses.²⁰² Again, hundreds of thousands of Muslims fled the country and some who remained created new armed resistances, such as the Rohingya Patriotic Front.²⁰³ During the next twenty-six years, while Ne Win pursued a Burmese form of socialism under one-party military rule, the military attempted to transform Myanmar by purging all forms of pluralism, ensuring the primacy of the *Tatmadaw* as the only potent political force responsible for the affairs of the state.²⁰⁴ Buddhism became the military's lodestar. The military was cleansed of Christian, Jewish, Muslim, and Hindu officers who refused to convert to Buddhism and the *Tatmadaw* was dispatched to suppress by brutal means, ethnic armies in Christian minority states such as Kachin and Shan.²⁰⁵ A new “purist” Buddhist

ps://www.rohingya.org/the-muslim-rohingya-of-burma/.

¹⁹⁷ *Id.*

¹⁹⁸ Konsam Devi, *Myanmar Under the Military Rule 1962–1988*, 3(10) INT'L RES. J. SOC. SCI. 46, 46 (2014).

¹⁹⁹ *Id.*

²⁰⁰ There was broad agreement among the “main” ethnic minority groups (Shan, Karen, Kachin, Chin, Karenni, Mon, and Arakan communities) concerning the appropriate number of ethnic satellite states. See BURMA ETHNIC RES. GRP. & FRIEDRICH NAUMANN FOUND., FORGOTTEN VICTIMS OF A HIDDEN WAR: INTERNALLY DISPLACED KAREN IN BURMA 24 (1998), https://www.burmalibrary.org/docs3/Berg-Forgotten_Victims.pdf (“This 1974 constitution in no way satisfied the demands of the ethnic nationalities with regard to demarcation or powers, but it did express the broad agreement concerning the ethno-political framework of Burma.”).

²⁰¹ Martin Smith, *Army Politics as a Historical Legacy: The Experience of Burma, in POLITICAL ARMIES: THE MILITARY AND NATION BUILDING IN THE AGE OF DEMOCRACY* 273 (Kees Koonings & Dirk Kruijt eds., 2002).

²⁰² See IFFM 2018, *supra* note 29, paras 72–73.

²⁰³ *Burma/Bangladesh: Burmese Refugees in Bangladesh—Historical Background*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/2000/burma/burm005-01.htm> (last visited Feb. 26, 2020).

²⁰⁴ Kyaw Yin Hlaing, *Reconsidering the Failure of the Burma Socialist Program Party Government to Eradicate Internal Economic Impediments*, 11 SOUTH EAST ASIA RES. 5, 35 (2003).

²⁰⁵ Maung Zarni et al., *An Evolution of Rohingya Persecution in Myanmar: From Strategic Embrace to Genocide*, MIDDLE EAST INST. (Apr. 20, 2017), <https://www.mei.edu/publ>

vision prevailed.²⁰⁶ In relation to the Rohingya, the overarching strategy of the military was to degrade life to the point where it could no longer be endured: to deny food, work, the ability to marry within the law, and register the birth of their children.²⁰⁷ The aim was to force the Rohingya into ghettos to die of disease and hunger, or to force them to leave the country and flee into Bangladesh, or into Thailand and Malaysia via the desperate passage across the Andaman Sea, or through the jungle at the hands of people smugglers.²⁰⁸

The military's strategy included intermittent operations so brutal and terrorizing that the Rohingya historically fled.²⁰⁹ In 1978, the military commenced military operation *Ye The Ha*, designed to flush out insurgents and their sympathizers.²¹⁰ Simultaneously, they carried out a census operation, *Naga Min*, to check identity papers.²¹¹ In Muslim villages, these operations were accompanied by rape, murder, the destruction of mosques and the confiscation of identity papers.²¹² 200,000 Rohingya fled across the border to Bangladesh while state media propaganda blamed the trouble on Muslim extremists.²¹³ In 1982 the Ne Win government passed the Citizenship Law, which restricted full citizenship to "national" ethnic groups such as Burmans, Mons or Rakhines.²¹⁴ The Rohingya were not listed among the ethnic groups who were considered to belong in Burma.²¹⁵ In 1991–92, following the Burmese army's suppression of the democracy uprising in 1988, the military's attitude towards Muslims in Rakhine hardened.²¹⁶ More army and local border

ications/evolution-rohingya-persecution-myanmar-strategic-embrace-genocide.

²⁰⁶ *Id.*; see also Wa Lone, *Snr Gen Min Aung Hlaing Pledges to Help Safeguard Buddhism*, MYAN. TIMES (June 24, 2016), <https://www.mmtimes.com/national-news/21035-snr-gen-min-aung-hlaing-pledges-to-help-safeguard-buddhism.html>.

²⁰⁷ See IFFM 2018, *supra* note 29, paras 100–14; 412–1067.

²⁰⁸ Catherine Renshaw, *Human Trafficking in Southeast Asia: Uncovering the Dynamics of State Commitment and Compliance*, 37 MICH. J. INT'L L. 611 (2016).

²⁰⁹ SMITH, *supra* note 26, at 260.

²¹⁰ Sabyasachi Basu Ray Chaudhury and Ranabir Samaddar, *Introduction*, in Sabyasachi Basu Ray Chaudhury & Ranabir Samaddar, *The Rohingya in South Asia*, PEOPLE WITHOUT A STATE 18–20 (2018).

²¹¹ SMITH, *supra* note 26, at 308–09.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See Md. Mahbudul Haque, *Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma*, 37 J. MUSLIM MINORITY AFF. 454 (2017).

²¹⁵ Rohingyas could apply for "Naturalized Citizenship" if they applied as "Bengalis"—but not if they applied as "Rohingya." "Associate membership" was available to those who were in the process of applying for citizenship under the former 1948 Citizenship Election Act. "Naturalized citizenship" was available if it was determined by a Council of State that they "speak one of the national languages . . . were of good character . . ." and "sound mind." Neither associate citizens nor naturalized citizens could hold government office. See *id.*

²¹⁶ *Id.*

police, known as “Na Ka Sa,” were deployed in the Northern border region.²¹⁷ There were forced relocations and confiscation of Muslim land and property and accompanying brutality, including murder, rape and forced labor.²¹⁸ Large numbers of Rohingya died during this period and 250,000 Muslims from Maungdaw, Buthidaung and Rathedaung fled into the Cox’s Bazar area of Bangladesh.²¹⁹

B. Citizenship and the 2008 Constitution

The 2008 Constitution was specifically drafted to exclude the Rohingya by reserving important rights for citizens only.²²⁰ The constitutional prohibition on discrimination on the basis of race, birth, religion and other characteristics, the right to freedom of religion, the right to freedom of expression and assembly, the right to freedom of movement, the right to education and the right to enterprise, are all explicitly reserved only for citizens.²²¹ Policies, laws and regulations that deliberately target the Rohingya, such as the regulation in Buthidaung and Maungdaw townships that restricts Muslim families to having only two children, are not unconstitutional.²²² In 2015, the national parliament passed the “Four Race and Religion Protection Laws,”²²³ which gives

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See Angelo Ribeiro (Special Rapporteur U.N. Commission on Human Rights), *Rep. on Religious Intolerance and Discrimination*, in NATIONAL COALITIONAL GOVERNMENT OF THE UNION OF BURMA, DEMOCRACY AND POLITICS AND BURMA 350–61 (1993); Thomas K. Ragland, *Burma’s Rohingyas in Crisis: Protection of Humanitarian Refugees under International Law*, 14 B.C. THIRD WORLD L.J. 301 (1994); *Myanmar: The Politics of Rakhine State*, INT’L CRISIS GRP. (Oct. 22, 2014), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-politics-rakhine-state>.

²²⁰ Renshaw, *supra* note 79, at 223.

²²¹ *See id.* at 215–34.

²²² FORTIFY RTS., POLICIES OF PERSECUTION: ENDING ABUSIVE STATE POLICIES AGAINST ROHINGYA MUSLIMS IN MYANMAR 23 (2014) 23, https://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf; Jason Szep & Andrew R.C. Marshall, *Myanmar Minister Backs Two-Child Policy for Rohingya Minority*, REUTERS (June 11, 2013), <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-minister-backs-two-child-policy-for-rohingya-minority-idUSBRE95A04B20130611>; Engy Abdelkader, *Myanmar’s Democracy Struggle: The Impact of Communal Violence Upon Rohingya Women and Youth*, 23 PAC. RIM L. & POL’Y J. 511 (2014).

²²³ Law Regarding Population Control and Health (2015); The Buddhist Women’s Special Marriage Law (2015); The Practice of Monogamy Law (2015); and The Law Concerning Religious Conversion (2015). *See* Law Regarding Population Control and Health (No. 28/2015) (draft; unofficial translation), <http://www.asianlii.org/mm/legis/laws/pch12015h592.pdf>; *Burma: Reject Discriminatory Population Bill*, HUMAN RIGHTS WATCH (May 16, 2015), <https://www.hrw.org/news/2015/05/16/burma-reject-discriminatory-population-bill>; The Buddhist Women’s Special Marriage Law (No. 50/2015) (draft; unofficial translation), http://www.burmalibrary.org/docs21/2015-Myanmar_Buddhist_Women_Special

local authorities the power to monitor and control the marriage, reproductive and religious practices of target minority groups.²²⁴ Given the past practice of authorities in Rakhine state, which was to apply laws and regulations in ways that severely discriminated against the Rohingya,²²⁵ there were well-founded fears that the Four Laws presaged an intensification of efforts to marginalize and debase the Rohingya.²²⁶ In 2014, the Special Rapporteur on the Situation of Human Rights in Myanmar argued that:

Given the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a state policy that involves authorities in the executive, military, and judiciary at all levels.²²⁷

Marriage Bill.pdf; *Burma: Reject Discriminatory Marriage Bill*, HUMAN RIGHTS WATCH (July 9, 2015), <https://www.hrw.org/news/2015/07/09/burma-reject-discriminatory-marriage-bill>; see also, Guy Dinmore & Shwe Yee Saw Myint, *President Signs off on Population Control Law*, MYAN. TIMES (May 25, 2015), <http://www.mm-times.com/index.php/national-news/14648-president-signs-off-on-population-control-law.html>; Paing Soe, *Monogamy Bill Sails Through Lower House*, DEMOCRATIC VOICE OF BURMA (DVB) (July 23, 2015), <http://english.dvb.no/news/monogamy-bill-sails-through-lower-house/55068>; Feliz Solomon, *Burma Parliament Approves Contentious Race and Religion Bills*, IRRAWADDY (Aug. 20, 2015), <http://www.irrawaddy.org/burma/burma-parliament-approves-contentious-race-and-religion-bills.html>; *Myanmar President Signs Two Controversial Religion Bills*, ROHINGYA POST (Aug. 29, 2015), <http://www.thestateless.com/2015/08/religion-bills.html>.

²²⁴ Michael Caster, *The Truth About Myanmar's New Discriminatory Laws*, DIPLOMAT (Aug. 26, 2015), <https://thediplomat.com/2015/08/the-truth-about-myanmars-new-discriminatory-laws/>.

²²⁵ Engy Abdelkader, *The Rohingya Muslims in Myanmar: Past, Present, and Future*, 15 J. OR. REV. INT'L L. 393 (2014) (Abdelkader recounts that in 2013, two female Rohingya villagers, one of whom was pregnant, were killed by authorities while engaged in peaceful protest against the government's efforts to relocate their families to a new camp. Additionally, two Muslim women were sentenced to two years of hard labor for causing communal strife in the town of Okkan when they bumped into a Buddhist monk, causing his food to spill and alms bowl to break).

²²⁶ Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683 (2014).

²²⁷ Human Rights Council, Progress Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar, ¶ 121, U.N. Doc. A/HRC/13/48 (Mar. 10, 2010).

C. *The Path to Genocide*

In June 2012, President Thein Sein announced a state of emergency in Rakhine state and brought the area under military control.²²⁸ This followed widespread rioting after a group of Buddhist villagers detained a bus and killed ten Muslim passengers as reprisal for the alleged rape of a Buddhist woman.²²⁹ Military intervention fueled rather than diminished the violence, with reports that police and paramilitary forces opened fire on Muslims as Buddhist villagers burnt their homes.²³⁰ 140,000 people were left homeless, and the army forcibly relocated many more Rohingya into overcrowded camps, restricting their movement, access to medical care, work, and food.²³¹ President Thein Sein's public statement was that the "only solution" lay in the expulsion of the Rohingya to other countries or to camps overseen by UNHCR.²³² In the wake of the violence, Aung San Suu Kyi appointed former UN Secretary General Kofi Annan to establish an advisory commission made up of domestic and international members, charged with developing recommendation to improve conditions for all in Rakhine State.²³³

In October 2016, the government of Myanmar announced that the military was commencing what it called a "clearance operation" in response to an attack by armed insurgents on three border guard posts.²³⁴ The area was sealed off, movement within the area was restricted, and humanitarian agencies were denied access.²³⁵ The operation lasted from October 9, 2016 until February 9, 2017.²³⁶ During that period, according to a report published by the United

²²⁸ Thomas Fuller, *Crisis in Myanmar Over Buddhist-Muslim Clash*, N.Y. TIMES (June 10, 2012), <https://www.nytimes.com/2012/06/11/world/asia/state-of-emergency-declared-in-western-myanmar.html>.

²²⁹ *Id.*

²³⁰ "All You Can Do is Pray": *Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*, HUMAN RIGHTS WATCH (Apr. 22, 2013), <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>.

²³¹ Attacks by Arakanese forcibly displaced over 125,000 Muslims and at least 20,000 others from their home. *Id.*

²³² *Id.*

²³³ ANNAN, *supra* note 182, at 12. Among other suggestions, the Report advised a review of the 1982 Citizenship Law, and advocated for freedom of movement and access to political rights, as well as social services, education and livelihood assistance, for Rakhine-based Muslims. *Id.* at 31, 34, 45.

²³⁴ Antoni Slodkowski et al., *How a Two-Week Army Crackdown Reignited Myanmar's Rohingya Crisis*, REUTERS (Apr. 25, 2017), <https://www.reuters.com/investigates/special-report/myanmar-rohingya-crisis2/>.

²³⁵ *Burma: Aid Blocked to Rakhine State*, HUMAN RIGHTS WATCH (Oct. 21, 2016), <https://www.hrw.org/news/2016/10/21/burma-aid-blocked-rakhine-state>.

²³⁶ *Tatmataw Ends Area Clearance Operations In Northern Rakhine*, GLOB. N. LIGHT MYAN. (Feb. 18, 2016), <https://www.burmalibrary.org/docs24/NLM2017-02-18-NRS.pdf>.

Nations Human Rights Office of the High Commissioner, government forces carried out a series of atrocities against local Muslim populations.²³⁷ These included: the burning and looting of Rohingya villages; the murder of Rohingya men, women, and children; summary execution of imams, religious scholars and community leaders; and rape and torture.²³⁸ The military used helicopters to fire bullets and drop grenades on villagers, and shot people as they were working on their farms, shopping in markets, or fishing.²³⁹ Hundreds of thousands of villagers fled across the border to Bangladesh. In an open letter to the President of the Security Council, a group of Nobel Peace laureates said that “human tragedy amounting to ethnic cleansing and crimes against humanity is unfolding in Myanmar.”²⁴⁰ One Rohingya said, “[n]ow is the worst it has ever been . . . We have heard from our grandparents that there were bad things happening in the past too, but never like this.”²⁴¹ In 2016, the High Commissioner for Human Rights presented a report to the Human Rights Council which suggested there had been a widespread or systematic attack against the Rohingya, which if established by a court of law would indicate the possible commission of crimes against humanity.²⁴²

This report was followed, in February 2017, by another report by the High Commissioner for Human Rights into the government’s clearance operation in Northern Rakhine state after October 9, 2016.²⁴³ This report was carried out with a rigor and thoroughness designed to counter accusations of fabrication.²⁴⁴ Investigators, who were denied access to Northern Rakhine State, gathered evidence from 220 refugees who had fled across the border in Bangladesh.²⁴⁵ They adopted the methods and techniques of a criminal investigation. They gathered first-hand testimony from men, women, and children in eight different refugee camps, who had been fired upon by helicopters, driven

²³⁷ U.N. Human Rights Office of the High Comm’r, Rep. of OHCHR Mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar Since October 9, 2016-Flash Report (Feb. 3, 2017), <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf> [hereinafter OHCHR Flash Rep. 2016].

²³⁸ *Id.* at 13–31.

²³⁹ *See id.* at 14–15.

²⁴⁰ Muhammad Yunus, *Open Letter to the President of the Security Council and Member Countries of the Council to End the Human Crisis of Rohingyas in Myanmar*, FACEBOOK (Dec. 30, 2016), <https://www.facebook.com/Professor.Muhammad.Yunus/posts/996372943802283:0>.

²⁴¹ OHCHR Flash Report 2016, *supra* note 237, at 43.

²⁴² U.N. High Comm’r for Human Rights, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, ¶ 55, U.N. Doc. A/HRC/32/18 (June 29, 2016); *see also* Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Rep. on the Situation of Human Rights in Myanmar*, ¶ 51, U.N. Doc. A/HRC/25/64 (Apr. 2, 2014).

²⁴³ OHCHR Flash Rep. 2016, *supra* note 237, at 3.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 3–5.

from their villages, raped, burnt, and beaten.²⁴⁶ Investigators photographed the bullet and knife wounds, burns, and injuries that the assaults had left.²⁴⁷ The evidence from all the camps was qualitatively and quantitatively consistent.²⁴⁸ The Report stated:

The testimonies gathered by the team—the killing of babies, toddlers, children, women and elderly; opening fire at people fleeing; burning of entire villages; massive detention; massive and systematic rape and sexual violence; deliberate destruction of food and sources of food—speak volumes of the apparent disregard by Tatmadaw and BGP officers that operate in the lockdown zone for international human rights law, in particular the total disdain for the right to life of Rohingyas.²⁴⁹

Suu Kyi responded: “The Myanmar government is responding to the issue of Rakhine state based on the principles of the rule of law.”²⁵⁰

In the wake of this report, the High Commissioner for Human Rights and the Special Advisor on the Prevention of Genocide, together with human rights advocates, urged the Human Rights Council to establish a Commission of Inquiry (COI) to investigate allegations of violations, identify the perpetrators and determine whether international crimes had taken place.²⁵¹ Within the Human Rights Council, however, there was only sufficient support for establishing a Fact-Finding Mission.²⁵² On 24 March 2017, a UN Fact-Finding Mission was created with a mandate to investigate reports “with a view to ensuring full accountability for perpetrators and justice for victims.”²⁵³ Five months later, the military launched a second and more ferocious reprisal in

²⁴⁶ *Id.*

²⁴⁷ Investigators considered three independently prepared satellite imagery analysis reports, provided by UNOSAT (The United Nations Operational Satellite Applications Programme), Amnesty International, and Human Rights Watch, which showed Rohingya villages burned and destroyed. *Id.* at 5.

²⁴⁸ Evidence was taken in eight different camps. In five of the camps, potential interviewees had been forewarned of the visit of OHCHR investigators; in three camps there had been no forewarning and interviewees were randomly selected. *Id.* at 10.

²⁴⁹ *Id.* at 41.

²⁵⁰ Minami Funakoshi, *Suu Kyi Says ‘Delicate’ Myanmar Conflict Handled by Rule of Law*, REUTERS (Nov. 3, 2016), <https://www.reuters.com/article/us-myanmar-japan-idUSKBN12Y0B0>.

²⁵¹ Press Release, Adama Dieng, Statement by Adama Dieng, United Nations Special Advisor on the Prevention of Genocide Following OHCHR’s Report on the Situation in Northern Rakhine State, Myanmar, U.N. Press Release (Feb. 6, 2017).

²⁵² The Council’s decision was by consensus. China and India disassociated themselves from it. *See* Human Rights Council, Situation of Human Rights in Myanmar, U.N. Doc. A/HRC/34/L.8/Rev.1 (Mar. 22, 2017).

²⁵³ *See* Human Rights Council, Res. 34/22, U.N. Doc. A/HRC/Res/34/22, at ¶ 11 (Apr. 3, 2017).

Rakhine state.²⁵⁴ The Mission provided its Final Report to the Human Rights Council in September 2018. The Report called for the investigation and prosecution of Myanmar's Commander-in-Chief, Senior General Min Aung Hlaing, and his top military leaders for genocide, crimes against humanity and war crimes.²⁵⁵

Within Myanmar, vitriol against the Rohingya intensified and support for Aung San Suu Kyi and the military strengthened. In October 2016, the state-run newspaper, the *Global New Light of Myanmar*, ran an editorial about the danger posed by terrorists. The writer used the analogy of fleas: a flea by itself is harmless, but together, they could amass enough force to cause chaos and destruction. In a similar way, argued the editorial, Muslim terrorists were trying to disintegrate the unity and strength of the country by waging armed attacks, spreading rumours and performing subversive activities. The editorial urged the people to be wary of the dangers of “detestable human fleas.”²⁵⁶ Senior Burmese diplomats were reported describing the Rohingya as “ugly as ogres” because of their “dark brown” complexions and other racial features.²⁵⁷ A Burmese commander gave an interview to the BBC in which he denied the possibility that the *Tatmadaw* was raping ethnic Rohingya because Rohingya women were “too dirty” to rape.²⁵⁸ In October 2017, one of the country's most

²⁵⁴ Human Rights Council, Rep. of the Independent International Fact-Finding Mission on Myanmar, ¶92, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

²⁵⁵ *Id.*

²⁵⁶ See Khin Maung Oo, *A Flea Cannot Make a Whirl of Dust, But*, GLOB. N. LIGHT OF MYAN. (Nov. 26, 2016), <http://www.globalnewlightofmyanmar.com/a-flea-cannot-make-a-whirl-of-dust-but/>; see also Patrick Winn, *Myanmar State Media Alludes to Rohingya Muslims as 'Human Fleas'*, GLOB. POST (Nov. 30, 2016), <https://www.pri.org/stories/2016-11-30/myanmar-state-media-alludes-rohingya-muslims-human-fleas>; *Myanmar State Media Calls Rohingya "Detestable Human Fleas"*, BURMA TASK FORCE (Dec. 1, 2016), <https://www.burmataskforce.org/content/myanmar-state-media-calls-rohingya-detestable-human-fleas>.

²⁵⁷ Shashank Bengali, *In Myanmar, Hatred for Rohingya Muslims Runs So Deep That a Diplomat Called Them 'Ugly as Ogres'—and Got Promoted*, L.A. TIMES (Dec. 26, 2017), <https://www.latimes.com/world/asia/la-fg-myanmar-rohingya-hate-20171225-story.html>; Thomas Fuller, *Internet Unshackled, Burmese Aim Venom at Ethnic Minority*, N.Y. TIMES (Jun. 15, 2012), <https://www.nytimes.com/2012/06/16/world/asia/new-freedom-in-myanmar-lets-burmese-air-venom-toward-rohingya-muslim-group.html>; Kyaw Zwa Moe, *Skin Color and Prejudice Endangers Rohingya*, IRRAWADDY (Feb. 13, 2009), http://www2.irrawaddy.com/opinion_story.php?art_id=15110; Andrew R.C. Marshall, *Special Report: Plight of Muslim Minority Threatens Myanmar Spring*, REUTERS (June 15, 2012), <https://www.reuters.com/article/us-myanmar-rohingya/special-report-plight-of-muslim-minority-threatens-myanmar-spring-idUSBRE85E06A20120615>; Michael Sullivan, *Muslim Minority Suffers Under Harsh Myanmar Rule*, NPR (June 22, 2009), <https://www.npr.org/templates/story/story.php?storyId=105709922>.

²⁵⁸ See Bengali *Rohingya Are Dirty Muslim Women BBC Report*, YOUTUBE (Nov. 9, 2016), <https://www.youtube.com/watch?v=f2dAe7nUh20>; Phil Robertson, *A New Wave of*

revered monks, Sitagu Sayadaw, addressed a gathering of military officers, where he told a parable implying that non-Buddhists were sub-human beings, so killing them was not a sin.²⁵⁹

What happened to the Rohingya in 2016 and 2017 can be read as an extension and intensification of military conduct that had been practiced in 1948, 1962, and 1992. What ended as genocide was the continuation of a historical pattern in which the military acted in a precarious political context to address “the Rohingya problem,” using extreme violence, supported by a powerful logic of nationalism and religious fervor. In January 2017, a YouTube video was released on Facebook showing Burmese policemen at work in Ko Tan Kauk village in Northern Rakhine State.²⁶⁰ The video, taken by a member of the police, shows fellow policemen carrying out a military operation in a Rohingya village.²⁶¹ The men and boys of the village are seated in rows on the ground, their hands behind their heads and their knees bent, while a group of policemen beat them with sticks and kick them in the back and in the face.²⁶² At the very beginning of the video a young boy, appearing to be no more than 7 or 8 years old, is kicked in the back as he moves towards the lines of men, his hands raised above his head.²⁶³ There is no sense of crisis or urgency in the actions of the police: they carry out the beatings in a casual, matter-of-fact way. Some of the policemen are aware that they are being filmed: one lights a cigarette and stares straight into the camera.²⁶⁴ The complacency of the perpetrators, the casual violence, and the air of routine brutality were striking.²⁶⁵

Atrocities Is Being Committed Against Muslims in Burma's Rakhine State, HUMAN RIGHTS WATCH (Mar. 15, 2017), <https://www.hrw.org/news/2017/03/15/new-wave-atrocities-being-committed-against-muslims-burmas-rakhine-state>.

²⁵⁹ Mratt Kyaw Thu, “*Tatmadaw, Sangha and Government Must Work Together*,” *Sitagu Sayadaw Says in Sermon to Officers*, FRONTIER MYAN. (Nov. 1, 2017), <https://frontiermyanmar.net/en/tatmadaw-sangha-and-government-must-work-together-sitagu-sayadaw-says-in-sermon-to-officers>.

²⁶⁰ *Rohingya Police Beating Footage: Myanmar Government to Investigate—Video*, GUARDIAN (Jan. 2, 2017), <https://www.theguardian.com/world/video/2017/jan/02/rohingya-a-police-beating-footage-myanmar-government-investigate-video>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ The veracity of the video was never contested. The video prompted a response from the government of Myanmar through the State Counsellor's office, the office of Aung San Suu Kyi. A spokesman for the government announced that four of the police officers shown in the video had been identified and arrested, including the one who filmed the video. See *Myanmar Police Officers Detained over Rohingya Beatings Video*, BBC (Jan. 2, 2017), <https://www.bbc.com/news/av/world-asia-38490957/myanmar-police-officers-detained-over-rohingya-beatings-video>; Carole Oudot & Matthieu Baudey, *Policemen Arrested for Beating Rohingyas, Filming It*, ASIA TIMES (Jan. 9, 2017), <http://www.atimes.com/2007/01/article/policemen-arrested-beating-rohingyas-filming/>.

In 2019, the Mission reported to the Human Rights Council that it had reasonable grounds to conclude that the State's genocidal intent against the Rohingya had strengthened and that "there is a serious risk that genocidal actions may occur or recur."²⁶⁶

VI. CONCLUSION: THE CALL TO MEMORY

In recent years, scholars have interrogated the "memory assumption" axiomatic in writing about transitional justice. They have argued that there is no rule that a violent past must be addressed in any process of transition; that a therapeutic understanding of memory is not applicable in all cultural contexts; that acknowledging and addressing past wrongs is not necessary and can indeed undercut prospects for democratic consolidation.²⁶⁷ Critics of transitional justice have argued that there is limited potential for court processes in the aftermath of conflict and authoritarian rule to deter wrongdoing, enhance social cohesion, produce reliable historical records about the context of international crimes, or promote healing for victims.²⁶⁸ The backdrop to Myanmar's transformation from military rule to a limited form of constitutional democracy in the period 2008–2018 was a complex, fragile politics of transition where there was deep cultural ambivalence about pursuing accountability for past wrongs.²⁶⁹ In the particular circumstances of Myanmar, there appeared to be strong reasons for deferring serious discussion about transitional justice.

Nonetheless, the failure of Myanmar's leaders to provide even the most basic recognition of historical wrongs as part of the transition to democracy contributed to the carrying out of acts of mass atrocity against the Rohingya. This is because "forgetting" significantly contributed to a political culture where the identity and humanity of individual victims was not recognised and where pre-existing patterns of oppressive rule were able to continue, unpunctuated by new understandings about the nature of the rule of law. The direct consequence of this was the willingness of the military to carry out—and the preparedness of many people in the country to accept—the commission of acts that are in likelihood genocide. I have shown that there was a historical precedent for forgetting as a political strategy in the transition from colonialism. It was a strategy made politically palatable (and plausible to the outside world) by the dynamics of the military-led transformation of power (Section

²⁶⁶ IFFM 2018, *supra* note 29, at para. 58.

²⁶⁷ Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, U.S. INST. OF PEACE (Feb. 13, 2005), <https://www.usip.org/publications/2005/0a2/rethinking-truth-and-reconciliation-commissions-lessons-sierra-leone>; HAYNER, *supra* note 122, at 60, 187.

²⁶⁸ Shaw, *supra* note 266; HAYNER, *supra* note 122, at 183–84.

²⁶⁹ See Jack Volpe Rotondi & Nir Eiskovits, *Forgetting After War: A Qualified Defense*, in *THEORIZING TRANSITIONAL JUSTICE* 21–22 (Claudio Corradetti et. al. eds., 2015).

I). It was supported by deep cultural beliefs and understandings about the nature of suffering, time, and identity, held by many in the majority Buddhist population (Section II). The attempt to signal a new order of accountability by focusing on the rule of law could not shift past patterns of oppression and abuse (Section III). The result of all this was that the generals of the *Tatmadaw* had the freedom to dispose of “the Rohingya problem” with a fierceness and urgency that included atrocity (Section IV). If I am correct and the decision to pursue a policy of forgetting contributed to the genocide of the Rohingya, then Myanmar stands as a compelling case for remembering.

The aim of any process of remembering—whether through a trial or truth commission—is to prompt the kind of complex national deliberation that can build a foundation for values of toleration, moderation, and civil respect.²⁷⁰ Transitional justice processes and institutions are inevitably, regardless of their shortcomings, sites for discussion about the moral and legal worth of individual human beings and reflections about fundamental social and political values. They are discursive phenomena about moral principles and the humanity of victims, perpetrators, bystanders, and political leaders: public theatres where complex deliberations about culpability, responsibility, state violence, and retribution play out.²⁷¹ Processes for remembering also require us to compile detailed knowledge about other lives and about the indignities, abuses, and atrocities that bring lives to an end. At the highest point this enables an act of imagination, an invitation to a question that is fundamental to building social cohesion in deeply divided societies: “How would I feel if this were done to me?” In *The Warrior's Honor*, Michael Ignatieff asserts that in ethnic conflict our ability to perceive separate human beings is replaced by an insistence on seeing groups.²⁷² It was not by chance that the generals of the *Tatmadaw*, in their battles with ethnic insurgents, deliberately deployed soldiers to regions within the country that were foreign to them: where they did not speak the language and could not understand the customs. The generals were correct in assuming that it would be easier for soldiers to carry out terrible acts against people with whom they felt no familiarity.

After the Second World War, the archdeacon of Rangoon, George Appleton, argued against the prosecution of Aung San. He said: “In Burma people do not generally think in terms of justice and reason, but in terms of personalities and relationships.”²⁷³ In Appleton's view there were “racial factors” involved in the murder of Rashid and he foreshadowed violent reprisals

²⁷⁰ MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 2 (1997).

²⁷¹ See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgement*, 96 MICH. L. REV. 2031, 2084 (1998).

²⁷² MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC AND THE MODERN CONSCIENCE* 63 (1998).

²⁷³ CHRISTOPHER BAYLY & TIM HARPER, *FORGOTTEN WARS: FREEDOM AND REVOLUTION IN SOUTHEAST ASIA* 233 (2007).

against Muslim Indians if the prosecution went ahead.²⁷⁴ The trial of Aung San, the country's heroic soldier and statesman, would certainly not have generated closure: its consequences may have been dramatic and bloody. But a trial would have painted the story of Aung San and his victim Abdul Rashid in all its complex moral hues and prompted a set of questions that would have reverberated through the pages of Myanmar's troubled history: Do the exigencies of war justify torture and atrocity? Should even the country's heroes be held to account when they breach fundamental laws of humanity? What value should be placed on individual life? What does it mean to respect the dignity of a human being, whether they are Muslim, or Christian, or Buddhist? At the core of my argument in this Article is the centrality of discussion of controversial views about the moral autonomy of the individual in the face of everyday calculations of politics and pragmatism and the role legal processes can play in provoking this discussion.

As I write this Conclusion, the International Criminal Court has confirmed it has jurisdiction to consider the situation in Rakhine state even though Myanmar is not a party to the Statute of the International Criminal Court.²⁷⁵ This is because one of the crimes Myanmar is alleged to have committed is the crime against humanity of deportation, partially carried out in the territory of Bangladesh. Bangladesh is a party to the statute of the International Criminal Court. In a statement rejecting the decision, a spokesperson for the government of Myanmar said that the ruling on jurisdiction was "the result of faulty procedure and is of dubious legal merit."²⁷⁶ Without domestic participation or internal legitimacy, it seems unlikely that the circuitous ICC process to securing jurisdiction will encourage civil dissensus in Myanmar, promote reasoned debate about the events in Rakhine state, or further the internalization of norms relating to justice and reason. But, in the absence of other forums for acknowledging the victims of administrative massacre in Myanmar, the ICC processes may yet stand as a fragile point of remembering—of resistance to the conclusion that the individual victim is "alone . . . outside history . . . non-existent."²⁷⁷

²⁷⁴ *Id.*

²⁷⁵ See Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ¶ 1, (Sept. 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF; see also Laignee Barron, *The International Criminal Court Says It Can Rule on Alleged Crimes Against Myanmar's Rohingya*, TIME (Sept. 7, 2018), <http://time.com/5389574/icc-jurisdiction-ruling-myanmar-rohingya/>.

²⁷⁶ *Can the ICC Bring Justice to Myanmar?*, ASEAN POST (Sept. 25, 2018), <https://theaseanpost.com/article/can-icc-bring-justice-myanmar>.

²⁷⁷ GEORGE ORWELL, 1984 258 (2017).