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IMPUNITY IN MYANMAR: GENOCIDE AND THE RESPONSE OF THE INTERNATIONAL COMMUNITY

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RESUMEN

Los Rohinyás han sufrido una discriminación sistemática y constante promovida por el gobierno de Myanmar durante décadas. La situación ha sido definida recientemente como genocidio, uno de los crímenes más graves bajo el derecho internacional. Sin embargo, la comunidad internacional no ha respondido adecuadamente para finalizarlo. Esta investigación trata de entender qué factores históricos y políticos han dado forma al país y como han conducido a la presente situación. En base a las recomendaciones de las Naciones Unidas y otras organizaciones, proporciona un análisis de las posibles opciones de la comunidad internacional, que abarcan desde la remisión del caso a la Corte Penal Internacional a la imposición de sanciones y otras medidas menos severas. Finalmente, el trabajo da razones para la inacción de la comunidad internacional, principalmente centrándose en ciertos estados como China o los Estados Unidos. El mundo es testigo de un genocidio, pero la política restringe el sistema internacional y los mecanismos de aplicación que este tiene para ponerle fin.

Palabras clave: Rohinyá, Estado Rakáin, Myanmar, genocidio, Corte Penal Internacional

ABSTRACT

The Rohingyas have suffered systematic and constant discrimination encouraged by the Myanmar government during decades. The situation has recently been defined as genocide, one of the gravest crimes under international law. However, the international community has not responded adequately to end it. This research tries to understand which historical and political factors have shaped the country and how they lead to the current situation. Based on the recommendations of the United Nations and several other organisations, it provides an analysis of the possible options of the international community to act, ranging from a case referral to the International Criminal Court to the imposition of sanctions and other less severe measures. Finally, the paper gives reasons for the inaction of the international community, primarily focusing on several states such as China or the United States. The world is witnessing a genocide, but politics constraint the international system and the enforcing mechanisms it has to end it.

Keywords: Rohingya, Rakine State, Myanmar, genocide, International Criminal Court

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LIST OF ACRONYMS

AADMER	ASEAN Agreement on Disaster Management and Emergency Response
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of Southeast Asian Nations
CBRO	Canadian Burmese Rohingya Organization
FDI	Foreign Direct Investment
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRtoP	International Coalition for the Responsibility to Protect
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced People
MSF	Médecins Sans Frontières
NRC	National Registration Cards
OHCHR	Office of the United Nations High Commissioner for Human Rights
R2P	Responsibility to Protect
TRC	Temporary Registration Cards
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council
UNICEF	United Nations International Children's Emergency Fund
UNSC	United Nations Security Council

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1. INTRODUCTION

Ever since the outbreak of violence in August 2017, the Republic of Myanmar has been in the international spotlight. The UN delivered a critical and controversial report claiming the existence of a situation of genocide in the Rakhine region, war crimes and crimes against humanity, as well as other violations of human rights against the Rohingya population. However, this situation is not new, but the result of a history of ethnic tensions. During the second half of the 20th century, the crisis became critical, but now the international community has given a name to it: genocide. This affirmation implies a possible response from other countries, which can lead to a variety of outcomes.

1.1. Research Question

*What have been the historical and political causes of the genocide in Myanmar?
What has been the response of the international community?*

The hypothesis that has created these questions is that the international community has not acted with enough diligence and promptness to end the genocide after Myanmar failed to stop it, even when there had been several warnings from different organisations and countries.

This project will try to answer through an in-depth analysis of the possible consequences and future actions of the international community while taking into account the reasons for those acts. The temporary delimitation is focused on the beginning of the current crisis in August 2017, but briefly reviewing the historical context and the phases of the crisis during the second half of the 20th century. The geographical focus will be on the Rakhine region in Myanmar, also mentioning the destination of the migrants, Bangladesh. The international community plays a decisive role. For this reason, other actors outside Myanmar, such as China or the US, will be included. The analysis will include the review of legal documents of international law and human rights and precedents of *ad hoc* courts, as well as United Nations documents and reports.

The research will be focused on the conflict and international response of the actors, mainly in legal terms. The humanitarian disaster concerning displaced people will not

be at the centre of the analysis, so the response of Bangladesh to the arrival of refugees will be mentioned but not a target.

1.2. Research Justification

One of the most shocking facts about the situation is how the UN presented its findings. Describing a situation as “genocide” is extremely rare due to the difficulty of proving “intent”. However, the Independent International Fact-Finding Mission on Myanmar in charge of the research has affirmed that genocide is occurring, as well as other crimes. This affirmation gives incredible gravity to the crisis. In the second place, the report not only defines the situation, but calls for the punishment of several actors. What must be highlighted, as it has been a significant change compared to previous situations, is that some have seen their names published in the report, not only blaming, for example, the government or the army, but giving specific individuals’ names.

Apart from this report, what also justifies the election of the topic are the possible next steps of the international community. Even if the genocide in Myanmar has been condemned and several international actors have given support to this, there has not been, yet, a visible and effective response.

Another reason is the time frame of the genocide. The last spark of violence is recent and the situation is still ongoing. However, as it does not generate media interest, there is no international attention. There is a clear situation of a violation of human rights, but public opinion is not interested. Human rights seem to have no validity in some regions, even if nowadays the standards are high.

As to personal reasons, this topic is related to what I want to work on in the future. I want to work in the field of international law and human rights and continue my studies doing a Master’s in International Public Law. For this reason, this paper will provide a better understanding of the topic and an insight into what my future employment may consist of.

1.3. Research Objectives

This research will have two objectives. Firstly, the study of possible outcomes of the crisis and genocide proofs and consequences, for example, a possible International

Criminal Court (ICC) case, the creation of an *ad hoc* tribunal, an R2P-based intervention or even the impunity of Myanmar leaders and even the continuation of the genocide. This will be complemented by a previous analysis of the causes and timeline of the conflict.

As for the second objective, the paper will try to give an explanation of the reasons of the international community for their current seemingly absence of action due to political, economic and military reasons.

1.4. Methodologies

This paper has a multidisciplinary approach concerning history, law, international relations and politics. For this reason, the methodologies of these social and juridical sciences disciplines have to be used.

Firstly, there is a historical part to understand who the Rohingyas are, causes of the genocide and a study of the last outbreaks of violence. Secondly, there is an explanation of the complexity of genocide, precedents to the UN Report and an analysis of the latter. Then, an analysis of the actions and possible options of the international community follows before turning to the inaction; why the international community has not acted. These steps enable the project to reach a conclusion and answer the questions proposed.

As for the historical part, the type of research is descriptive, mainly an observation of the facts. The juridical and IR part concerns analytical research. In both cases, the sources are primary, such as reports from the United Nations, NGOs and other institutions, and secondary, for example, articles from newspapers to understand better the last occurrences of the situation.

Concerning the research techniques, the paper uses mainly qualitative techniques. Quantitative technique, such as statistics to provide scientific data to give numerical proofs for the analytical research, especially in relation to the last outbreak of violence and the data it has uncovered, are also used.

2. THEORETICAL FRAMEWORK

To understand what have been the causes and consequences of the situation in Myanmar and what are the options and current actions of the international community, some concepts must be defined. This research framework will describe of the following topics: *Rohingya*, *genocide*, *Responsibility to Protect (R2P)* and *humanitarian intervention*. An analysis of the international relations theories that can be applied to this project will follow.

2.1 Terminology

2.1.1. Rohingya

The Rohingya population has faced a history of conflicts during the years. It must be understood who they are and the characteristics and problems that have influenced the outcome of the current crisis.

The Rohingyas are a Muslim ethnic group that inhabits part of what is called the Rakhine state, previously known as Arakan, situated along the Western coast of the country and separated from the rest of Myanmar by a range of mountains. In its Northern part, it touches Bangladesh. In terms of population, *The Union Report of 2014 census*, a UN-backed census and the first one conducted in thirty years, estimated that 3.2 million people lived in that state, from which around two thirds were Buddhists and less than 1 million Rohingya Muslims¹. Those two groups differ ethnically, religiously and linguistically.² Concerning the census, the numbers might not be completely accurate, as the Rohingya were excluded from the census and labelled as “Bengali” immigrants, not Myanmar nationals as, after protests of the Buddhist population, the Rohingya, first identified as so, were only registered if they identified as Bengali.

Ethnicity and linguistic identity determine the socio-economic situation of the population. According to the World Bank, the Rohingya are 2.4 times more likely to

¹ Department of Population, Ministry of Immigration and Population, *The 2014 Myanmar Population and Housing Census*. (Nay Pyi Taw: The Republic of the Union of Myanmar, 2015)

² Eleanor Albert & Andrew Chatzky, “The Rohingya Crisis”, Council on Foreign Relations, accessed March 1, 2019, <https://www.cfr.org/backgrounder/rohingya-crisis>

live in poverty than the population at large³. In the Rakhine state, the poverty rate is a 78%, a 40% higher rate than the 37.5% national average⁴. This part of the country suffers from a situation of underdevelopment and lack of investment, infrastructure and employment opportunities as well as economic marginalization.

However, the main issue faced by this minority is its nationality status. There is a widespread belief among the population that Rohingyas are “Bengali” immigrants, not nationals from Myanmar, who should return to where they belong – Bangladesh. But, according to the Rohingyas, the Muslim presence in the area can be traced back to the 7th century AD and they were culturally, socio-economically and politically distinct from the other ethnics and religions.⁵ Anthony Ware and Costas Laoutides explain these differences in the perception of this minority’s origin using the term “Rohingya”. They claim that it is perceived as a claim for political rights and self-governance, a way to prosecute political claims, not as a defined ethnic identity. Due to this, the rest of Myanmar perceives them as a threat to national cohesion and integrity.⁶

The government shared this view and took measures to avoid granting citizenship to the Rohingyas, now facing a situation of statelessness. They have complained for years about the lack of autonomy and opportunities, which increased political and social tensions, but, as the country is controlled by the Burman ethnic group, who maintain strict and centralized control, their power is limited.⁷

2.1.2. Genocide

It has been delimited the primarily affected ethnic group by the crisis, the Rohingyas, so now a definition of the crimes they are facing should be provided. Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) defines *genocide* as:

³ World Bank Group, *Myanmar: Ending Poverty and boosting shared prosperity in a time of transition. A systematic country diagnostic*, (Yangon: World Bank, 2014), 24

⁴ World Bank Group, *Myanmar: Ending Poverty and boosting shared prosperity in a time of transition*, 30

⁵ Zul Nurain, “Introduction of Arakan (Burma) Myanmar”, Canadian Burmese Rohingya Organization (CBRO), accessed March 1, 2019. <https://rohingya.webs.com/arakanhistory.htm>

⁶ Anthony Ware, Costas Laoutides, *Myanmar’s “Rohingya” Conflict* (New York: Oxford University Press, 2018), XVI

⁷ Amnesty International, “*Caged without a roof*”: *Apartheid in Myanmar’s Rakhine State*, (London: Amnesty International, 2017), 26

“...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

In addition, according to Article 3, not only genocide *per se* must be punished, but also the conspiracy, incitement, attempt and complicity to commit it. The International Criminal Court (ICC), in Article 5 of the *Rome Statute* (1998), claims jurisdiction over certain crimes, one being genocide. In Article 6, it defines genocide as in the Convention.

However, before the Convention, the term “genocide” was not used. In 1941, Winston Churchill defined it as “a crime without a name” after the German invasion of the Soviet Russia.⁸ It was not until 1944 when Raphael Lemkin, a Polish-Jewish jurist, coined the term. He combined the Greek word *genos* (race or tribe) and the Latin term *cide* (killing) to create *genocide*. For the author, it meant a “coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves.”⁹ He later was able to include the term in the Nuremberg Trials, but not as a legal crime. Subsequently, he lobbied at the UN sessions and influenced the wording of the posterior 1948 Convention.¹⁰ This document legally recognized genocide as a crime under international law, after the affirmation of it as a crime under the UN General Assembly Resolution 96 (1946).

⁸ Winston Churchill, “Broadcast to the world about the meeting with President Roosevelt” (speech, London, August 24, 1941), British Library of Information

⁹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New Jersey: The Lawbook Exchange, LTD, 2005), 79

¹⁰ United States Holocaust Memorial Museum, “Coining A Word And Championing A Cause: The Story Of Raphael Lemkin”, accessed April 7, 2019, <https://encyclopedia.ushmm.org/content/en/article/coining-a-word-and-championing-a-cause-the-story-of-raphael-lemkin>

2.1.3. Responsibility to Protect (R2P)

Protection for the peoples' human rights has been consistently encouraged. For the last two decades, an idea that now can be applied to the situation in Myanmar has been emerging and consolidating: Responsibility to Protect (R2P). This idea was officially framed in the 2005 World Summit Outcome by the UN General Assembly. In §138 and §139, the "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" was defined and R2P legally created.¹¹

These two sections lead to the establishment of the three pillars of R2P. Firstly, pillar one stipulates that every state has the R2P its citizens from the four mass atrocity crimes: genocide, crimes against humanity, war crimes and ethnic cleansing. Pillar two consists of the responsibility of the international community to help states meet this responsibility. However, in case a state fails to protect its population, pillar three states that the international community has to be prepared to take collective action following the UN Charter.¹² Preferably, it concerned the use of peaceful measures, being military intervention a measure of last resort to be avoided unless there is no other option. It has to be authorised by the Security Council acting under Chapter VII of the UN Charter. R2P involves three types of responsibility: prevent, react and rebuild.¹³

The origins of the idea can be traced to the failure of the international community to provide a rapid and effective response to Rwanda (1994) or Srebrenica (1995). The former UN Secretary-General Kofi Annan insisted on a redefinition of sovereignty, ending with the report "We the Peoples" in 2000 concerning the role of the UN in the new century. That year, the government of Canada established the International Commission on Intervention and State Sovereignty (ICISS) as an answer to the report. At their third round table meeting in February 2001, the notion of R2P was suggested by the commissioners Gareth Evans, Mohamed Sahnoun and Michael

¹¹ General Assembly resolution 60/1, *2005 World Summit Outcome, A/RES/60/1* (October 24, 2005), 30

¹² Global Centre for the Responsibility to Protect, "About R2P", accessed April 1, 2019, http://www.globalr2p.org/about_r2p

¹³ Alex Bellamy, "Conflict prevention and the Responsibility to Protect", International Coalition for the Responsibility to Protect (ICRtoP), accessed April 1, 2019), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/1857-conflict-prevention-and-the-responsibility-to-protect>

Ignatieff as an alternative to intervention.¹⁴ This was reflected in the 2001 report of the ICISS “Responsibility to Protect”. This report stated the path that would lead to the 2005 World Summit and changed the conception towards responsibility to protect and intervention as a measure last resort.

Both works were partly based on the previous work of authors such as Francis M. Deng, Roberta Cohen and Jan Eliasson. The formers tried to encourage the international community to protect Internally Displaced People (IDPs), for example with *The Forsaken People: Case Studies of the Internally Displaced* (1998). Deng proposed the concept of “sovereignty as responsibility” in his work “Reconciling Sovereignty with Responsibility” (1995). Eliasson, responding to a questionnaire circulated by Deng, stated that assisting IDPs was “a question of striking a balance between sovereignty and solidarity with people in need”.¹⁵

2.1.4. Humanitarian intervention

However, even when R2P was specifically created to avoid intervention, we cannot neglect its part in the third pillar. The definition of humanitarian intervention has slightly changed over the years, but the core concepts remain equal.

For years it was based on Hugo Grotius’ idea of interventionism, reflected in its work *On the Laws of War and Peace* (1625). He stated that, when a state uses force as a response to human rights violations, the purpose was to punish to protect the law of nature and nations. However, nowadays, the idea of a right of punishment is not accepted, as being able to punish another would result in a hierarchy not consistent with sovereign equality. He also proposed an idea of foreign states as temporary guardians for citizens who suffer at the hands of their nation – protectors against oppression acting on behalf of the population. It would only be possible when it is clear that a government commits clear abuse against its people. This theory can be linked with today’s humanitarian intervention as a defensive and not offensive action. This guardianship idea has been related to colonialism, even when Grotius did not

¹⁴ George Kassimeris, John D. Buckley, *The Ashgate Research Companion to Modern Warfare* (Surrey: Ashgate Publishing, Ltd., 2010), 323

¹⁵ Sara E. Davies, Luke Glanville, *Protecting the Displaced: Deepening the Responsibility to Protect* (Leiden: BRILL, 2010), 72-73

directly accept it; a method to hide colonial domination saying that intervention was for protection. For this reason, a guardian-ward relationship is considered outdated.¹⁶

To understand what the international community could do in Myanmar, we will use the definition Professor Sean D. Murphy proposes:

*“Humanitarian intervention is the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.”*¹⁷

Humanitarian is a broad term frequently used to describe activities with the objective to improve the well-being of individuals and protect their human rights, not following strategic national interests.

While R2P has intervention as a measure of last resort in its third pillar, humanitarian intervention directly concerns the use of force to protect human rights. According to customary international law and Article 2(4) of the UN Charter, the use of force is prohibited.¹⁸ However, there is an exception on which humanitarian intervention relies: Chapter VII of the Charter. Article 2(7), with regard to national sovereignty, reads:

*“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ... but this principle shall not prejudice the application of enforcement measures under Chapter VII.”*¹⁹

Chapter VII concerns “Action with respect to threats to the peace, breaches of the peace and acts of aggression”. This, according to article 39, shall be determined by the UN Security Council. The Charter proposes certain measures, but if they prove to be inadequate, the UNSC can authorise the use of force acting under Article 42.²⁰ Humanitarian intervention can be, then, legally authorised.

The Charter and R2P were understood as a Western concept, as the ones with the power to intervene were typically these countries. However, the idea of the right to

¹⁶ Evan J. Criddle, "Three Grotian Theories of Humanitarian Intervention." *Theoretical Inquiries in Law*, vol. 16, no. 2 (2015): 473-476

¹⁷ Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), 11-12

¹⁸ United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (New York: United Nations, Office of Public Information, 1945), 3

¹⁹ United Nations, *Charter of the United Nations*, 3

²⁰ *Ibid*, 3

intervene was present in the Constitutive Act of the African Union (2000) in its Article 4(h), which states that:

“the Union shall function in accordance with the following principles: ... (h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity...”²¹

Kofi Annan, in his report “We the Peoples” also expressed his concern about intervention, but understanding its importance:

“We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported ... Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle—not even sovereignty—can ever shield crimes against humanity ... Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.”²²

The line between effective and justified intervention and a political and military statement that just responds to national principles seems blurred. Anne Ryniker expressed that:

“While armed intervention in response to grave violations of human rights and international humanitarian law may be unavoidable in certain extreme situations, what we expect of the community of States is that they should not view either such intervention or the situations that have caused it as inevitable. To systematically use armed intervention for humanitarian purposes would amount to an abdication by the international community of its true responsibilities: preventing conflict and promoting the basic values expressed in international humanitarian law.”²³

However, nowadays, according to Mohammed Ayoob, the new wave of interventionism and support to R2P have changed the definition of humanitarian intervention towards a concept more in line with respect of international values and intervention as a measure almost always avoidable. Firstly, it is increasingly defined taking into account new purposes and goals humanitarian and universal, not just traditional objectives.

²¹ African Union, *Constitutive Act of the African Union* (Lomé: African Union, 2000)

²² Kofi Annan, *We the peoples: The Role of the United Nations in the 21st Century* (New York: United Nations, Office of Public Information, 2000), 48

²³ Anne Ryniker, “The ICRC’s Position on ‘humanitarian intervention’”, *International Review of the Red Cross*, vol. 83, no. 842 (2001): 532

Secondly, interventionism is now launched by or on behalf of the international community as a whole. It is not limited to intervention by states or groups of states only for their national ends. States are agents of the international community; intervention is international. They attempt to reach humanitarian objectives surpassing traditional national sovereignty.²⁴

2.2 Theories

After the review of the terms, it must be understood the ideological approach of this project. The most appropriate international relations' theory for this analysis would be realism and its variations, especially structural realism. It will be mainly used for the examination of the reasons that explain how the international community is acting.

2.2.1 Realism

To understand the basis of structural realism, we must define the core concepts of classical realism, one of the most established theories in international relations. Political realism is defined by the idea of power. It influences the relation between states, the main actors, which becomes conflictive. There is not a superior international government, so sovereign states pursue their national interests to increase their power. The international realm is anarchic, as Thomas Hobbes described the state of nature. Realist though can also be traced to Thucydides, a classical Greece author, and Machiavelli.²⁵

However, the school of classical realism can be said to be created by Morgenthau who, in its *Politics Among Nations* (1948), stated six principles of realism. The first one states that "political realism believes that politics, like society in general, is governed by objective laws that have their roots in human nature"²⁶ and claimed the "concept of interest defined in terms of power".²⁷ The struggle for power comes from the essential human will for power. International relations are conflict-based and power and security governed it, not moral laws.

²⁴ Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty", *The International Journal of Human Rights*, vol. 6, no.1 (2002): 81

²⁵ Stanford Encyclopedia of Philosophy, "Political Realism in International Relations", accessed April 30, 2019, <https://plato.stanford.edu/archives/sum2013/entries/realism-intl-relations/#RooReaTra>

²⁶ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1978), 4

²⁷ Hans J. Morgenthau, *Politics Among Nations*, 5

2.2.2 Structural Realism

After briefly defining the basic premises of realism, we have to move on to neorealism or structural realism, an evolution from the classical theory. Kenneth Waltz, in *Theory of International Politics* (1979), pursued a more scientific approach to the theory and dismissed the philosophical dimension of human nature. The ultimate goal of states, still the principal actors, was surviving. What defined their behaviour was the structure of the system, not their organization. The concept of an anarchic system, without a central authority, was maintained. What distinguished states were their relative capabilities, their power, to pursue a common goal; surviving. This is a distinction between classical and neorealism; for the former, power was an end but also a means. However, for the latter, the main interest is their security, which depends on their power.²⁸

Mearsheimer focused the division on why do states want power. Classical realists answer with human nature, structural realists with the structure of the international system, which pushes states to pursue power. They all have offensive capabilities. In addition, another element is uncertainty, as there is no guarantee that the arena will remain peaceful, so ensuring being able to protect themselves is basic, which can lead to a security dilemma.²⁹

In terms of how much power is enough, structural realism is divided into two schools, defensive and offensive. The former, with authors such as Waltz, claim that maximizing power will result in punishment from the system. Hegemony will turn against those states which pursue it. For this reason, they should strive for an appropriate amount of power that does not represent a threat to others. Then, there will be balancing, an offence-defence balance and fewer central wars. Offensive realists such as Mearsheimer, on the contrary, think that gaining as much power as they can will be beneficial, as it will ensure their survival.³⁰

The present analysis has been undergone having as a model for the system a structural realism approach, bearing in mind its characteristics and the strive for survival thanks to the power that it proposes.

²⁸ Stanford Encyclopedia of Philosophy, "Political Realism in International Relations"

²⁹ John J. Mearsheimer, "Structural Realism", *International Relations theories: Discipline and diversity*, vol. 83 (2007), 72

³⁰ Mearsheimer, "Structural Realism", 75-77

3. A HISTORY OF ETHNIC TENSIONS

3.1. The Rohingya population in the Rakhine State: competing historical narratives

The Rakhine State has been facing a history of ethnic tensions during centuries, aggravated in the last decades. As it has been explained, the major problem of the Rohingya ethnic minority is nationality. According to Azeem Ibrahim's book *The Rohingyas: Inside Myanmar's Genocide* (2018), the population living in the area before British colonial conquest in 1826 was what

FIGURE 1: LOCALIZATION OF THE RAKHINE STATE



Source: Amnesty International

determined this distinction. Even if the Rohingyas claim that their presence has been constant for centuries, other groups qualify this as a falsification of history to acquire citizenship and focus on the Bengali immigration during colonial times. In fact, there was not a clear uniform and stable political order at the pre-colonial times. The area of Arakan was not invaded until 1784 and control was weak.³¹

These factors matter if we take into account how citizenship is defined currently in Myanmar. Legally, the justification for a political and socio-economic systemic discrimination to this minority, which tries to rationalize the violence, comes from the 1982 Citizenship Law. It created three types of citizens: *full*, those inhabiting the country before 1823 or members of one of the 135 officially recognized ethnic groups; *associate*, those eligible who applied for citizenship following the previous law; and *naturalized*, those living in the territory before 1948. In addition, the government has the right to deny citizenship when it considers it necessary, even if criteria are met.

What stemmed from this are a denial of Rohingya citizenship and a situation of statelessness. This means no protection from the state, restrictions on movement,

³¹ Carlos Sardiña, "Rohingya and national identities in Burma", *New Mandala*, September 22, 2014, <https://www.newmandala.org/the-rohingya-and-national-identities-in-burma/>

healthcare and education, labour problems, confiscations, etc. with legal justification.³² Before that, during the 70s, North Arakan Muslims were not given National Registration Cards (NRCs), proof of nationality. After the law, during the 90s, Rohingyas were given Temporary Registration Cards (TRCs), a physical proof that they were not full citizens which were cancelled in early 2015.³³ Even if they did confer limited rights, they never served as recognition of citizenship.³⁴

Within this framework, one could assume that they *do* have the right of citizenship, as there was a Muslim presence previous to those years. Here is where the Myanmar government differs. The situation was complicated before and during the colonial era. There were no defined Nation-States before the British arrival, but then they classified the complex demography of the region using mother tongue and “race”. They recruited people using ethnic characteristics as a criterion and tended to favour some groups. That led to the reinforcement of ethnic classifications and problems currently affecting the system.

The second factor that must be taken into account is the waves of immigration from Bangladesh. The historical sources demonstrate the migration of Muslims during the colonial era, not just seasonal workers, but permanent migrants. This movement of people was encouraged by British authorities, so resentment among the Buddhist population grew. However, it is almost impossible to trace which people were already living in Myanmar before the colony and which came with the immigration waves. It would be unviable to identify an ancestral group due to the blending of the population and lack of historical sources, both for the Rohingya and for the other ethnics defined as national. However, this cannot be understood as the non-existence of the Rohingya identity.³⁵

Tensions continued during the Second World War, when Buddhists were mainly in the Japanese side while Muslims were given support by the British, even arriving at a

³² Benjamin Zawacki, ‘Defining Myanmar’s “Rohingya Problem”’, *Human Rights Brief*, vol. 20, no. 3 (2013): 19

³³ Jaques Leider, *Rohingya: The History of a Muslim Identity in Myanmar* (USA: Oxford Research Encyclopedia of Asian History, 2018), 13

³⁴ Albert&Chatzky, “The Rohingya Crisis”

³⁵ Sardiña, “Rohingya and national identities in Burma”

state of civil war between the groups. The latter, as a form of gratitude, were recognized as a distinct racial group by the UK.³⁶

The differences were amplified with the lack of stability in the country. A combination of cultural, religious, linguistic and historical disparities made the Rohingya population a perfect scapegoat to be used to unify the rest of the communities. As they are and were presented as a common threat and enemy, the government tried to ease down the complicated process of building a new and democratic nation using that sense of unity against them.³⁷ This approach has continued during the decades, while impunity persisted. Additionally, as there has been international aid towards the Rohingyas, the population feels that the international community is biased towards them. Attention from international media platforms, humanitarian organizations and other groups, which increased the view of Rohingya only as victims, has made other oppressed communities, left apart by the central government, increase their resentment towards the Rohingya.³⁸

3.2. The violence of the second half of the 20th century and its causes

All this complex interaction of historical and ethnical divisions, encouraged by the British presence and the War, resulted in systemic discrimination and violence. We can trace it back to independence in 1948. The Rohingyas felt excluded from the negotiations of the Union Treaty (1947), as their representatives were not invited even if the British had recognized them as a distinct ethnic group after their help.³⁹

During the 50s, the expression of a separate Muslim identity with the will to create a separate state or an autonomous region emerged. This evolved towards a rebellion against the government and a posterior guerrilla-war, the Mujahid insurrection. Although the rebels were defeated in 1954, the last fighters did not surrender until six years later. After it, a younger generation of Muslims started pushing for identity and autonomy, to which they would later identify the term "Rohingya", giving them a new sense of unity. Unlike their fight-focused predecessors, they resorted to English messages and media, they united their ethnic claims with political goals and

³⁶ Nurain, "Introduction of Arakan (Burma) Myanmar"

³⁷ Sardiña, "Rohingya and national identities in Burma"

³⁸ Amnesty International, "*Caged without a roof*", 26

³⁹ Nurain, "Introduction of Arakan (Burma) Myanmar"

differentiated themselves from other Muslim groups.⁴⁰ Their political goals, however, could only be advanced by the recognition of their members as a distinct national ethnic group, something to what the authorities fervently opposed.⁴¹

3.3. A systemic bias: stateless and discriminated

Following the insurrection and growth of the political movement, the situation worsened for Rohingyas. As they were deprived of citizenship, they are defined as stateless. This status is used as a validation for increasing discrimination by the government and other ethnic groups.⁴² The last decades, fundamental rights such as register newborn infants or appearing in residency lists, meaning there is no proof of residence in the register, have been extremely complicated. For those who left, without possibility to prove their previous residence or acquire citizenship, legally to return is impossible.

According to several NGOs and humanitarian organizations, there is institutionalized discrimination against the Rohingyas maintained through every institution of the system. This has been even more visible after 2012, when the reforms being made were interrupted by an outburst of violence between Buddhist and Rohingya and other Muslim groups after the rape of a Buddhist woman by, allegedly, Muslims. These events lead to tens of deaths and the grievance of racial tensions. The government's response consisted of systematic and coordinated attacks targeting the Rohingya ethnic group. Again, impunity persisted.⁴³ In fact, even if the relationship between the Rakhine Buddhists and the Rohingya Muslims was tense, the situation became evidently worst after 2012, when business dealings and friendships were definitely broken.

In its report "Caged without a roof", Apartheid in Myanmar's Rakhine state' (2017), Amnesty International identified several violations of human rights due to systemic discrimination, such as: denial of the right to a nationality, violations of the right of free movement, violation of economic and social rights, such as access to health, education, livelihood and food, freedom of religion or social and political exclusion,

⁴⁰ Leider, *Rohingya: The History of a Muslim Identity in Myanmar*, 13

⁴¹ Renaud Egretreau and François Robinne, *Metamorphosis: Studies in Social and Political Change in Myanmar* (Singapore: NUS Press, 2016), 155

⁴² Zawacki, 'Defining Myanmar's "Rohingya Problem"', 19

⁴³ Amnesty International, "Caged without a roof", 22

for example through the restriction of employment. Apart from the policies itself, the government has not only not challenged discriminatory attitudes and racial tensions, but fostered them.

3.4. The last outbreak (2017)

Even though there was violence in Myanmar before the start of the current crisis, we can define its beginning on the 25th of August 2017. That day, more than 20 border police posts were attacked by Rohingya militants from the Arakan Rohingya Salvation Army (ARSA). The action resulted in 71 deaths, including 12 members of the security forces. This represented the worst outbreak of violence that Myanmar had suffered in weeks.⁴⁴ This came after the government decided to increase the security forces' presence in the Rakhine state previously that month, an action that drew criticism from the United Nations and boosted a massive migration to Bangladesh. The UN already warned of the possible widespread abuses occurring in the country, especially after October 2016, when a similar attack resulted in the killing of nine police officers and highly violent government response, a claim dismissed by the government.⁴⁵

The authorities declared ARSA a terrorist group and a campaign against the Rohingyas started. Villages were destroyed and people tried to leave Myanmar. According to the Human Rights Watch *World Report* (2017), military forces and ethnic militias started attacking Rohingya towns while committing crimes such as rape, arbitrary detention or massacres. Some of those who tried to escape were either killed by the military units, who opened fire towards the fleeing civilians, or by landmines near the border planted by the security forces in the escape routes.⁴⁶ As can be seen in the images, several villages were burned to avoid people from returning to their former homes.

⁴⁴ Poppy McPherson, "Dozens killed in fighting between Myanmar army and Rohingya militants", *The Guardian*, August 25, 2017, <https://www.theguardian.com/world/2017/aug/25/rohingya-militants-blamed-as-attack-on-myanmar-border-kills-12>

⁴⁵ Al Jazeera and News Agencies, "Government dismisses claims of abuse against Rohingya", *Al Jazeera*, August 6, 2017, <https://www.aljazeera.com/news/2017/08/government-dismisses-claims-abuse-rohingya-170806095548889.html>

⁴⁶ Human Rights Watch, *World Report 2017: Burma* (New York: Human Rights Watch, 2017)

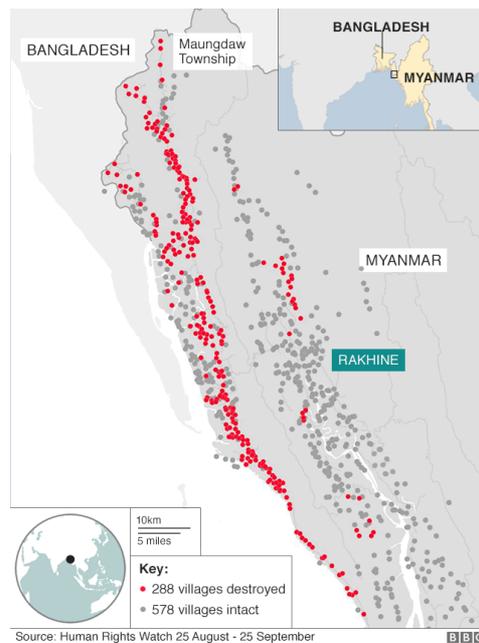
FIGURE 2: SATELLITE IMAGES OF BURNED ROHINGYA VILLAGES



(Source: HRW and BBC, 2017)

Between August and September 2017, the estimation of destroyed villages in Rakhine State, according to the Human Rights Watch, was of almost 300, as it can be seen in the following image:

FIGURE 3: DESTROYED VILLAGES IN RAKHINE STATE



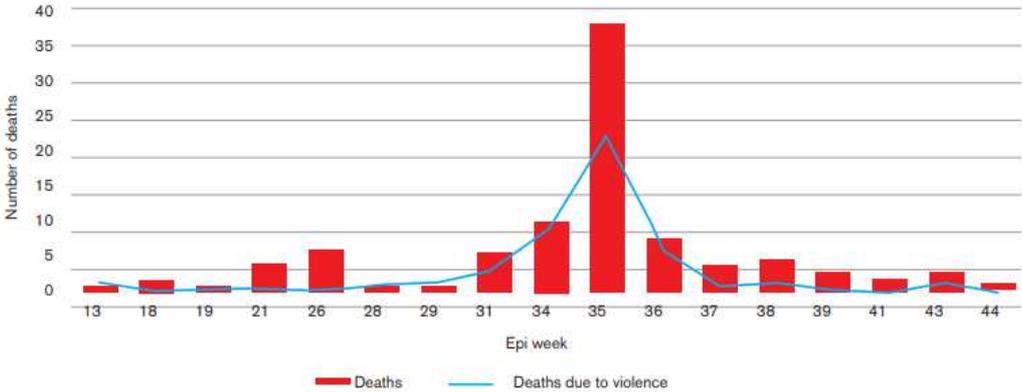
(Source: HRW and BBC, 2017)

The Burmese government designated investigative commissions, but all denied unlawful action by security forces and the UN Fact-Finding Mission, as well as human rights agencies and independent journalists, continued to be denied access.

As the UN Fact-Finding Mission described it in its Report, “what happened on 25 August 2017 and the following days and weeks was the realization of a disaster long in the making. It was the result of the systemic oppression of the Rohingya, the violence of 2012, and the government’s actions and omissions since then. It caused the disintegration of a community.”⁴⁷

In fact, not only words support this point of view, but also data. According to a Report published by Médecins Sans Frontières (MSF) (Doctors Without Borders) in March 2018, around 10,000 people died between August and September 2017, 6,700 due to violence, including around 730 children under five years old⁴⁸.

TABLE 1: MORTALITY DISTRIBUTION AMONG REFUGEES, COX’S BAZAR



Distribution of mortality among recently displaced refugees by reported cause of death and week, Kutupalong and Balukhali, Cox’s Bazar district, Bangladesh

(Source: Médecins Sans Frontières, 2018)

What are also shocking are the reasons of death. According to MSF estimations, 71.7% of the deaths were violent, 72.8% for children. Among the causes of violent death, the results are alarming⁴⁹:

⁴⁷ Independent International Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar*, (Geneva: Human Rights Council, 2018), 8

⁴⁸ Médecins Sans Frontières, *'No one was left': Death and Violence Against the Rohingya in Rakhine State, Myanmar*, (Geneva: Médecins Sans Frontières, 2018), 8

⁴⁹ Médecins Sans Frontières, *'No one was left'*, 9

TABLE 2: PERCENTAGE OF TOP 3 CAUSES OF VIOLENT DEATH

Cause of violent death	Total population	Under 5 years old
Gunshot	69.4%	59.1%
Burned in home	8.8%	14.8%
Beating	5.0%	6.9%

(Source: Médecins Sans Frontières, 2018)

FIGURE 4: COX'S BAZAR AREA



(Source: Aljazeera, 2017)

The numbers concerning refugees are also distressing. There are several estimations, as it is extremely complicated to keep track of the real number of people fleeing the country. Numbers provided by MSF or UNICEF will be used. Most of the refugees fled to Bangladesh, specifically to a region next to the border, Cox's

Bazar, where several refugee camps exist. The biggest is in Kutupalong, which has had to expand enormously.

According to MSF, the total number of Rohingya in the area at the end of January 2016 was of 900,000+, around 740,000 having arrived between the last outbreak of violence in August 2017 and January 2019.⁵⁰ UNICEF estimated that almost 60% of that number, around 400,000, were children⁵¹. The conditions in the camp are alarming, and MSF declared that they have already attended more than one million consultations since the crisis started. The main diseases are related to poor living

⁵⁰ Médecins Sans Frontières, "The 5 things we've found after one million consultations in Cox's Bazar", accessed March 14, 2019 <https://www.msf.org/weve-provided-one-million-consultations-coxs-bazar-5-things-weve-found-bangladesh-rohingya>

⁵¹ UNICEF, "Rohingya crisis", accessed March 14, 2019, https://www.unicef.org/emergencies/bangladesh_100945.html

conditions and there is a risk of an outbreak of diseases despite vaccination. Chronic conditions and maternity care are not adequately treated.⁵²

4. THE RESPONSE OF THE INTERNATIONAL COMMUNITY

4.1. Genocide: a complex concept

After the last outbreak of violence, the international community seemed to be ready to take action. The reason, partly, was the qualification of the situation as *genocide*, a complex term not commonly used due to the difficulty to prove it. However, even if several organizations had already defined it as so, it was a report released in August 2018 by the Independent International Fact-Finding Mission on Myanmar, appointed by the UN Human Rights Council what changed the rules of the game. But before its analysis, it must be understood why the term genocide is so scarcely used.

What creates a problematic application is a term in its definition: *intent*.⁵³ The Convention does not state which type of intent is required, something that has fuelled debate. Commonly, it is accepted a Romano-Germanic Civil Law concept, *dolus specialis* or specific intent. The perpetrator, therefore, commits the act seeking specifically to destroy a group. General intent is not enough; genocide requires the highest form of intent. In the *Draft Code of Crimes against the Peace and Security of Mankind Commentaries (1996)*, the International Law Commission (ILC) claimed that genocide “requires a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act”.⁵⁴ In addition, many experts and organizations have stated that “it is the specific intent to destroy an identified group either “in whole or in part” what distinguishes the crime of genocide from a crime against humanity”⁵⁵, *dolus specialis* separates genocide from other international crimes.

⁵² Médecins Sans Frontières, “The 5 things we’ve found after one million consultations in Cox’s Bazar”

⁵³ As it has been stated, Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”. This *intent* is what will be now studied.

⁵⁴ International Law Commission, “Draft Code of Crimes against the Peace and Security of Mankind Commentaries”, *Yearbook of the International Law Commission*, vol. 2, Part Two (1996): 44

⁵⁵ Office of the United Nations High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law*

However, it is extremely complex to obtain proofs of that intention. It is a “state of mind”, a non-visible implicit process which, unless confessed, is almost impossible to prove. For this reason, perpetrators most times reject to admit their intentions to make their conviction for genocide more difficult, so some who were thought to have committed genocide did escape conviction for it.⁵⁶

Even though in recent years an approach based on knowledge instead of intention has been put forward, it is still not totally accepted. It would mean that knowledge of the fact that committing an act could destroy that group would be enough to prove genocide.⁵⁷ Antonio Cassese differentiated intent and knowledge stating that intent “relates to the consequences specified in the definition of the crime”, whereas knowledge “relates to circumstances forming part of the definition of the crime”.⁵⁸ However, both factors have the same value and intent. In Article 30, the *Rome Statute* gives a combined approach to the terms, but both are necessary to prove genocide:

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly

committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (OHCHR, 2010), 12

⁵⁶ Katherine Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal*, vol. 5, iss. 3, Article 3 (2010): 242

⁵⁷ Goldsmith, "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide", 245

⁵⁸ Antonio Cassese, *International Criminal Law*, (New York: Oxford University Press, 2008), 62

It is for these factors that the term genocide is not commonly used, which gives a higher degree of importance to the UN Report, as it defined the situation in Myanmar as one of clear genocide.

4.2. Precedents to the UN Report

While the Report was a turning point, there had been other denounces from several institutions and personalities concerning the situation in Myanmar. It was a succession of precedents during years which finally compelled the international community to investigate. However, most did not define it as genocide, but as crimes against humanity and ethnic cleansing. For the purpose of this paper, we can define the former as “specific crimes committed in the context of a large-scale attack targeting civilians, regardless of their nationality. These crimes include murder, torture, sexual violence, enslavement, persecution, enforced disappearance, etc.”⁵⁹ Article 7(1) of the *Rome Statute* presents a list of the crimes against humanity and defines them as “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. On the other hand, ethnic cleansing can be defined as “the expulsion, imprisonment, or killing of an ethnic minority by a dominant majority in order to achieve ethnic homogeneity”.⁶⁰

Bearing this distinction in mind, in his opening statement for the United Nations Human Rights Council (UNHRC) 36th Session, Zeid Ra'ad Al Hussein, former UN High Commissioner for Human Rights, addressed the situation and stated that “because Myanmar has refused access to human rights investigators the current situation cannot yet be fully assessed, but the situation seems a textbook example of ethnic cleansing”.⁶¹

Many other organisations had released reports and statements denouncing the crimes being committed. They defined the situation to be one of ethnic cleansing, crimes against humanity, apartheid and even genocide. To put some other examples, we can cite “‘Caged without a roof’, Apartheid in Myanmar’s Rakhine State”, published by Amnesty International in November 2017. Anna Neistat, Amnesty

⁵⁹ TRIAL International, “Crimes against humanity”, accessed March 18, 2019, <https://trialinternational.org/topics-post/crimes-against-humanity/>

⁶⁰ Merriam-Webster, “Ethnic Cleansing”, accessed February 10, 2019, <https://www.merriam-webster.com/dictionary/ethnic%20cleansing>

⁶¹ Zeid Ra'ad Al Hussein, “UNHRC 36th Session: Opening Statement” (speech, Geneva, September 11, 2017)

International's Senior Director for Research, stated that "the Myanmar authorities are keeping Rohingya women, men and children segregated and cowed in a dehumanising system of apartheid. Their rights are violated daily and the repression has only intensified in recent years".⁶² The report, based on a two-year investigation concluded that the situation was one of *apartheid*.

Apartheid is a crime against humanity according to customary law, *The International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973) and Article 7(1)(j) of the *Rome Statute*. Article 7(2)(h) describes the crime of apartheid as: "inhumane acts ... in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". Amnesty International concluded that, apart from other severe violations of human rights, inhumane acts had been committed, giving the qualification of apartheid.

Previously, this Human Rights organization had also published other documents claiming the commission of crimes against humanity, for example in October 2017, with the report "My world is finished'. Rohingya targeted in crimes against humanity in Myanmar" or the previous year, in December 2016, with the report "We are at breaking point' - Rohingya: persecuted in Myanmar, neglected in Bangladesh". Other organizations, such as the Human Rights Watch, included in its once a year World Report an analysis of the situation. In addition, in September 2017, the organization published "Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 25, 2017", declaring that:

"Human Rights Watch has found that serious violations committed by members of Burma's state security forces against the Rohingya Muslim population in northern Rakhine State since August 25, 2017, amount to crimes against humanity under international law. The crimes ... include: a) forced population transfers and deportation, b) murder, c) rape and other sexual violence, and d) persecution..."⁶³

⁶² Amnesty International, "Myanmar: Rohingya trapped in dehumanising apartheid regime", accessed March 20, 2019, <https://www.amnesty.org/en/latest/news/2017/11/myanmar-rohingya-trapped-in-dehumanising-apartheid-regime/>

⁶³ Human Rights Watch, "Crimes against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State since August 25, 2017", accessed February 24, 2019,

It had also previously accused the Burmese government of crimes against humanity in 2012 in reports such as “‘All You Can Do is Pray;’ Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State” (2013).

Even the Office of the United Nations High Commissioner for Human Rights (OHCHR) published in February 2017 their Flash Report of the OHCHR mission to Bangladesh, stating that “the attacks against the Rohingya population in the area ... seem to have been widespread as well as systematic, indicating the very likely commission of crimes against humanity”.⁶⁴

Other institutions and organizations did not limit themselves to crimes against humanity and ethnic cleansing labels, but defined the situation as the UN would do it months after; genocide. To cite two examples, as early as in 2015, the International State Crime Initiative published “Countdown to annihilation: genocide in Myanmar”. Another example would be “‘They gave them long swords’: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar” a report published by the organization Fortify Rights in July 2018, a month before the UN Report.

Other personalities and politicians had also called for solutions, for example, Theresa May, Prime Minister of the United Kingdom, which, in November 2017, declared that the situation in Myanmar was “a major humanitarian crisis. It's been created by Burma's military and it looks like ethnic cleansing”.⁶⁵ This was shared by the United States, as Rex Tillerson, former Secretary of State, expressed in November 2017:

“After a careful and thorough analysis of available facts, it is clear that the situation in northern Rakhine state constitutes ethnic cleansing against the Rohingya ... Those responsible for these atrocities must be held accountable”.⁶⁶

<https://www.hrw.org/news/2017/09/25/crimes-against-humanity-burmese-security-forces-against-rohingya-muslim-population>

⁶⁴ OHCHR mission to Bangladesh, *Flash Report: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, (Geneva: OHCHR, 2017), 42

⁶⁵ David Wilkinson and James Griffiths, “UK says Rohingya crisis 'looks like ethnic cleansing'”, *CNN*, November 13, 2017, <https://www.cnn.com/2017/11/13/asia/myanmar-rohingya-uk/index.html>

⁶⁶ Department of the State, Democracy in Action, *Efforts to address Burma’s Rakhine State crisis*, (Washington DC: 2017)

Mike Pompeo, actual US Secretary of State, just before the release of the UN Report, qualified the situation as an “abhorrent ethnic cleansing of ethnic Rohingya”.⁶⁷

However, to emphasize the importance of the UN Report the analysis that will follow, it must be distinguished “ethnic cleansing” from genocide. This term, although grave, does not imply domestic or international legal actions as “genocide” or “crimes against humanity” would do.⁶⁸ This is why Pompeo, and the United States as a whole received criticism for the language used to describe the situation, as an accusation of genocide would have increased international and local public awareness, as well as support.⁶⁹

After these proofs, it is clear that the international was aware of what was happening in Myanmar. Several organizations and personalities had denounced the facts, but no effective actions were taken. It has been a situation known for years. In that context is when the UN Report was published.

4.3. The UN Report

On 27th August 2018, the Independent International Fact-Finding Mission on Myanmar released a 20-page report stating its main discoveries on the situation in Myanmar. The 18th September 2018, it was released the full report, 440 pages in length, after fifteen months collecting proofs. It was a document unprecedented in its scope.⁷⁰

According to the report, the outburst of violence commenced by the ARSA attacks and the posterior government response in 2017 were “foreseeable and planned”. The Mission identified the Tatmadaw, the armed forces of Myanmar, as the main

⁶⁷ Rich McKay, “Pompeo decries ‘abhorrent ethnic cleansing’ in Myanmar on anniversary”, *Reuters*, August 26, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-anniversary-usa/pompeo-decries-abhorrent-ethnic-cleansing-in-myanmar-on-anniversary-idUSKCN1LB06V>

⁶⁸ Robbie Gramer, “Tillerson Finally Brands Myanmar Crisis ‘Ethnic Cleansing’”, *Foreign Policy*, November 22, 2017, <https://foreignpolicy.com/2017/11/22/tillerson-finally-brands-myanmar-crisis-ethnic-cleansing-rohingya-muslims-war-crimes-genocide-state-department-asia-refugees/>

⁶⁹ Nahal Toosi, “Lawmakers demand Pompeo take a stand on “genocide” in Myanmar”, *Politico*, September 9, 2018, <https://www.politico.com/story/2018/09/26/lawmakers-pompeo-myanmar-genocide-843646>

⁷⁰ Nathan Thompson, “Myanmar: UN Fact-Finding Mission releases its full account of massive violations by military in Rakhine, Kachin and Shan States”, OHCHR, September 18, 2018, accessed February 24, 2019, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>

perpetrators, as well as other security forces such as the police or army divisions. In addition, sometimes they had help from local Rakhine men and civilians from other minorities. These were controlled by the Tatmadaw, with consistent involvement and organization. However, also ARSA is accused of severe violations of human rights.⁷¹

These violations were also incited by the government, which silences critics and amplifies hate rhetoric. Criticism or scrutiny towards authorities or the Tatmadaw are not tolerated, and those who try, such as civilians, journalists, or human rights advocates, are arrested. Hate speech is not only not targeted, but encouraged by the government, online and offline, as well as nationalism and religious and racial hatred. This has instigated discrimination, social tensions and, ultimately, violence.⁷²

As to the characteristics of the Tatmadaw operations, the Report identified four main points: (1) targeting of civilians, (2) sexual violence, (3) exclusionary rhetoric and (4) impunity. Disrespect for international humanitarian law is constant, as civilians are targeted and the principles of *distinction*, *proportionality* and *precaution* are ignored. Crimes such as indiscriminate murder, rape or burning villages can never be justified on the grounds of military necessity. In addition, sexual violence and rape have not been a punctual fact, but a systematic strategy to intimidate civilians; a war tactic that has led to a “normalization” of the practice.⁷³ All these factors have been encouraged by the exclusionary rhetoric used for decades in the country. Discrimination and exclusion have been strong since the 1960s and the state has constantly stigmatized and dehumanized Rohingyas, who are stateless. This rhetoric is now present among the whole society, not only government sources. Finally, the last characteristic is impunity. The armed forces have never had to answer for their crimes, which the state denied and dismissed. Accountability is insufficient, which exacerbates a message of no-consequences for the military.⁷⁴

After identifying the Tatmadaw strategy, the most critical part of the report turned to the crimes discovered. It identified as present the three most serious crimes under international law: genocide, crimes against humanity and war crimes. The Mission believed that the genocidal intent was proved, as the acts were similar to others

⁷¹ Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar*, 9-11

⁷² *Ibid*, 14

⁷³ *Ibid*, 14-15

⁷⁴ *Ibid*, 15-16

previously considered genocide, and the factors that determined it included the “broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence committed”.⁷⁵

As to the crimes against humanity, the Mission found “murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution, and enslavement”, being part of a “widespread and systematic attack on a civilian population”, as the *Rome Statute* states. In addition, it also suggested that, as Amnesty International claimed, apartheid was also present. In addition, the crimes against humanity could also be considered as war crimes, as, since August 2017, the Mission considered that a non-international armed conflict was occurring. However, not only the government was guilty of such crimes, but other organisations and ARSA could also be.⁷⁶

In terms of responsibility, the Report is also surprising. It identifies non-stated armed groups as responsible, helped by the authorities, militias, civil groups and other actors, and stated that the Tatmadaw exercised effective control over both its soldiers and other militias, so it could be held accountable. But here it is when the report is outstanding: it did not limit itself to groups, but gave specific names of different individual actors, such as commanders or lieutenants, for example, the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing. This is a rare occurrence, as normally a list of explicit names is never provided, especially in public documents.⁷⁷

In addition, the report affirms that, while military authorities accumulate most of the state power, civilian authorities could have used its limited influence to change the situation. The Nobel Peace Prize laureate Daw Aung San Suu Kyi, currently State Counsellor and *de facto* Head of Government, failed in using her moral authority to prevent the crimes. Both due to acts and omissions, the Mission established that the civil authorities did contribute. The organ also did take responsibility itself, declaring that the UN agencies and the UN as a whole, through the prioritization of

⁷⁵ Ibid, 16

⁷⁶ Ibid, 16

⁷⁷ Ibid, 17

development goals and quiet diplomacy, had failed to address the complex situation in Myanmar adequately.⁷⁸

The last part of the report is a series of recommendations for Burmese authorities, the international community, the UN and the UNHRC, which will be discussed in the next sections regarding the options the international community has after the publication.

5. THE ACTION: OPTIONS OF THE INTERNATIONAL COMMUNITY

5.1. A violation of international public law and R2P

104. The international community, through the United Nations, should use all diplomatic, humanitarian and other peaceful means to assist Myanmar in meeting its responsibility to protect its people from genocide, crimes against humanity and war crimes. It should take collective action in accordance with the Charter of the United Nations, as necessary.⁷⁹

A violation of international public law, international humanitarian law and human rights exist, that is undeniable; genocide, crimes against humanity and war crimes, a general situation of violence, including sexual violence, as well as a continuous violation of the Universal Declaration of Human Rights (UDHR), considered customary law, due to the statelessness state of the Rohingyas. Article 15 of the UDHR states that:

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Until now, the Myanmar authorities, especially the military, have enjoyed a high degree of impunity. The government created *ad hoc* commissions to clarify the acts, but none concluded that there was a violation of any kind, nor prosecuted anyone or provided redress for the victims. However, after the UN Mission examined those boards, it found that none meets standards of impartiality, independence and effectiveness. They concluded that “impunity is deeply entrenched in the State’s

⁷⁸ Ibid, 17-18

⁷⁹ Ibid, 19

political and legal system, effectively placing the Tatmadaw above the law.”⁸⁰ The responsibility of investigating such crimes lies in the government of the country involved and the *Rome Statute* encourages this. For example, it states issues of admissibility in its article 17:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

...

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

...

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

However, the UN Report considered the government both unable and unwilling to investigate.

Due to these violations, in Myanmar, there is a clear problem with R2P. In 2005, the government accepted the World Summit document and committed to it, but now it is failing to act under the first pillar. For this reason, now it is the turn of the UN members to keep their agreement and follow the third pillar. This would include action involving diplomatic, humanitarian and peaceful measures.⁸¹ However, R2P

⁸⁰ Ibid, 18

⁸¹ Global Center for the Responsibility to Protect, *Applying the Responsibility to Protect to Burma/Myanmar. Policy Briefing* (New York: Global Center for the Responsibility to Protect, 2010), 1

still acts more as a political, not legal tool. It tries to change the will of states and encourage good practices, but it is not an established global norm.⁸²

Nevertheless, a response from the international community is crucial. After the affirmation of those crimes, it had several options, also taking into account their commitment to R2P. Some had been proposed, but not executed. Mostly the focus has been on sanctions and other less severe actions. Now, an analysis of those possibilities, especially of legal approaches, will be conducted to understand what could and should be expected from the international sphere.

5.2. International Criminal Court (ICC)

The first option proposed in the UN Report appears in §105, stating that “the Security Council should ensure accountability for crimes under international law committed in Myanmar, preferably by referring the situation to the International Criminal Court ...”.⁸³ Firstly, it must be understood under what conditions can the ICC act. This is a court of last resort, so it does not replace domestic courts, which should act first, as stated in Article 1 of its Statute. The treaty that governs the ICC is the *Rome Statute*, created in 1998, which entered into force in 2002. It is the first permanent international criminal court. Unlike the International Court of Justice (ICJ), this Tribunal functions independently from the UN. However, its Statute does confer some powers to the Security Council (UNSC).⁸⁴

Its jurisdiction is very specific, consisting of a combination of *rationae materiae*, a material point of view – *what* are the crimes committed; *rationae temporis*, temporal point of view – *when* were the crimes committed; *rationae loci*, spatial point of view – *where* were the crimes committed; and *rationae personae*, *who* committed the crimes.⁸⁵

⁸² Allan Rock, Mel Cappe, Lois M Wilson, Hugh Segal, Brian Livingston, Michael Valpy, Marius Grinius, “Seven reasons why R2P is relevant today”, Open Canada, accessed March 24, 2019, <https://www.opencanada.org/features/seven-reasons-why-r2p-relevant-today/>

⁸³ Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar*, 19

⁸⁴ International Criminal Court (ICC) “About the ICC”, accessed February 20, 2019, <https://www.icc-cpi.int/about>

⁸⁵ Pierre D’Argent, “The ICC Jurisdiction” (Lecture, May 2018)

We must analyze each scope separately to understand the ICC power in Myanmar. As to *rationae materiae*, the Court would have jurisdiction. Article 5, “Crimes within the jurisdiction of the Court”, states that:

“1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

...”⁸⁶

As the crimes have been identified as genocide, crimes against humanity and war crimes, the Court would have *rationae materiae* jurisdiction.

As to the *rationae temporis*, Article 11 states that “1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute ...”, in 2002.⁸⁷ The crimes have been committed for years, but the genocide is ongoing and the Report identified the crimes concerning the last spark of violence. For this reason, the ICC would be able to judge the crimes in terms of temporal scope.

The problems start with *rationae loci* and *personae*. Article 12, “Preconditions to the exercise of jurisdiction”, states that:

“...

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

⁸⁶ International Criminal Court, *Rome Statute of the International Criminal Court* (Rome: United Nations, 1998), 3

⁸⁷ ICC, *Rome Statute*, 10

This means that the jurisdiction is territorial (a), personal (b) or both. The Court has jurisdiction over crimes committed on the territory of a state party, or a board, vessel or aircraft registered there, *rationae loci*. It has it also over persons with the nationality of a State party. For example, if the crime was committed on the territory of a State party, but by a national of a non-State party or by a national of a State party on a non State party territory, the ICC would have jurisdiction.⁸⁹ However, Myanmar is not a party of the *Rome Statute* and the crimes were committed by its nationals in its territory. For this reason, unless the country accepted the ICC jurisdiction following Article 12 (3), the Court cannot intervene.⁹⁰

That is why several organisations have called for the intervention of the Security Council. According to Article 13, there are three possibilities for the referral of a crime: State Party referral, UN Security Council referral and *Proprio Motu* Investigations. The former refers to a situation in which a State Party refers crimes to the ICC, being the atrocities committed on its territory or the territory of another State Party or by one of its nationals or of another State Party. The situation of Myanmar does not fall into this category.

The second possibility is the one the UN Report asked for: UNSC referral. According to Article 13, the Court can judge “(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.⁹¹ According to this, the UNSC can extend the territorial and personal scope of the ICC.⁹² The process would involve passing a resolution authorised by the UN Charter as it happened in March 2005 with Darfur and February 2011 with Libya. However, if a Permanent Member⁹³ vetoes the resolution, as with the Russian and Chinese veto in May 2014 to the referral of Syria to the ICC, the Court will not have jurisdiction.⁹⁴ The resolution has to be passed by the UNSC voting procedure of 9 affirmative votes out of 15 with

⁸⁸ Ibid, 11

⁸⁹ D’Argent, “The ICC Jurisdiction” (2018)

⁹⁰ ICC, *Rome Statute*, 10

⁹¹ Ibid, 11

⁹² D’Argent, “The ICC Jurisdiction” (2018)

⁹³ The five Permanent Members of the UNSC are: the United States, China, Russia, France and the United Kingdom.

⁹⁴ ABBA-ICC Project, “How the ICC works”, American Bar Association, accessed February 20, 2019, <https://how-the-icc-works.aba-icc.org/>

the positive vote or abstention of the Permanent Members following Article 27 of the UN Charter.⁹⁵

This is the fear of the international community, the possibility of the resolution being vetoed. The UNSC is partly a political organ, so referrals are influenced by their political nature. Even if the ICC is not part of the UN system, the recognition of the UNSC make it possible that the Court is pressured to start certain investigations rather than others or to refuse some. The Security Council should act impartially and fairly to avoid compromising the ICC due to decisions based on political interests.⁹⁶ For this reason, a veto coming from China or Russia is probable. This will be discussed in the next section of this paper.

However, the third option has already started taking shape: the start of an examination on the ICC Prosecutor's initiative. It is possible when the crimes were committed on the territory or by a national of a State Party or of a non-State Party that has consented to the Court's Jurisdiction.⁹⁷ On April 2018, the Prosecutor filed a request for the Pre-Trial Chamber on the question "whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar ("Myanmar") to the People's Republic of Bangladesh ("Bangladesh")" ⁹⁸ concerning Article 19(3)⁹⁹ of the Statute. The Prosecutor sought "jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as potentially other crimes under article 7 of the Rome Statute."¹⁰⁰ Article 7(1)(d) lists "deportation or forcible transfer of population" as a crime against humanity and under

⁹⁵ United Nations, *Charter of the United Nations*, 7

⁹⁶ Bethel Aregawi, "The Politicisation of the International Criminal Court by the United Nations Security Council Referrals", African Centre for the Constructive Resolution of Disputes, accessed March 4, 2019, <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-United-nations-security-council-referrals/>

⁹⁷ ABBA-ICC Project, "How the ICC works"

⁹⁸ Pre-Trial Chamber I, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* (The Hague: International Criminal Court, 2018)

⁹⁹ Article 19(3) of the *Rome Statute* states that: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court."

¹⁰⁰ Office of the Prosecutor of the International Criminal Court, "Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh", International Criminal Court, accessed April 4, 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>

the Court's jurisdiction.¹⁰¹ The Chamber granted authority the 6th September 2018. The Prosecutor proceeded to a preliminary examination process. This is not an investigation, but an examination of the situation to determine if an investigation can follow.

The jurisdiction comes from the fact that an element of the crime took place in Bangladesh, a state party, where most refugees head to. As the country ratified the *Rome Statute* in March 2010, the Court has jurisdiction over crimes from June 2010 onward. This would concern Article 7, crimes against humanity, not genocide (Article 6), but it is a powerful first step towards the fight against impunity. Myanmar rejected the jurisdiction of the Court completely, first denying the crimes and secondly because the country has not ratified the Statute.¹⁰² However, since March 2019, ICC officials are in Bangladesh conducting the preliminary examination. Some voices have approved the decision, such as Yanghee Lee, UN Special Rapporteur into Human Rights in Myanmar, who declared that he is "very hopeful. This is something that was unprecedented. It is a tiny step forward, but I really do wish that this would open the floodgates [of justice]".¹⁰³

As to other issues concerning the admissibility of the case, for the sake of this research, it is assumed that the admissibility assessments would be fulfilled. Concerning "complementarity", meaning the crimes being adequately investigated by another able and willing national or international court as the ICC is a court of last resort, we assume that this would not be the case. As to "gravity" of the crimes, we consider that genocide, crimes against humanity and war crimes have been proven, so the Court would probably accept the case based on these two premises.¹⁰⁴

5.3. An *ad hoc* tribunal

Another solution would be following an action already used in other genocide cases: the creation of an *ad hoc* tribunal. This is also a solution proposed by the UN Report

¹⁰¹ ICC, *Rome Statute* (1998), 3

¹⁰² Simon Lewis, "Myanmar says International Criminal Court has no jurisdiction in Rohingya crisis" *Reuters*, September 7, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-icc/myanmar-says-international-criminal-court-has-no-jurisdiction-in-rohingya-crisis-idUSKCN1LN22X>

¹⁰³ Tom Miles, "ICC officials visit Bangladesh to look into Myanmar case: U.N. investigator", *Reuters*, March 11, 2019, <https://www.reuters.com/article/us-myanmar-rohingya-un-icct/icc-officials-visit-bangladesh-to-look-into-myanmar-case-un-investigator-idUSKBN1QS1R8>

¹⁰⁴ ABBA-ICC Project, "How the ICC works"

(§105).¹⁰⁵ Amnesty International in its report “Caged without a roof” (2017) demanded accountability and “If the authorities fail to ensure domestic accountability they must fully cooperate with all international efforts to ensure accountability including through investigations and prosecutions by international tribunals or foreign jurisdictions”.¹⁰⁶

The Security Council would be in charge of its creation. The power of doing so comes principally from two articles, 25 and 41. The former states that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”¹⁰⁷, so Member States conferred power to the UNSC and have to follow its decisions. As to give the power to create an ad hoc tribunal, Article 41, Chapter VII of the UN Charter, states that:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”¹⁰⁸

According to the *Repertoire of the Practice of the Security Council*, mandated in Resolution 686 (VII) (1952) by the General Assembly and which provides an interpretation of the UNSC’s application of the UN Charter, “apart from sanctions, Article 41 includes measures such as the creation of international tribunals (such as those for the Former Yugoslavia and Rwanda in 1993 and 1994) or the creation of a fund to pay compensation for damage as a result of an invasion.”¹⁰⁹ This provides the legal possibility of creating an ad hoc tribunal for Myanmar.

The process would consist on passing a Resolution to create it, as Resolution 808 (22nd February 1993) for the International Criminal Tribunal for the former Yugoslavia (ICTY) and Resolution 955 (8th November 1994) for the International Criminal Tribunal for Rwanda (ICTR). Taking into account the content of these resolutions and

¹⁰⁵ Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar* (2018), 19

¹⁰⁶ Amnesty International, “Caged without a roof”, 14

¹⁰⁷ United Nations, *Charter of the United Nations*, 7

¹⁰⁸ United Nations, *Charter of the United Nations*, 9

¹⁰⁹ United Nations Security Council, “Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”, United Nations, accessed March 20, 2019, <https://www.un.org/securitycouncil/content/repertoire/actions#rel3>

the institutions created, the jurisdiction of the Tribunal would need to be explicitly stated, meaning that the territorial, temporal and geographical scope would have to be clearly stated. In addition, the types of crimes that the Tribunal can judge must always be specified. Apart from this, it must be stated whom the Tribunal can judge; individuals, organizations, army units, other legal subjects, etc. Whether it can take over national proceedings or can refer cases to the national authorities must also be debated. The ICTY and the ICTR enjoyed primacy over national jurisdictions, a possibility in the present case, contrary to the ICC, which only has complementary jurisdiction and cannot take over national courts.¹¹⁰ Then, a Statute assembling all the information would be written.

In the same way as the UNSC referral, the Resolution has to be passed by the UNSC voting procedure of 9 affirmative votes out of 15 with the favorable vote or abstention of the Permanent Members.¹¹¹ Again, the possibility of veto is feared.

Another option related to ad hoc tribunals is “hybrid” tribunals. Some features are shared with the more traditional ad hoc courts, such as independent judges or rules of procedures or that they address specific situations with a limited scope. Hybrid ones have as their main characteristic a mixed nature. They include international and domestic characteristics, being somehow part of national judiciaries.¹¹²

They have been considered effective as the combination of domestic and international actors and procedures do respect sovereignty and better interaction with the local culture is possible. They have also been criticised, on the one hand, due to an inappropriate reliance on allegedly undemocratic domestic judiciaries and, on the other hand, a significant international presence involved in domestic affairs.¹¹³ However, hybrid courts will not be considered in this Project as, firstly, it is not a recommendation from the respective institutional reports and, secondly and most importantly, because the government of Myanmar is considered incapable and

¹¹⁰ D’Argent, “The ICC Jurisdiction” (2018)

¹¹¹ United Nations, *Charter of the United Nations*, 7

¹¹² Library of the Graduate Institute of International and Development Studies, “International Tribunals”, Graduate Institute of International and Development Studies, accessed March 27, 2019, <http://libguides.graduateinstitute.ch/icl/hybrid>

¹¹³ Caitlin E. Carroll, “Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State”, Law School Student Scholarship, accessed April 4, 2019, https://scholarship.shu.edu/student_scholarship/90

unwilling to prosecute the crimes, so its judiciary would not be appropriate for this task, at least presently.

5.4. Humanitarian intervention

The international community and the reports related to the Myanmar situation opted for a judicial and peaceful remedy. In §104, the UN Report recommends that “the international community, through the United Nations, should use all diplomatic, humanitarian and other peaceful means to assist Myanmar in meeting its responsibility to protect...”.¹¹⁴ However, to make this analysis truthful to the different possibilities, humanitarian intervention is included.

In fact, some international leaders have asked for a military solution. Mahathir Mohamad, Prime Minister of Malaysia, a country pushing for stronger measures towards Myanmar, stated that robust action is needed. When asked which form, he claimed that maybe military action is necessary, as genocide would be reason enough to do it, and that “the world needs to sit down and think about the limits of non-interference”. A UN Force engagement would be an option.¹¹⁵ Some authors have declared that the Rohingyas need an international UN-based coalition to “pool their respective diplomatic, commercial, political and even military influences” to end the genocide.¹¹⁶

Other international actors have raised their voices too. For example, the Iranian government had previously called for a “NATO-like joint military force that can intervene in such situations” for Muslim countries. The deputy head of the Parliament said that “the crimes of the government of Myanmar will not be halted without using military force”. Iranian institutions have condemned the lack of action of the West towards the Rohingya Muslims in Myanmar.¹¹⁷ If the international community refuses

¹¹⁴ Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar* (2018), 19

¹¹⁵ *A Conversation With Mahathir Mohamad*, YouTube video, 48:44, posted by the “Council on Foreign Relations”, October 4, 2018, https://youtu.be/JfwHmy_3UDQ

¹¹⁶ Maung Zarni, Natalie Brinham, “Ensuring the Safety of Rohingyas as a National Minority Inside Myanmar: Who? How?”, Middle East Institute, accessed February 20, 2019, <https://www.mei.edu/publications/ensuring-safety-rohingyas-national-minority-inside-myanmar-who-how>

¹¹⁷ Ahmad Majidyar, “Iranian Leaders Call for Forming “Joint Islamic Army” to Defend Myanmar Muslims”, Middle East Institute, accessed April 10, 2019, <https://www.mei.edu/publications/iranian-leaders-call-forming-joint-islamic-army-defend-myanmar-muslims>

to help this minority, Muslim states can start an action and if they are the only ones acting, the international community's reputation would be at stake.¹¹⁸

However, the international community does not seem eager to respond. The 2011 Libyan intervention through Resolution 1973, which overthrew Muammar al-Qaddafi's regime, attracted criticism due to its result and the fact that some countries saw it as using R2P to cover a regime change. This situation is a factor that limits humanitarian interventions.¹¹⁹ Syria has also been a controversial issue. In addition, the way the intervention would be pursued is complex. As it would require a UNSC resolution, Russia and China, historically against direct military UN intervention, would perhaps veto the proposal due to political interests.

At the moment, humanitarian intervention is not seen as a viable option and has not been officially proposed. However, it must be revised in case the development of the crisis leads to it.

5.5. Refugees' repatriation (Bangladesh)

Another international actor must be taken into account: Bangladesh. Most of the refugees fleeing Myanmar is currently in Cox's Bazar. Around a million Rohingyas are there, and Bangladesh cannot support anymore the pressure this involves.

For this reason, in late October 2018, the governments of this country and Myanmar signed a deal to start the repatriation of refugees. However, the only actor indeed advocating for repatriation is Bangladesh. This country, overpopulated and with infrastructure deficiencies, has reached a breaking point. Myanmar, on the other hand, is not truly willing to take back the refugees and the agreement seemed an excuse to ease international pressure.¹²⁰

The initiative failed due to two factors, refugees and the international community. As the return, starting on November 15th, had to be voluntary, the refugees chosen to be

¹¹⁸ John Feffer, "What are We Doing to Protect the Rohingya?", *Fair Observer*, accessed February 20, 2019, https://www.faiobserver.com/region/asia_pacific/rohingya-refugees-myanmar-rakhine-r2p-latest-news-81721/

¹¹⁹ Jayshree Bajoria and Robert McMahon, "The Dilemma of Humanitarian Intervention", Council on Foreign Relations, accessed March 26, 2019, <https://www.cfr.org/backgrounder/dilemma-humanitarian-intervention>

¹²⁰ Nasir Uddin, "Ongoing Rohingya repatriation efforts are doomed to failure", *Al Jazeera*, November 22, 2018, <https://www.aljazeera.com/indepth/opinion/ongoing-rohingya-repatriation-efforts-doomed-failure-181122124753014.html>

repatriated had to specifically agree to return to Myanmar. Bangladeshi authorities encountered protests at the refugee camps and complete lack of cooperation. The refugees do not want to return if their safety is not ensured by an international body and Myanmar guarantees that their demands for justice and citizenship, as well as the possibility of returning to their original villages, are met. The repatriation was delayed to 2019.¹²¹ In fact, refugees were excluded from the negotiations between Myanmar and Bangladesh, so they were never asked what their desires were.¹²² The UN has also repeatedly warned that the repatriation conditions do not ensure Rohingyas' safety, so it has strongly advised against this action.¹²³

The repatriation process has, therefore, not started. But Bangladesh cannot deal with this situation alone anymore. On 28th February 2019, the foreign secretary Shahidul Haque told the UNSC that they "regret to inform the council that Bangladesh would no longer be in a position to accommodate more people from Myanmar". Bangladesh had been praised for its welcoming position, but the situation in Cox's Bazar is unsustainable. For this reason, Haque asked the UN: "Is Bangladesh paying the price for being responsive and responsible in showing empathy to a persecuted minority population of a neighbouring country?". He criticised the lack of action of the international community and the Council and accused Myanmar of impeding repatriation.¹²⁴

5.6. Sanctions and other actions

Judicial alternatives and humanitarian intervention do not advance, at least as fast as they should. In fact, the main action from the international community has been sanctions and other less severe measures to deal with the situation in Myanmar. Humanitarian aid and relief has been continuously provided for years, and still is, so, as it is not a recent or standing-out legal measure, it will not be studied in this paper.

¹²¹ Zeba Siddiqui, "Exclusive: Rohingya repatriation, relocation plans set to be pushed back to 2019 - government official", *Reuters*, November 18, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-bangladesh-exclusive/exclusive-rohingya-repatriation-relocation-plans-set-to-be-pushed-back-to-2019-government-official-idUSKCN1NN0FC>

¹²² Nasir Uddin, "Ongoing Rohingya repatriation efforts are doomed to failure"

¹²³ Natasha Ghoneim, "Rohingya crisis: UN warns repatriation", *Al Jazeera*, January 27, 2019, <https://www.aljazeera.com/news/2019/01/rohingya-crisis-warns-repatriation-190127094704166.html>

¹²⁴ Hannah Ellis-Petersen, "Rohingya crisis: Bangladesh says it will not accept any more Myanmar refugees", *The Guardian*, March 1, 2019, <https://www.theguardian.com/world/2019/mar/01/rohingya-crisis-bangladesh-says-it-will-not-accept-any-more-myanmar-refugees>

5.6.1. Sanctions

In §105, the UN Report proposed other measures for the UNSC recommending that it “should adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law. It should also impose an arms embargo on Myanmar.”¹²⁵

We will differentiate between two types of sanctions: those established by the UN and those settled by individual countries or groups of states such as the EU. In the first case, the UNSC can authorise sanction measures under Article 41 of the UN Charter, from “comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions.”¹²⁶

In fact, in its 8381st meeting the on 24th October 2018, the members of the UNSC discussed the situation in Myanmar and the possibility to impose sanctions. China, Russia and Bolivia opposed to the meeting arguing that the Council should not be involved in country-specific missions, that there was no precedent of reporting to the UNSC by a Human Rights Council’s special mechanism and that the situation had already been discussed previously. However, the other members stressed the importance of the report and the UNSC hearing directly from Human Rights bodies.¹²⁷ The Council, however, has still to establish sanctions towards Myanmar.

Some countries have started actions. Those imposed by the EU, the US and Canada stand out, as they are the most powerful actors. The European Union started an arms embargo during the 90s. In 2012, most sanctions were lifted, but the embargo remained. With the recent violence, the 26th April 2018 the EU expanded the prohibitions and widened the arms embargo scope. In addition to the embargo on arms, munitions and equipment, the EU prohibited military training to and cooperation with the Tatmadaw. Apart from military-related sanctions, the Council

¹²⁵ Fact-Finding Mission on Myanmar, *Report of the independent international fact-finding mission on Myanmar* (2018), 19

¹²⁶ United Nations Security Council, “Sanctions”, United Nations, accessed April 13, 2019, <https://www.un.org/securitycouncil/sanctions/information>

¹²⁷ UN Meeting Coverage and Press Releases, “Head of Human Rights Fact-Finding Mission on Myanmar Urges Security Council to Ensure Accountability for Serious Violations against Rohingya”, United Nations, accessed February 20, 2019, <https://www.un.org/press/en/2018/sc13552.doc.htm>

imposed a travel ban and asset freeze to certain members of the government and does not welcome commanders of the Myanmar armed forces in the EU territory.¹²⁸

The US has been slower and quieter in its imposition of sanctions, as they fear a Myanmar-China relation to becoming closer. Their action has been to sanction four commanders and two military units. US citizens cannot engage in transactions with them and their assets and properties were frozen. Other sanctions were proposed but blocked by the Senate.¹²⁹

US' Northern neighbour, Canada, has been more firm in its sanctioning process, aligning with EU's measures. They amended the 2007 *Special Economic Measures (Burma) Regulations* to include assets freeze on seven Myanmar nationals, as the EU did, prohibitions related with transactions, services and properties, and an arms embargo and prohibitions regarding military-related activities and services.¹³⁰

The approach with sanctions has not been as severe as it could have been. However, some actors are considering additional measures which would affect enormously the economy in Myanmar if the situation does not change. The EU started a review process to decide if they remove the tariff-free access Myanmar has to the EU. This could be disastrous for Myanmar's textile sector and economy, as almost 50% of its exports go to the EU. Even though Myanmar has tried to appease its investors, Foreign Direct Investment (FDI) has declined to a third of what it was in previous periods. In addition, tourism, mainly European, has plummeted.¹³¹ Sanctions do have an impact, which can increase with the imposition of more

¹²⁸ Press office - General Secretariat of the Council, "Myanmar/Burma: EU extends and strengthens its arms embargo, and adopts a framework for targeted measures against officials responsible for serious human rights violations", Council of the EU, accessed April 20, 2019, <https://www.consilium.europa.eu/en/press/press-releases/2018/04/26/myanmar-burma-eu-extends-and-strengthens-its-arms-embargo-and-adopts-a-framework-for-targeted-measures-against-officials-responsible-for-serious-human-rights-violations/pdf>

¹²⁹ Shibani Mahtani, "U.S. sanctions Myanmar military commanders and units for their role in 'ethnic cleansing'", *The Washington Post*, August 18, 2018, https://www.washingtonpost.com/world/asia_pacific/us-sanctions-myanmar-military-commanders-and-units-for-their-role-in-ethnic-cleansing/2018/08/17/71690820-a22a-11e8-b562-1db4209bd992_story.html?utm_term=.49d378b539bf

¹³⁰ Government of Canada, "Canadian Sanctions Related to Myanmar", accessed April 14, 2018, https://international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng

¹³¹ Philip Heijmans, "Sanctions Squeeze Myanmar's Economy", *US News*, January 31, 2019, <https://www.usnews.com/news/best-countries/articles/2019-01-31/western-sanctions-squeezing-myanmars-economy>

measures. However, the scope is limited and they do not restrain enough the economy to the point of stopping the genocide and impunity.

5.6.2. Facebook

There have also been other less severe actions, such as what happened with Facebook, which has been having problems with Myanmar. In 2012, only 1.1% of the population used the internet. However, due to a deregulation of communications, foreign mobile companies entered and SIM cards prize dropped. In 2016, almost half of the population had a phone subscription. Operators, who wanted to gain an advantage, started promoting a deal: no data charges for Facebook use. Smartphones were sold with the app preinstalled. In 2014, the platform had 1.2 million users. In 2018, it had 18 million, around one third of the population. Nowadays, in Myanmar, Facebook is almost equivalent to the Internet itself.¹³²

The military took advantage of this to start a campaign against the Rohingya. They created hundreds of fake accounts used to spread fake news and hate speech. Facebook did not detect it until it was too late. Some examples of messages are: “Cut off those necks of the sons of the dog and kick them into the water”, “Stuff pig’s fat inside the damn kalar’s¹³³ mouth”, “Pour fuel and set fire so that they can meet Allah faster” or “We must fight them the way Hitler did the Jews, damn kalars!”¹³⁴

Facebook was heavily criticised as they did not deal with the situation in time. They have closed many accounts, fake and official, for example of the commander in chief of the military, cited in the UN Report. But this took until August 2018 and required enormous public pressure. Earlier this year, they banned four groups, naming them “dangerous organizations”.¹³⁵

One of the main problems was the language. In 2014, Facebook had only one content reviewer that spoke Burmese. The number was increased to four in 2015,

¹³² Steve Stecklow, “Hatebook: Inside Facebook’s Myanmar operation”, *Reuters*, August 18, 2018, <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>

¹³³ *Kalar* is a pejorative expression to refer to the Rohingyas.

¹³⁴ Stecklow, “Hatebook”

¹³⁵ Samuel Sigal, “Facebook is reckoning with its role in ‘a textbook example of ethnic cleansing’”, *Vox*, February 7, 2019, <https://www.vox.com/future-perfect/2019/2/7/18214351/facebook-myanmar-rohingya-muslims>

who had to deal with 7.3 million users. Nowadays, around 60 people are content reviewers who can speak Burmese, but this number is still too low.¹³⁶

Despite the efforts and measures taken, the problem is still ongoing. Facebook has been and still is a crucial player in hate speech and fake news diffusion, so other powerful actions are needed, but will be improbable without more external pressure.

6. THE INACTION: POSSIBLE REASONS FOR THE LACK OF RESPONSE

Even though there has been some action by the international community, it does not seem it is acting with enough promptness taking into account the gravity of the situation – a proven genocide. In this part of the paper, the possible causes for lack of an effective response will be analysed.

6.1. Veto power at the Security Council

The first complexity the situation encounters is the way UNSC resolutions are passed. Referring the case to an international tribunal or imposing sanctions would require a voting process at the Security Council in which none of the five permanent members vetoes the resolution. However, there are two which, in case they faced the voting, they would likely vote against the resolution: China and Russia.

6.1.1. The Chinese veto

The fiercest opponent to a resolution is China. There are several reasons that explain this behaviour. We could divide them between economic, political and security-related causes, which intertwine constantly.

Firstly, the economy is a key factor in the relationship China-Myanmar. The Asian giant has invested in its neighbour and has several economic interests, such as a port in Kyaukpyu, in the West of the Rakhine State, a network of roads, rails and pipelines for an easy transportation of materials and energy through that part of the country, and resources the North of the country offers. In addition, Myanmar

¹³⁶ Stecklow, "Hatebook"

represents an access to the Indian Ocean and to new trade routes.¹³⁷ China will not renounce voluntarily to its influence in the country.

Chinese reasons are also political. First and foremost, China wants to avoid foreign, meaning Western, influence and involvement in the territory. The country actively opposes a US engagement, especially taking into account the enmity between these states and the fact that China shares a border with Myanmar. When the Nobel Peace Prize winner Aung San Suu Kyi took power in 2015, China started an aggressive strategy to improve both the relationship with the government and its public image among its population, as it feared that the new leader would be more engaged with the West. The country believes that, unlike the US, they deserve a dominant presence in the territory.

The Rohingya crisis also proved useful to China in terms of influence. The country has provided military support and aid but, unlike most donors, directly to the government and not through NGOs or UN institutions. It has attracted the regional media and popular support, as it has protected Myanmar from sanctions at the Council and reduced international pressure. Even though Myanmar refused their offer to mediate in the conflict, it has embraced China's political and material support. However, Myanmar believes that a heavy reliance in China can be unbeneficial. For this reason, it has tried to cooperate with the United Nations these last years. But with the Rakhine crisis and the sanctions, China has expected that the country will turn to them seeking more support, which the Asian giant provides primarily by opposing the Security Council.¹³⁸

Lastly, concerning security, the country is important for Chinese geopolitical strategies. Militarily, China has increased its influence. Since the 90s, it has provided training for the Myanmar army, navy and air force in exchange of access to natural resources. In addition, due to the isolation from the West that Myanmar suffered, China offered military cooperation and has worked to strengthen that relationship over the years.¹³⁹

¹³⁷ USIP Senior Study Group, *China's Role in Myanmar's Internal Conflicts*, (Washington DC: United States Institute of Peace, 2018), 2-5, 17-21

¹³⁸ USIP, *China's Role in Myanmar's Internal Conflicts*, 5, 21

¹³⁹ *Ibid*, 12, 15

The Rohingya crisis does not pose a security menace, as it is not in its border, but China has interests concerning it. True peace would be translated in less need of Chinese assistance. The US and the UN could be welcomed and China would lose influence. Its support in the UNSC would not be a bargaining asset anymore. For this reason, it has defended Myanmar's national sovereignty and territorial integrity and the resolution of the conflict at the national level, with no foreign interference.¹⁴⁰

6.1.2. The Russian veto

Even though Russia tried to present itself as a neutral party, it is an important Myanmar ally that has repeatedly been supporting the government. In February 2018 they stated that:

“In our opinion, the situation in the Rakhine national region ... remains difficult but in general under control. The Myanmar authorities' planned social and economic development efforts there have in large part contributed to that”¹⁴¹

It has accused the government opponents of causing all the destruction and violence and refused to use the label of genocide. It supported Bangladesh efforts with the refugees and, as China, took a non-interventionist position to ensure national sovereignty and territorial integrity. In fact, Russia is one of the most powerful Chinese allies; their relationship is strong and they have had the same position against the West in the UNSC repeatedly.

Their primary relationship with Myanmar, however, is military in character. As the Tatmadaw prefer not to rely entirely on China, they had increased their military links with Russia and purchased military equipment and weapons from it.¹⁴² Early in 2018, they made an agreement concerning the supply of military hardware. That increases the bilateral military cooperation to which the countries had agreed upon in 2016 and ensures a stable partnership, as well as information exchange between their militaries.¹⁴³ The Ministry of Foreign Affairs declared that it was directed towards an improvement of Myanmar's defence capability and “to see a connection between this aim and the threat of ‘even greater suffering’ of the civilian population can only be the

¹⁴⁰ Ibid, 7-8

¹⁴¹ United Nations Security Council, *8179th meeting*, (New York: United Nations, 2018), 19

¹⁴² USIP, *China's Role in Myanmar's Internal Conflicts*, 15

¹⁴³ TASS, “Russian defense minister points to Russia-Myanmar developing military cooperation”, *TASS Russian News Agency*, January 20, 2018, <http://tass.com/defense/986024>

very 'rich' imagination of our colleagues from the [US] State Department.”¹⁴⁴ Russia cannot risk its relationship with China and its investment in military assets.

6.2. The American quietism towards Myanmar

Even though the US has imposed several sanctions towards Myanmar, a more robust response was expected. However, the US has not pursued a more effective and aggressive policy. There are various reasons that can explain this quietism, which contrast with other President Donald Trump's actions.

Firstly, it should be mentioned the relation between the US and the ICC. The US is not part of the ICC and has declared its intention not to become a state party, so it has no obligations under the Rome Statute. The relationship between both, which improved under the Obama administration, has notably deteriorated with President Trump. In the 73rd Session of the UN General Assembly in September 2018, he stated that:

“the United States will provide no support in recognition to the International Criminal Court. As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy. America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.”¹⁴⁵

In fact, the US threatened that same month to impose financial sanctions on judges and prosecutors of the Court and ban them from entering the country due to a case that tries to prove war crimes committed by the US in Afghanistan. In March 2015, they imposed visa restrictions and claimed to be prepared to take more measures.

¹⁴⁴ Jack Stubbs, “Russia: military supplies to Myanmar are to strengthen defences”, *Reuters*, January 26, 2018, <https://www.reuters.com/article/us-usa-russia-myanmar/russia-military-supplies-to-myanmar-are-to-strengthen-defenses-idUSKBN1FF1GN?il=0>

¹⁴⁵ Donald Trump, “Remarks by President Trump to the 73rd Session of the United Nations General Assembly” (speech, New York, September 25, 2018), White House, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>

Organisations such as HRW accused them to set a precedent which sends a message pro impunity.¹⁴⁶

This hard-line opposition to the Court could conflict with referring the crimes to the ICC through the UN Security Council. Backing a resolution would mean that it is acceptable to prosecute countries like Myanmar, which, like themselves, are not part of the ICC, but not the United States. However, in case the situation is referred to the UNSC, the US will probably not veto the resolution.

Another complex point in the inaction of the US has been its rejection towards the label of genocide. In August 2018, it was leaked to *Politico* a statement by Pompeo with regard to the presentation of the results of a State Department investigation on Myanmar. The Trump administration avoided the label of “genocide” and picked up instead “crimes against humanity” and the previously used “ethnic cleansing”. This could be due to the fact that the term could force the US to act toughly and start punitive measures towards Myanmar.¹⁴⁷

The last reason that should be analyzed is the US relation with Myanmar concerning two points: China and the change to a civilian government Myanmar of 2015. Even though the Trump administration has proven to be uninterested in relation to Myanmar, the country is important for the US international agenda. Firstly, it is well known the enmity US-China. The country has become a competition spot between the powers. The US has tried to avoid a tense relation with Myanmar as it would push the country even more towards China. It has tried to move it out of the Chinese sphere of influence and that has meant a softer position.¹⁴⁸ Secondly, accusing the government and the country would decrease the civilian power the US advocated for. The administration favoured Aung San Suu Kyi, leader of the civilian branch of the

¹⁴⁶ Lesley Wroughton, “U.S. imposes visa bans on International Criminal Court investigators - Pompeo”, *Reuters*, March 15, 2019, <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH>

¹⁴⁷ Nahal Toosi, “Leaked Pompeo statement shows debate over 'genocide' label for Myanmar”, *Politico*, August 13, 2018, <https://www.politico.com/story/2018/08/13/mike-pompeo-state-department-genocide-myanmar-775270>

¹⁴⁸ Sampa Kundu, “How Myanmar Benefits from the US-China Competition in the Indo-Pacific”, *The Diplomat*, December 8, 2018, <https://thediplomat.com/2018/12/how-myanmar-benefits-from-the-us-china-competition-in-the-indo-pacific/>

government, and removed some sanctions with the rise of the civilian government.¹⁴⁹ A punitive action towards the government could undermine the credibility of the US.

6.3. Association of Southeast Asian Nations (ASEAN)

Another potential player involved in the Rohingya crisis is ASEAN, of which Myanmar is part since 1997. There are two factors that could explain the inaction of this regional group: religion and their policies of non-interference.

The conflict mainly consists of a problem between a Buddhist majority and a Muslim minority. Countries that have an Islamic and active majority, such as Indonesia and Malaysia, have had protests that claimed for justice for the Rohingya.¹⁵⁰ However, other countries which are Buddhist or mixed have tended to support Myanmar's government. In addition, Myanmar has rejected aid coming from ASEAN Islamic countries for the Rohingyas and denied them access to the region. This situation could escalate and translate into religious and domestic problems for the countries of the organization, something they are trying to avoid.¹⁵¹

Another point to take into consideration is ASEAN's commitment to non-interference. For example, a mechanism that could be used is the ASEAN Agreement on Disaster Management and Emergency Response (AADMER). However, Article 3 states that "the sovereignty, territorial integrity and national unity of the Parties shall be respected" and, most importantly, "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party."¹⁵² That means that Myanmar has to accept humanitarian aid and intervention. That is, in part, why several members have authoritarian regimes, as the organization refuses to intervene.¹⁵³

¹⁴⁹ Editorial Board, "What is happening in Myanmar is genocide. Call it by its name.", *The Washington Post*, August 29, 2018, https://www.washingtonpost.com/opinions/global-opinions/what-is-happening-in-myanmar-is-genocide-call-it-by-its-name/2018/08/29/611a1090-aafe-11e8-a8d7-0f63ab8b1370_story.html?noredirect=on&utm_term=.51d5aba9c2ea

¹⁵⁰ Nicholas Farrelly, "Assessing the Rohingya crisis", *New Mandala*, June 13, 2018, <https://www.newmandala.org/assessing-rohingya-crisis/>

¹⁵¹ Wooyeal Paik, "Domestic politics, regional integration, and human rights: interactions among Myanmar, ASEAN, and EU", *Asia Europe Journal*, vol. 14, iss. 4 (2016): 417

¹⁵² ASEAN, *Agreement on Disaster Management and Emergency Response* (Vientiane: ASEAN, 2005), 6

¹⁵³ Paik, "Domestic politics, regional integration, and human rights: interactions among Myanmar, ASEAN, and EU", 2016

7. CONCLUSIONS

The world seems to ignore the call for help shouted by the Rohingyas. There have been several proposals, but their effectiveness has not been proved. This project has provided an analysis to answer to which have been the historical and political causes of the genocide and which has been the response of the international community.

Firstly, in terms of what was the origin of the crisis, this conflict is deeply rooted in historical intertwined with political causes that have led the Rohingya minority to statelessness and to suffer institutionalized discrimination. The last outbreak of violence was not a punctual situation, but a consequence of the ethnic tensions between Muslims and Buddhists that have been at the centre of Myanmar politics since its independence. It is evident that some conflict was bound to happen.

As to the response of the international community, it has been clear that there were enough warnings about the situation from several organizations. However, what turned international attention towards the country, at least temporarily, was the UN Report, that gave a name to the crisis: genocide. It proposed options for the international community to act. The most supported has been referring the case to the ICC and mainly legal action. However, international courts are known for its cautious and restrictive approach to the interpretation of the gravest crimes against international law, especially genocide, so it is not sure the possible verdict of the ICC. In addition, an ad hoc tribunal has also been a proposition. These actions must be taken by the Security Council, which has not commenced an adequate response. As to other options, humanitarian intervention could be a possibility, but is not seen as viable by the international community, especially taking into account the problems some interventions lead to, for example in Libya. In addition, the UNSC would have to approve it too.

The primary response consisted of the imposition of sanctions. The UN recommended this step, but its effectiveness is not apparent. Even with a transition to a more democratic government in 2015, which helped raise some sanctions, the Rohingya population have been equally discriminated, by the military and by the government. For this reason, sanctions alone, even if they are a source of international pressure, will definitely not resolve the problem.

The reason is because is rooted in an ethnic and religious conflict. Punishing perpetrators is not enough; there must be a long-term change to reshape ethnical relations in the country and build social harmony. The problem in Myanmar's legal and political institutions must be addressed to provide institutional protection to the Rohingyas and respect to the rule of law. Without measures that target the deeper problems of the system and not just the causes, the present crisis cannot and will not be solved.

This concerns the national level, but internationally we should take a critical look towards the UN system, because what causes concern at the UNSC is their national interests. This project hypothesized that the international community has not acted with enough diligence and promptness to stop the genocide. China and the US are playing their own game using Myanmar as their board. The Asian giant has been the country's saviour against sanctions and sentences due to economic, political and security reasons. They do not want to lose their investment, especially concerning the infrastructure, and reject entirely Western and American intervention. With their support, they are gaining influence in Myanmar, a commercial and military partner, and have opted, through their veto power, for non-interference. Russia would also veto the resolution, as it is the main Chinese ally at the UNSC and provides military cooperation and investment to Myanmar.

The US has answered through sanctions, but their response is weaker than expected. It has rejected to use the term "genocide", as it would compel the country to act. In addition, being one of the leading opponents to the ICC, obstructing their investigations in their territory, it is yet to be seen if they would support a case referral to this tribunal. But first and foremost, they do not want Myanmar to develop closer ties to China. Mostly for these reasons, the US has been quieter than expected. ASEAN has not given a robust response either. They commit to non-interference and do not want their members to clash due to religious reasons, as some are Buddhist and would support Myanmar's government and some Muslims, backing the Rohingyas.

What is clear is that we are witnesses of a proven genocide in the 21st century, but the response of the international community has been powerless – the hypothesis is proven. We have a Genocide Convention, Charters, the United Nations, but the

Rohingyas, seem to be the less protected and secondary actors, and the situation does not seem to be about to change. The UN system and its reliance on the UNSC are unsuccessful. The veto is being used to support national interests, not to solve international crises. Without a change in the system of voting, being an ally of one of the five permanent members is an insurance against all crimes. We have options which can be effective, but there must be a will to adopt them, which is not possible with the current enforcing mechanisms. The UNSC needs a change to adapt to the current global situation, or we will risk that situations such as the genocide in Myanmar remain unsolved and happen again.

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