

**(Re)Imagining ‘Justice’:  
Documentation of Sexual Violence against Rohingya  
Women and Girls in Myanmar**

by

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## Abstract

The Rohingya population of Myanmar have been called one of the most persecuted ethnic minorities on earth. Beyond the systemic discrimination and ongoing violations of basic human rights, *Tatmadaw* operations against Rohingya communities in Rakhine State in recent years have amounted to ethnic cleansing, if not genocide. Reports of widespread sexual violence by security forces have garnered significant international attention, increasing our collective awareness of how rape is used as a weapon of war. In light of Canada's Special Envoy to Myanmar's report recommending that investigation take place to establish an evidence base for future prosecutions, it is critical that sexual and gender-based violence crimes be adequately factored into documentation strategies. This strategy will send a message that abuses upon women's bodies are no longer regarded as mere inevitable 'spoils of war', but instead belong among the gravest of crimes, worthy of international resources and expertise to address. In order to minimize further intrusion into the lives of Rohingya survivors, it is necessary to consider the various possible justice mechanisms that may be used, and the different methods and standards of documentation that may be required for each. While early documentation efforts are encouraged so that relevant evidence is not lost, these considerations call for careful research, planning and ethical reflection. In order to contribute to this process, this thesis explores how law may operate to bring about justice for sexual and gender-based violence, and provides guidance on how to document evidence to be used for this purpose. At the same time, it recognizes that the form of justice international criminal trials can offer is inherently limited in scope. It further explores how "justice", a contested concept, is not always defined or achieved through the punishment of perpetrators alone. It therefore draws on critiques of international criminal justice to imagine other ways that justice might manifest, and then identifies the methods of documentation possible to facilitate these efforts.

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## **List of Abbreviations**

|                        |  |
|------------------------|--|
| ACRS                   | Advisory Commission on Rakhine State   |
| ARSA                   | Arakan Rohingya Salvation Army   |
| CEDAW                  | Convention on the Elimination of all Forms of Discrimination against Women                   |
| CSO                    | Civil Society Organization   |
| ECCC                   | Extraordinary Chambers in the Courts of Cambodia   |
| EoC                    | Elements of Crimes   |
| HRW                    | Human Rights Watch   |
| ICC                    | International Criminal Court   |
| ICTR                   | International Criminal Tribunal for Rwanda   |
| ICTY                   | International Criminal Tribunal for the Former Yugoslavia                                    |
| ICL                    | International Criminal Law   |
| International Protocol | International Protocol on the Documentation and Investigation of Sexual Violence in Conflict |
| MSF                    | Médecins Sans Frontières/ Doctors Without Borders  |
| NGO                    | Non-Governmental Organization  |
| OTP                    | Office of the Prosecutor (of the International Criminal Court)                               |
| SCSL                   | Special Court for Sierra Leone   |
| SGBV                   | Sexual and Gender-Based Violence   |
| UN                     | United Nations   |
| UNHCR                  | United Nations High Commissioner for Refugees  |
| UNHRC                  | United Nations Human Rights Council  |
| UNSC                   | United Nations Security Council  |

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## **Dedication**

*For the Rohingya of Myanmar.  
May they soon find justice.*

## Chapter I: Introduction

In April 2018, Myanmar was placed on a United Nations (UN) “blacklist” for credible suspicion that state actors had committed sexual violence against Rohingya women and girls.<sup>1</sup> International human rights organizations, as well as various UN bodies, have also documented allegations that Rohingya women have been systemically raped by Myanmar security forces (*Tatmadaw*), Myanmar Border Guard Police, and other militia groups. According to these accounts, rape and other forms of sexual and gender-based violence (SGBV) have been used as a weapon to terrorize Rohingya communities; a deliberate tool to drive them from their villages and out of the country.<sup>2</sup> The Myanmar government has categorically denied these accusations.<sup>3</sup>

Bangladesh now houses approximately 900,000 Rohingya refugees.<sup>4</sup> The camps in Cox’s Bazaar are filled with international humanitarian aid organizations, and frequented with visits from international journalists, diplomats, human rights organizations, and other interested parties. Thus the plight of the Rohingya has remained in the headlines, and the international community continues to consider its collective responsibility in responding to the mass violence and population displacement. Bob Rae, Canada’s Special Envoy to Myanmar, for example, recently released a report setting out recommendations for Canada’s contribution to this effort after a several-month long fact-

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<sup>1</sup> Joanne Lu, “Myanmar Armed Forces Blacklisted By UN For Committing Sexual Violence Against Rohingya” *UN Dispatch* (17 April 2018), online: < <https://www.undispatch.com/myanmar-armed-forces-blacklisted-by-un-for-committing-sexual-violence-against-rohingya/>>.

<sup>2</sup> Rick Gladstone, “Rohingya Were Raped Systematically by Myanmar’s Military, Report Says” *The New York Times* (16 November 2017), online: <<https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html>>.

<sup>3</sup> Thiri Min Zin and Roseanne Gerin, “Myanmar Rejects Evidence Presented in UN Report on Mass Sexual Violence Against Rohingya” (18 April 2018) *Radio Free Asia*, online: <<https://www.rfa.org/english/news/myanmar/myanmar-rejects-evidence-presented-in-un-report-on-mass-sexual-violence-against-rohingya-04182018172101.html>>; Ben Westcott, “Myanmar’s Military Clears Itself Over Reported Rohingya Atrocities” (14 November 2017) *CNN*, online: <<http://www.cnn.com/2017/11/13/asia/myanmar-military-rohingya/index.html>>.

<sup>4</sup> **According to the World Health Organization (WHO), as of April 2018 there are 883,868 Rohingya in Bangladesh, which includes 671,500 new arrivals since 25 August 2017:** WHO, “Rohingya Crisis – WHO Bangladesh Weekly Situation Report #21” (12 April 2018), online: <<https://reliefweb.int/report/bangladesh/rohingya-refugee-crisis-who-bangladesh-weekly-situation-report-21-12-april-2018>>.

finding mission.<sup>5</sup> The focus at the moment rightfully remains on meeting daily survival needs, including responding to the monsoon season which has already caused devastating floods amongst the camps' terrain.<sup>6</sup> However, there are some who have also begun to turn their minds to longer-term responses.

Amidst this international dialogue, increasingly voices are calling for “justice” to be served. Often these calls specifically envision a criminal law response, thus demand that the UN Security Council (UNSC) refer Myanmar to the International Criminal Court (ICC). This is not unexpected, as “law remains the dominant frame for thinking about justice”.<sup>7</sup> For many, accountability and ending impunity have become synonymous with the concept of justice. Indeed, a legal response, especially an international criminal law (ICL) response, carries “an emotional and moral legitimacy that can have considerable political force.”<sup>8</sup> In particular, punishment of crimes predominantly committed against women demonstrates a shift towards greater gender equality within international legal institutions that has not always been present. While there is still work to be done in this regard, current efforts that prioritize the investigation and prosecution of SGBV crimes, send a message that abuses upon women’s bodies are no longer regarded as mere inevitable ‘spoils of war’, but instead belong among the gravest of crimes, worthy of international resources and expertise to address. ICL, and the rituals of the justice system within which it operates, thereby carry symbolic meanings that extend beyond the individuals directly affected, into the broader global society by “establishing and

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<sup>5</sup> Report of the Prime Minister’s Special Envoy to Myanmar, the Honourable Bob Rae, “‘Tell Them We’re Human’ What Canada and the World Can Do About the Rohingya Crisis” (3 April 2018), online: [http://international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/rep\\_sem-rap\\_esm.aspx?lang=eng#a5](http://international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/rep_sem-rap_esm.aspx?lang=eng#a5).

<sup>6</sup> Jonathon Gatehouse, “Monsoon rains mean greater peril for Rohingya refugees, aid workers warn” (3 April 2018) *CBC News*, online: <http://www.cbc.ca/news/thenational/national-today-newsletter-france-strikes-rohingya-migrants-1.4602772>.

<sup>7</sup> Nicola Henry, Asher Flynn and Anastasia Powell, “The Promise and Paradox of Justice: Rape Justice Beyond Criminal Law” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Pgrave Macmillian, 2015) 1 at 5.

<sup>8</sup> Hilary Charlesworth, “Feminist Methods in International Law” in Nancy E. Dowd & Michelle S. Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, 2003) 78 at 84.

communicating normative standards of sexual conduct.”<sup>9</sup> International criminal justice’s mission to end impunity thereby strives towards prevention of future harm.<sup>10</sup>

However, “justice”, a contested concept, is not always defined or achieved through the punishment of perpetrators alone. As Henry et al succinctly explain, “[l]aw, disguised as justice, may bring some satisfaction and other therapeutic gains to victim-survivors and the community more generally, but law can never fully erase the injury or long-term impacts of violence.”<sup>11</sup> Further, as conviction rates for rape and other forms of sexual violence are recognizably low, the result is that justice eludes most survivors who depend on the legal model. There are also concerns that legal processes themselves may re-traumatize survivors, or cause other harms through unmet expectations or failure to recognize all forms of violation and injury. Indeed, while the law “has the power to pronounce judgement and to construct the truth about an event, it can also silence and/or suppress other narratives and ‘truths’”.<sup>12</sup> Another problem with associating justice with “punitive, carceral punishment” is that other means of securing justice have been almost completely obscured.<sup>13</sup> While international criminal justice often proposes a ‘one size fits all’ approach, this may not always be most appropriate or beneficial depending on the particular cultural context, or the justice expectations of survivors and their communities. Inevitably, context matters for perceptions of justice and their realization.<sup>14</sup>

Thus, the possibilities of justice mechanisms for Rohingya women and girls requires further exploration. While it is not known at this time which avenue(s) will be followed, there is currently momentum for conducting documentation of the allegations of harms suffered by Rohingya communities, with the view of establishing an evidence

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<sup>9</sup> *Supra* note 7 at 5-6.

<sup>10</sup> **The ICC claims that it is “participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.”** See: International Criminal Court, *About*, online: <<https://www.icc-cpi.int/about>>.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> *Supra* note 7.

<sup>13</sup> Clare McGlynn, “Feminism, Rape and the Search for Justice” (2011) 31:4 *Oxford J Legal Stud* 825 at 826.

<sup>14</sup> Kathleen Daly, “Sexual Violence and Justice: How and Why Context Matters” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Pgrave Macmillan, 2015) 36.

base for future use.<sup>15</sup> In light of the recognition of widespread state-sanctioned sexual violence against the Rohingya, as well as Canada's feminist foreign policy objectives, it is critical at this stage, as investigative plans start to be developed, that SGBV crimes be adequately factored into documentation strategies. In order to minimize further intrusion into the lives of Rohingya survivors, while taking a trauma-informed approach, it is necessary to consider the various possible justice mechanisms that may be used, and the different methods and standards of documentation that may be required for each. While early documentation efforts are encouraged so that relevant evidence is not lost, these considerations call for careful research, planning and ethical reflection.

In order to contribute to this process, this thesis explores how law may operate to bring about justice for SGBV, and provides guidance on how to document evidence to be used for this purpose. At the same time, it recognizes that the form of justice ICL can offer is inherently limited in scope. It therefore draws on critiques of international criminal justice to imagine other ways that justice might manifest, and then identifies the methods of documentation possible to facilitate these efforts.

While the focus throughout this thesis is on varying conceptions of justice, it explicitly does not suggest that international resources should focus on this objective alone. The Rohingya crisis, as discussed below, has developed from a complex historical, socio-cultural, political, economic and religious context in Myanmar. Rohingya both inside and outside of Myanmar have a variety of urgent needs, but also exert agency, ingenuity and resilience despite their circumstances. International responses must therefore be multi-faceted; and above all, be rooted in and informed by ongoing consultations with the Rohingya themselves. The voices of Rohingya women and girls will be particularly instructive in this regard.

## **I. Research Questions**

With the above framework in mind, this thesis seeks to answer the following research question:

**In the wake of widespread state violence against the Rohingya in Myanmar, including rampant sexual and gender-based violence, how**

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<sup>15</sup> Tom Perry, "Canada and Britain call for 'credible' Rohingya investigation" *CBC News* (17 April 2018), online: <<http://www.cbc.ca/news/politics/canada-and-britain-call-for-credible-rohingya-investigation-1.4623821>>.

**should Rohingya women's experiences be documented so that future options for justice, in its diverse forms, may be preserved?**

In doing so, it will address the sub-question of *how might competing conceptions of justice influence the manner and method of this documentation?* More specifically, the following research questions will be answered:

- a) What sources of international law are applicable to SGBV committed by Myanmar state actors?
- b) What is the ICL standard of documentation, and what are the elements of crimes that need to be established through evidence collection?
- c) What are the recognized best practices for investigating and documenting evidence of SGBV in conflict situations?
- d) Is the ICL standard of documentation an appropriate standard to be used for non-law justice responses?
- e) What are some opposing views, or critiques, of the ICL standard of documentation, and what can these views tell us about different conceptions of justice?
- f) What are some alternative justice mechanisms that might be appropriate for responding to the experiences of Rohingya women and girls?
- g) What standard and method of documentation is required at this stage for ensuring that these alternative justice mechanisms will be available for use in the future?

This thesis thereby seeks to place the recognition and documentation of gendered violence at the forefront of international action and assistance in answering the calls for justice for the Rohingya.

## **II. Methodology**

Following this introduction, this thesis is divided into two main parts. **Chapter II** focuses on how to document SGBV committed against Rohingya women and girls by Myanmar security forces, for the purpose of creating an evidence-base to support an international criminal law response. This section is rooted in a feminist legal theoretical framework, which seeks to make crimes against women more visible in international forums, and posits that diligent and purposeful evidence collection at an early stage will allow for these crimes to be given greater prosecutorial priority. Working with the Rome

Statute of the ICC, I begin by identifying the specific prohibited acts for which SGBV crimes may be prosecuted under international law as potential crimes against humanity, acts of genocide, and war crimes. Applying a doctrinal approach,<sup>16</sup> I examine each of these prohibited crimes, identifying the specific elements that need to be proven through credible evidence, and reviewing international criminal case law from the ICC and *ad hoc* tribunals to identify how such elements have previously been established. I then engage in an analysis of the relevant accounts of Rohingya women, as documented and reported by international human rights and aid organizations, as well as international media sources, which lend support for the prioritization of certain avenues of investigation over others. I then identify and review publicly available best practice guidelines for the investigation and documentation of sexual violence in conflict, drawing out key lessons for reducing harm to survivors, witnesses, and investigators, as well as ensuring that the information collected is credible and reliable to meet admissibility thresholds of international criminal proceedings.

**Chapter III** takes the ICL model of investigation and documentation as a starting point for intellectual critique. It engages a variety of critical theoretical perspectives, including feminist legal theories, Third World Approaches to International Law (TWAIL), and various Rohingya viewpoints, in order to evaluate the ICL approach to documentation and justice outcomes, as informed by insights into various power relations (gender, global political and economic order, *et cetera*). In reviewing ICL through these alternative lenses, we can begin to identify the shortcomings of international retributive justice models for bringing about justice for Rohingya women. By doing so, space is opened for imagining and identifying alternative forms of justice, which might have a more transformative effect on women's lives. Within this framework of exploration, alternative mechanisms for achieving justice are identified through interdisciplinary research, and alternative methods of documentation to fit these models is discussed.

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<sup>16</sup> A 'doctrinal approach' can be defined as "research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments." See: Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 Deakin L Rev 83 at 101.

The final chapter of this thesis entitled ‘Conclusion’ will provide recommendations and concluding remarks on how to move forward with documentation efforts at this stage, based on the preceding analysis.

Prior to commencing the analytical section of this thesis, I provide an overview of the historical, political and socio-cultural causes of the current humanitarian crisis in Myanmar, in an effort to provide context for the persecution of the Rohingya. While it does not claim to be exhaustive, this section draws on academic publications, international media, human rights reports, UN findings, and other reliable sources in order to establish both the historical context, and the current accounts as described by refugees and those on the ground in Bangladesh’s refugee camps.

### III. Rohingya Context

The Rohingya are a Muslim minority group who predominantly reside in north-western Rakhine State of Myanmar. While their claim to this territory is widely contested, historical evidence situates them as permanent inhabitants prior to British colonial rule, after the territory that is now Rakhine (previously known as Arakan State) was conquered by the Burmese<sup>17</sup> in 1784.<sup>18</sup> Already oppressed by the Burmese King, the Arakanese Muslims backed the British colonizers, as did other marginalized ethnic groups such as the Karen and Shan. In turn, the British granted them state positions higher than the majority Bamar ethnic group.<sup>19</sup> The Rohingya stayed loyal to the British during World War II, which created ethnic strife with the Rakhine ethnic communities who favoured the Japanese invaders.<sup>20</sup> These divisions in loyalties contributed to fuelling ethnic and religious chauvinism against non-Bamar communities during the independence movement that would follow.<sup>21</sup>

During the 1970s and 1980s, in the absence of a homogenous ethnic identity, the military regime began to use Buddhism as the essential criterion for being a ‘true

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<sup>17</sup> **Burma was re-named Myanmar by the ruling military regime in 1962; the same time that Arakan became Rakhine:** Kazi Fahmida Farzana, “Boundaries in Shaping the Rohingya Identity and the Shifting Context of Borderland Politics” (2015) 15:2 Stud in Ethn & Nat 292 at 297.

<sup>18</sup> *Ibid* at 296.

<sup>19</sup> Francis Wade, *Myanmar’s Enemy Within: Buddhist Violence and the Making of the Muslim ‘Other’* (London: Zed Books Ltd, 2017) at 30.

<sup>20</sup> Azeem Ibrahim, *The Rohingyas, Inside Myanmar’s Hidden Genocide* (United Kingdom: C. Hurst & Co. Ltd, 2016) at 37.

<sup>21</sup> *Supra* note 19 at 30.

Burmese' in their nation-building project.<sup>22</sup> A narrative developed which depicted the military as restorers of Myanmar to its “supposed pre-colonial glory, when a Buddhist order thrived, uncontaminated by foreign influence, and all subjects of the king enjoyed an abiding sense of national unity.”<sup>23</sup> This paved the way for the gradual exclusion of the Muslim Rohingya from national belonging. Most significant has been the official claim that in Myanmar there live exactly 135 “national races” who are indigenous to the country, and the subsequent decision to base citizenship on membership in one of these groups.<sup>24</sup> The Rohingya’s absence from the list of ‘national races’ has rendered most of them without citizenship in Myanmar, and effectively stateless. Militarized efforts to register and classify the Rohingya communities in Rakhine has led to massive displacement of this population to Bangladesh on several occasions, however repatriation has always followed.<sup>25</sup> Although not proof of citizenship, Rohingya have held national registration cards at various points in history, which could be used to travel, engage in politics, and vote.<sup>26</sup> However, in response to negative public opinion about the enfranchised rights of the Rohingya, President U Thein Sein declared that all White Cards<sup>27</sup> would expire in March 2015, and subsequently seized this documentation.<sup>28</sup> Throughout these developments, the Myanmar government has cemented an exclusionary narrative of the Rohingya as “Bengalis”, illegal migrants from Bangladesh, therein refusing to acknowledge their historic residence in Myanmar or even their collective identity as a unique ethnic group.<sup>29</sup>

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<sup>22</sup> *Supra* note 20 at 37.

<sup>23</sup> *Supra* note 19 at 34.

<sup>24</sup> Nick Cheeseman, “How in Myanmar “National Races” Came to Surpass Citizenship and Exclude Rohingya” (2017) 47:3 *J Contemp Asia* 461 at 468.

<sup>25</sup> **There were allegations among that Rohingya that these registration campaigns (seen in the 1970s and again in the late 1980s), which sought to classify the Rohingya as non-citizens, were highly violent in nature. Repatriation was partly the result of international pressure, and has been widely criticized as being involuntary.** See Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas” (2017) 15:3 *J Imm & Ref Stud* 269 at 275-278.

<sup>26</sup> *Ibid* at 278.

<sup>27</sup> **Temporary identity cards issued to the Rohingya from 1995 onwards:** *Supra* note 25 at 279.

<sup>28</sup> *Supra* 25 at 280; *supra* note 20 at 10. **This was also largely in response to the spread of negative attitudes towards the Rohingya after violent incidents in 2012:** *Supra* note 19.

<sup>29</sup> Hannah Beech, “No Such Thing as Rohingya: Myanmar Erases a History” (2 December 2017) *New York Times*, online: <<https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html>>. **In a recent visit to Rohingya refugee camps in Bangladesh, Win Myat Aye, Myanmar’s social welfare minister, advised refugees that if they were to return to Myanmar, they would have to accept national verification cards stating that they were migrants from**

The human rights situation for the Rohingya in Myanmar has largely deteriorated as their legal status in the country has been nullified. Amnesty International recently declared that the conditions for the Rohingya constitute “institutionalized discrimination that amounts to apartheid”.<sup>30</sup> Their report details the sharp decline in respect for human rights of the Rohingya in recent years, citing violations to their rights to citizenship, freedom of movement, freedom of religion, and access to health care, education, work and food.<sup>31</sup> The rate of food insecurity and malnutrition caused by state policy, including restrictions on movement, is of significant concern. In 2017, the World Food Program reported that approximately two-thirds of households in Maungdaw district (with a roughly 80% Rohingya population) could not meet adequate diet needs.<sup>32</sup> Moreover, since 2005, a strict two-child policy has also been imposed exclusively on Rohingya families, which has caused many women to risk illegal and unsafe abortions.<sup>33</sup> Newly born babies are not being registered in official household records or issued birth certificates, which further limits their ability to realize their rights.<sup>34</sup> Furthermore, since widespread state-condoned communal violence overwhelming against the Rohingya began in 2012, security forces (*Tatmadaw*) have “deliberately targeted Rohingya civilian populations and [...] women, men, children, whole families and entire villages have been attacked and abused.”<sup>35</sup>

Although state violence has been committed against the Rohingya to varying degrees since independence, it has increased exponentially since a small Rohingya militant group, now known as the Arakan Rohingya Salvation Army (ARSA), organized

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**Bangladesh:** “Will Myanmar respond to Rohingya refugees’ demands?” *Al Jazeera* (12 April 2018), online: <<https://www.aljazeera.com/programmes/insidestory/2018/04/myanmar-respond-demands-rohingya-refugees-180412144230175.html>>.

<sup>30</sup> Amnesty International, “Myanmar: Rohingya trapped in dehumanizing apartheid regime” (20 November 2017), online: <<https://www.amnesty.ca/news/myanmar-rohingya-trapped-dehumanising-apartheid-regime>>.

<sup>31</sup> Amnesty International, “Caged without a Roof: Apartheid in Myanmar’s Rakhine State” (2017), online: <<https://www.amnesty.org/en/documents/asa16/7484/2017/en/>>.

<sup>32</sup> World Food Programme, “Food Security Assessment in the Northern Part of Rakhine State, Final Report” (July 2017), online: <<https://www.wfp.org/content/myanmar-food-security-assessment-northern-part-rakhine-state-july-2017>>.

<sup>33</sup> Fortify Rights, “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar” (February 2014), online: <[http://www.fortifyrights.org/downloads/Policies\\_of\\_Persecution\\_Feb\\_25\\_Fortify\\_Rights.pdf](http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf)> at 28.

<sup>34</sup> *Supra* note 31 at 37.

<sup>35</sup> *Supra* note 31 at 98.

an attack against a police outpost in October 2016, killing nine officers.<sup>36</sup> In response to this attack, the *Tatmadaw* claimed to initiate “clearance operations” amidst Rohingya communities in order to apprehend those responsible for the violence.<sup>37</sup> In reality, these operations amounted to a widespread and systematic attack against the Rohingya civilian population, including rape and murder, causing thousands to flee into neighbouring Bangladesh to seek refuge.<sup>38</sup>

Further coordinated ARSA “terrorist” attacks committed against police stations and outposts in Rakhine State on 25 August 2017, are said by the Myanmar government and state media to be responsible for the most recent wave of state violence against the Rohingya.<sup>39</sup> However, refugees in Bangladesh have described a state of extreme security lockdown in northern Rakhine State prior to August 25, and absolutely no attempt to identify ‘terrorists’ during the *Tatmadaw*’s clearance operations.<sup>40</sup> The *Tatmadaw*’s response to this “terrorist threat” has instead been a widespread indiscriminate attack on Rohingya civilian communities, which is reported to include mass murder, torture, enforced disappearances, and the burning of villages, causing almost 700,000 Rohingya refugees to flee to Bangladesh in what the United Nations (UN) has labelled a “textbook

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<sup>36</sup> Fortify Rights, “‘They Tried to Kill Us All’ Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar” (November 2017), online: <[http://www.fortifyrights.org/downloads/THEY\\_TRIED\\_TO\\_KILL\\_US\\_ALL\\_Atrocity\\_Crimes\\_a gainst\\_Rohingya\\_Muslims\\_Nov\\_2017.pdf](http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocity_Crimes_against_Rohingya_Muslims_Nov_2017.pdf)> at 6.

<sup>37</sup> Oliver Holmes, Katharine Murphy and Damien Gayle, “Myanmar says 40% of Rohingya villages targeted by army are now empty” *The Guardian* (13 September 2017), online: <<https://www.theguardian.com/world/2017/sep/13/julie-bishop-says-myanmar-mines-in-rohingya-path-would-breach-international-law>>.

<sup>38</sup> *Supra* note 36 at 6-12.

<sup>39</sup> **The Government of Myanmar labelled ARSA a terrorist organization under Myanmar law on 25 August 2017:** *Supra* note 36 at 6.

<sup>40</sup> Kaladan Press Network, “Refugee testimonies contradict Burmese government version of the August 25 “terrorist attacks” (31 October 2017), online: <<http://www.kaladanpress.org/images/document/2017/Investigative-Analysis.pdf>>.

example of ethnic cleansing”.<sup>41</sup> Since the end of August 2017, this number has grown at a rate the UN called the fastest displacement of a population since the Rwandan genocide.<sup>42</sup>

Along with other forms of violence committed by the *Tatmadaw* against the Rohingya as part of these widespread attacks, the international media and human rights organizations have also widely reported accounts of sexual violence against women.<sup>43</sup> This violence is said to have begun on the very first day of the *Tatmadaw*'s current offensive against Rohingya villages.<sup>44</sup> Pramila Patten, the UN Special Representative on Sexual Violence in Conflict, has noted a “pattern of widespread atrocities, including rape, gang rape by multiple soldiers, forced public nudity and humiliation, and sexual slavery in military captivity directed against Rohingya women and girls.”<sup>45</sup> Human Rights Watch has also documented accounts of mass rape, where women were gathered together in groups and raped or gang-raped.<sup>46</sup> This violence is allegedly being commanded, orchestrated and perpetrated by predominantly state actors – the Armed Forces of Myanmar and the Myanmar Border Guard Police – as well as non-state actors such as militias composed of Rakhine State Buddhists and other ethnic groups.<sup>47</sup> Evidence that rape has been systematically planned and used as a weapon against the Rohingya

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<sup>41</sup> *Supra* note 29 [Beech]. **Total population of the Rohingya in Myanmar prior to this violence was estimated at around 1 million, however exact figures are not known as the group was deliberately excluded from the 2014 census:** Matthew J. Walton & Susan Hayward, “Contesting Buddhist Narratives: Democratization, Nationalism, and Communal Violence in Myanmar” (2014) Policy Stud No. 71 at 5.

<sup>42</sup> Hannah Beech, “Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya” *New York Times* (24 October 2017), online: <<https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html>>.

<sup>43</sup> **While this author recognizes the reality that both men and women are victims of sexual violence in both conflict and non-conflict environments, in the Rohingya context reports indicate that this overwhelming has affected women. While the experiences of men also warrant recognition and justice, they are not the focus of this thesis.**

<sup>44</sup> Kaladan Press Network, “Rape by Command: Sexual Violence as a Weapon against the Rohingya” (February 2018), online: <<http://www.kaladanpress.org/images/document/2018/RapebyCommandWeb3.pdf>> at 25.

<sup>45</sup> Letitia Anderson, “UN envoy urges greater support for Rohingya victims of sexual violence” *UN News* (16 November 2017), online: <<http://www.un.org/apps/news/story.asp?NewsID=58109#.WntHHiMwhcw>>.

<sup>46</sup> Human Rights Watch, “All of My Body Was Pain: Sexual Violence against Rohingya Women and Girls in Burma” (16 November 2017), online: <<https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>>.

<sup>47</sup> Serajul Quadir, “U.N. official says it will raise sexual violence against Rohingya with ICC” *Reuters* (12 November 2017), online: <<https://www.reuters.com/article/us-bangladesh-myanmar/u-n-official-says-will-raise-sexual-violence-against-rohingya-with-icc-idUSKBN1DC0N7>>.

includes widespread incidence of rape, use of rape in military camps, gang rape, public rape (lack of fear of witnesses), flagrant rape of young girls, and the frequent torture, mutilation and killing of rape victims.<sup>48</sup> Indeed, the UN has stated that sexual violence is being deliberately used by the *Tatmadaw* as a ‘push factor’ for forced displacement on a massive scale, and a calculated tool of terror aimed at the extermination and removal of the Rohingya as a group.<sup>49</sup> It is important to also note that this sexual violence is not happening in a vacuum, and is often alleged to be accompanied by threats or other acts of violence against either the women themselves, or a child or other family members.<sup>50</sup>

For women who flee Myanmar after these attacks, the journey through the jungle to Bangladesh becomes all the more harrowing in light of the injuries they have suffered. These women arrive in refugee camps without having received post-rape care, often too late for emergency contraception and prophylaxis against HIV infection.<sup>51</sup> Their care in the camp may also be compromised by the stigma and shame of seeking treatment, as well as the general chaos and overcrowding of the camps.<sup>52</sup> Unfortunately, arriving in Bangladesh does not provide absolute protection for women; there are now reports of domestic and gender-based violence within the camps, as well as forced marriages, human trafficking and other forms of exploitation.<sup>53</sup> While there was at one time a secret safe space designed for especially vulnerable women in one of the camps, it was recently raided and required to permanently close.<sup>54</sup> In general, protection services are not available for women.<sup>55</sup>

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<sup>48</sup> *Supra* note 44 at 34-39.

<sup>49</sup> *Supra* note 2.

<sup>50</sup> *Supra* note 44; Jeffrey Gettleman, “Rohingya Recount Atrocities: ‘They Threw My Baby Into a Fire’” *New York Times* (11 October 2017), online: <<https://www.nytimes.com/2017/10/11/world/asia/rohingya-myanmar-atrocities.html>>.

<sup>51</sup> *Supra* note 46.

<sup>52</sup> *Supra* note 46 at 34.

<sup>53</sup> David Longstreath, “UN warns of trafficking, sexual abuse in shadow of Rohingya refugee crisis” *UN News* (14 November 2017), online: <<http://www.un.org/apps/news/story.asp?NewsID=58082#.WntQGYMwhcw>>. Chris Buckley and Ellen Barry, “Rohingya Women Flee Violence Only to be Sold into Marriage” *New York Times* (2 August 2015), online: <<https://www.nytimes.com/2015/08/03/world/asia/rohingya-women-flee-violence-only-to-be-sold-into-marriage.html>>.

<sup>54</sup> MSF, “Beyond the Exodus: Rohingya Struggle for Survival” (3 April 2018), online: Livestream <<https://livestream.com/doctorswithoutborders/WebcastRohingya2018>> (comment by Aerlyn Pfeil at 0h:59m:30s).

<sup>55</sup> *Ibid* at 1h:00m:10s.

Both the Myanmar government and the *Tatmadaw* have made statements in response to Rohingya women's accusations of rape by military personnel as reported by international sources. For instance, when journalists asked about sexual violence allegations during a government-organized trip to Rakhine in September 2017, Phone Tint, Rakhine's minister for border affairs, stated: "[Rohingya] women were claiming they were raped, but look at their appearances – do you think they are that attractive to be raped?"<sup>56</sup> Subsequently, in response to international outcry about the violence perpetrated by the *Tatmadaw* against the Rohingya including accusations of gang rape, an internal investigation was conducted by the *Tatmadaw* into military operations in Rakhine. The final report of this investigation, released in November 2017, received heavy criticism from human rights organizations as lacking credibility and impartiality.<sup>57</sup> In it, the Investigation Team found that "security forces did not commit shooting at innocent villagers and sexual violence and rape cases against women."<sup>58</sup>

Despite standing in stark contrast to the findings of many external organizations, the *Tatmadaw* report was upheld by the Myanmar government's State Counsellor, Aung San Suu Kyi.<sup>59</sup> For some, this was not unexpected, as the Myanmar government had previously responded to accusations of sexual violence by the *Tatmadaw* during clearance operations with denials including the press release headline "FAKE RAPE", and accusations that "terrorists fabricated stories with the use of social media and the internet while foreign new [*sic*] agencies spread bad news that was contrary to the ethics of the media by publishing one-sided accusations."<sup>60</sup> For others, the burn of this denial takes on an additional dimension when considered in contrast to previous critical public statements by the *de facto* leader condemning the same military's use of rape as a weapon

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<sup>56</sup> Kristen Gelineay, "Rohingya methodically raped by Myanmar's armed forces" *Associated Press* (11 December 2017), online: <<https://www.apnews.com/5e4a1351468f4755a6f861e39ec782c9>>.

<sup>57</sup> Human Rights Watch, "Burma: Army Report Whitewashes Ethnic Cleansing: International Inquiry, Accountability Needed for Justice for Rohingya" (14 November 2017), online: <<https://www.hrw.org/news/2017/11/14/burma-army-report-whitewashes-ethnic-cleansing>>.

<sup>58</sup> *Supra* note 3.

<sup>59</sup> State Counsellor Office, The Republic of the Union of Myanmar, "Troops Did Not Commit Sexual Violence Nor Killed Civilians: Investigation Team", online: <<http://www.statecounsellor.gov.mm/en/node/1289>>.

<sup>60</sup> State Counsellor Office, The Republic of the Union of Myanmar, "Information Committee Refutes Rumours of Rapes" (26 December 2016), online: <<http://www.statecounsellor.gov.mm/en/node/551>>.

to terrorize other ethnic nationalities in Myanmar.<sup>61</sup> It may be surmised that she is either no longer able to speak out against the *Tatmadaw* in her current political position, or alternatively, that she is simply unwilling to do so on behalf of the Rohingya.

These official responses have created significant doubt over the prospect of an independent internal investigation into crimes committed against the Rohingya, in particular crimes of SGBV, in Myanmar. Against this background, it is therefore unlikely that the Rohingya will find justice within the domestic legal system, which already obstructs access to justice for many women who have experienced sexual violence, especially at the hands of state actors.<sup>62</sup> For this reason, the primary focus of advocacy for a legal response to these crimes has been through international mechanisms of criminal justice.

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<sup>61</sup> Nobel Women's Initiative, "Aung San Suu Kyi addresses violence against women", online: Vimeo <<https://vimeo.com/24086627>>. **Aung San Suu Kyi previously received widespread international recognition as a human rights champion for her role in Myanmar's democracy movement, culminating in her being awarded the Nobel Peace Prize in 1991.**

<sup>62</sup> Women's League of Burma, "Access to Justice for Women Survivors of Gender-based Violence Committed by State Actors in Burma" (24 November 2016), online: <<http://womenofburma.org/briefing-paper-access-to-justice-for-women-survivors-of-gender-based-violence-committed-by-state-actors-in-burma/>>.

## Chapter II: Documentation of Evidence at an International Criminal Law Standard

*What is happening to the Rohingya Muslims is a crime of genocide, and all those who are involved in this crime must be brought to the International Criminal Court. We need more international assistance.*

**- Shirin Ebadi, Nobel Laureate<sup>1</sup>**

*It is a fundamental tenet of Canada's foreign policy that those responsible for international crimes, including crimes against humanity and genocide, must be held responsible for those crimes. In order to ensure accountability and to end impunity for violations of international law, concrete and specific actions are required, such as:*

*a credible and effective process of investigation, which includes interviewing witnesses, collecting evidence and meticulous record keeping. Canada should work with like-minded countries to initiate such a process and as a matter of priority be prepared to contribute funding to it. This will require a willingness to work with like-minded countries, at the UN Human Rights Council, at the General Assembly, and at the Security Council to ensure that the most effective accountability mechanisms are put in place as soon as possible. This could include establishing a "Triple I-M" to collect and preserve evidence that could support case referrals to the ICC or to national jurisdictions carrying out prosecutions on the basis of universal jurisdiction [...].*

**- Bob Rae, Canada's Special Envoy to Myanmar<sup>2</sup>**

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<sup>1</sup> Nobel Women's Initiative, "Stop the Genocide: Dispatch from Bangladesh" (28 February 2018) online: <<http://nobelwomensinitiative.org/stop-genocide-dispatch-bangladesh/>>. **Shirin Ebadi was awarded the Nobel Peace Prize in 2003 for her efforts to promote human rights, particularly the rights of women, children and political prisoners in Iran: see Nobel Women's Initiative, "Shirin Ebadi"**, online: <<http://nobelwomensinitiative.org/laureate/shirin-ebadi/>>.

<sup>2</sup> Recommendation 14 in the Report of the Prime Minister's Special Envoy to Myanmar, the Honourable Bob Rae, "'Tell Them We're Human' What Canada and the World Can Do About the Rohingya Crisis" (3 April 2018), online: <[http://international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crises/rep\\_sem-rap\\_esm.aspx?lang=eng#a5](http://international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/rep_sem-rap_esm.aspx?lang=eng#a5)>.

## I. Introduction

Since the world has been awakened to the campaign of ethnic cleansing against the Rohingya in Myanmar,<sup>3</sup> there are increasing calls for perpetrators to be brought to justice.<sup>4</sup> Many have advocated for the ICC to take up the case, however the Office of the Prosecutor (OTP) has yet to initiate an investigation. One reason for this delayed action is Myanmar's legal status with respect to the ICC's founding treaty, the Rome Statute. As Myanmar has not ratified the Rome Statute, the ICC does not hold jurisdiction over crimes committed in Myanmar unless a case is specifically referred by the UNSC.<sup>5</sup> The UNSC has not initiated such a move, and there is reasonable fear that China and Russia, both allies of Myanmar and proponents of non-interference, would veto such a resolution in their capacity as permanent members.<sup>6</sup> An alternative approach, which has gathered some momentum, is a prosecution against Myanmar for "deportation", which is a crime against humanity pursuant to Article 7(1)(d) of the Rome Statute. This approach would circumvent Myanmar's status with respect to the ICC, and rely on the factual basis that the commission of this crime was only completed once the Rohingya had crossed into the

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<sup>3</sup> **The UN High Commissioner has called Myanmar's treatment of the Rohingya a "textbook example of ethnic cleansing"**: see UNHRC, 36th Sess, "Opening Statement by Zeid Ra'ad Al Hussein" (11 September 2017), online: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E>>.

<sup>4</sup> See for example Maung Zarni and Alice Cowley, "The Slow-Burning Genocide of Myanmar's Rohingya" (2014) 23:3 Pac Rim L & Pol'y J 683; "UN Rights Chief: Send Alleged Crimes Against Rohingya to ICC" *VOA News* (9 March 2018), online: <<https://www.voanews.com/a/un-human-rights-chief-rohingya-icc/4287632.html>>; Fortify Rights, "U.N. Security Council: Refer Myanmar to the International Criminal Court" (13 February 2018), online: <<http://www.fortifyrights.org/publication-20180213.html>>; Human Rights Watch, "UN Security Council: Refer Burma to the ICC" (3 November 2017), online: <<https://www.hrw.org/news/2017/11/03/un-security-council-refer-burma-icc>>; and Saif Khalid "Rohingya activists demand a halt to 'ongoing genocide'" *Al Jazeera* (15 November 2017), online: <<https://www.aljazeera.com/news/2017/11/rohingya-activists-demand-halt-ongoing-genocide-171115140225230.html>>.

<sup>5</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS 2187 at Art 13(b) (entered into force 1 July 2002).

<sup>6</sup> **China and Russia have already taken actions, such as recently blocking a UNSC statement of concern about the violence in Myanmar, and distancing themselves from a UN Human Rights Council resolution to send an independent fact-finding team to Myanmar.** See Michelle Nichols, "China, Russia block U.N. council concern about Myanmar violence" *Reuters* (17 March 2018), online: <<https://www.reuters.com/article/us-myanmar-rohingya-un/china-russia-block-u-n-council-concern-about-myanmar-violence-idUSKBN16O2J6>>; and Human Rights Watch, "Q&A: United Nations Fact-Finding Mission on Myanmar" (2 August 2017), online: <<https://www.hrw.org/news/2017/08/02/qa-united-nations-fact-finding-mission-myanmar>>.

territory of Bangladesh, which is a State Party. The OTP has sought a ruling on the question of jurisdiction for this approach, which is currently before the Pre-Trial Chamber.<sup>7</sup> The merit of this approach, as well as its implications for survivors of sexual violence, are yet to be determined.<sup>8</sup>

Despite this uncertainty, actions can be taken now to ensure that future prosecution remains a tangible option. In particular, careful and systemic documentation of relevant evidence at a standard that meets an ICL threshold of admissibility, is a reasonable first step. Indeed, Bob Rae, Canada's Special Envoy to Myanmar, included this step among the recommendations proposed in his final report on the Rohingya crisis.<sup>9</sup> Some documentation has already begun by aid groups, civil society, human rights organizations, international governmental agencies, and other interested parties,<sup>10</sup> however not all such efforts will meet the ICL criteria.<sup>11</sup> One important example is

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<sup>7</sup> ICC-RoC46(3)-01/18, Request to Submit an *Amicus Curiae* brief pursuant to rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecutions Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' (7 June 2018).

<sup>8</sup> **Unfortunately, this 'deportation' approach would likely preclude a subsequent referral of Myanmar to the ICC by the UNSC, and thereby the prosecution of specific crimes of sexual violence committed in Myanmar. However, it has been opined that the commission of sexual violence may be recognized within the crime of deportation, as it could satisfy the required element of a "coercive act" as the means of deportation:** Andrea Raab and Siobhan Hobbs, "The Prosecutor's Request for a Ruling on the ICC's Jurisdiction over the Deportation of Rohingya from Myanmar to Bangladesh: A Gender Perspective" (18 April 2018) *European Journal of International Law* (blog), online: <<https://www.ejiltalk.org/the-prosecutors-request-for-a-ruling-on-the-iccs-jurisdiction-over-the-deportation-of-rohingya-from-myanmar-to-bangladesh-a-gender-perspective/>>. **A further discussion of the gendered implications of this approach is beyond the scope of this thesis.**

<sup>9</sup> *Supra* note 2.

<sup>10</sup> *See for example:* Physicians for Human Rights ("Documenting Violence Against the Rohingyas Firsthand: Evidence That Can't Be Ignored" (22 December 2017), online: <<https://medium.com/@PHR/documenting-violence-against-the-rohingyas-firsthand-evidence-that-cant-be-ignored-2b87bd6a6b87>>); Human Rights Watch ("Rohingya Crisis" online: <<https://www.hrw.org/tag/rohingya-crisis>>); Amnesty International ("Myanmar" online: <<https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/>>); Fortify Rights ("'They Tried to Kill Us All' Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar" (November 2017), online: <[http://www.fortifyrights.org/downloads/THEY\\_TRIED\\_TO\\_KILL\\_US\\_ALL\\_Atrocity\\_Crimes\\_against\\_Rohingya\\_Muslims\\_Nov\\_2017.pdf](http://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocity_Crimes_against_Rohingya_Muslims_Nov_2017.pdf)>); Médecins Sans Frontières ("Myanmar/Bangladesh: MSF surveys estimate that at least 6,700 Rohingya were killed during the attacks in Myanmar" (12 December 2017), online: <<http://www.msf.org/en/article/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks>>); and Canada's Special Envoy to Myanmar (*supra* note 2).

<sup>11</sup> **While Physicians for Human Rights explicitly engages in documentation for the purpose of evidence collection for criminal proceedings, for example, other parties do not have the same**

resolution A/HRC/RES/34/22 adopted on 24 March 2017 by the UN Human Rights Council (UNHRC) on the situation of human rights in Myanmar. In it, a decision was made to:

dispatch urgently an independent international fact-finding mission, to be appointed by the President of the Human Rights Council, to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims...<sup>12</sup>

The government of Myanmar's response was to distance itself from this investigation, and declare that it had ordered its embassies not to issue visas to members of the fact-finding team.<sup>13</sup> It is noteworthy that China also disassociated itself from this resolution.<sup>14</sup> The three-member fact-finding team has instead conducted interviews among Rohingya refugees in Bangladesh and Malaysia, and will issue a final report by September 2018.<sup>15</sup> The fact-finding mission has also issued a call for "individuals, groups and organizations to submit information and/or documentation relevant to its mandate [...] in particular of human rights violations and abuses committed in Myanmar since January 2011."<sup>16</sup>

The final report of the UNHRC mission may be taken into consideration by the UNSC's decision with respect to an ICC referral; however, there are important distinctions between fact-finding missions and the collection of evidence for criminal prosecutions. Human rights fact-finding involves the "collection and analysis of information and reporting on violations mainly in relation to the state [...] rather than in

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**stated objectives. The possible problems with the latter documentation efforts is discussed further below.**

<sup>12</sup> *Situation of human rights in Myanmar*, UNHRC, 34th Sess, Supp No 34/22, A/HRC/RES/34/22 (2017) at 3.

<sup>13</sup> Human Rights Watch, "Q&A: United Nations Fact-Finding Mission on Myanmar" (2 August 2017), online: <<https://www.hrw.org/news/2017/08/02/qa-united-nations-fact-finding-mission-myanmar>>.

<sup>14</sup> *Ibid.*

<sup>15</sup> UN Human Rights Council, "News Detail: Independent International Fact Finding Mission on Myanmar concludes visit to Malaysia" (11 December 2017), online: <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22522&LangID=E>>.

<sup>16</sup> UN Human Rights Council, "Independent international fact-finding mission on Myanmar" online: <<http://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>>.

relation to individual criminal responsibility.”<sup>17</sup> These missions are mainly intended to “pressure governments to comply fully with their human rights and humanitarian law obligations”.<sup>18</sup> In contrast, international criminal prosecution-related evidence collection relates to the crimes set forth in the relevant legislation, such as the Rome Statute of the ICC, with “a view to halting, deterring and preventing crimes.”<sup>19</sup> These investigations focus on individual responsibility rather than state responsibility as a whole.<sup>20</sup> Furthermore, whereas human rights fact-finding “relies primarily on information in the public domain, criminal prosecutions often must obtain specific evidence confidentially to avoid tampering, interference or other tainting of potential evidence” and to meet chain of custody requirements.<sup>21</sup> As such, further investigative efforts into the current situation will still be required by ICC investigators, despite the UN fact-finding team’s forthcoming report. However, the distinctive purposes of these investigative efforts can together help formulate the historical narrative of state accountability and the relevant actors involved.

Other efforts have also been made to document human rights abuses against the Rohingya. Inside Myanmar, Fortify Rights has been documenting human rights violations; whereas among refugees, international organizations such as Doctors without Borders (MSF) and Human Rights Watch (HRW) have been doing the same.<sup>22</sup> This documentation is highly valuable for raising awareness and providing information about the scope and nature of these crimes, and can be used to develop and focus investigation and documentation efforts for those collecting evidence for the purpose of ICL proceedings.

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<sup>17</sup> Lyal S. Sunga, “How can UN human rights special procedures sharpen ICC fact-finding?” (2011) 15:2 Int’l J HR 187 at 189.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* **While this may include recognition that crimes such as sexual violence were part of a widespread state policy, only those individuals found most responsible for ordering these acts will likely face prosecution in the international realm.**

<sup>21</sup> *Supra* note 17 at 190.

<sup>22</sup> **HRW’s satellite imagery revealing the Myanmar government’s burning of villages, and MSF’s statistics on the estimated number of Rohingya deaths have been invaluable to understanding the scope of this crisis:** HRW, “Burma: Scores of Rohingya Villages Bulldozed” (23 February 2018), online: <<https://www.hrw.org/news/2018/02/23/burma-scores-rohingya-villages-bulldozed>>; MSF, “‘No one was left’ Death and Violence Against the Rohingya in Rakhine State, Myanmar” (2008), online: <[myanmarbangladesh-no-one-was-left-death-and-violence-against-rohingya](http://myanmarbangladesh-no-one-was-left-death-and-violence-against-rohingya)>.

In light of these efforts, and the increasing calls for justice, it has become relevant to have a clear understanding of how evidence, in particular survivor and witness interviews, should be documented so as to ensure their value and admissibility in international criminal proceedings. Furthermore, early consideration of how to document harms most commonly committed against women warrants specific attention in light of institutional biases that often fail to prioritize these crimes.<sup>23</sup>

Rohingya women, like men and children, have been subject to brutal assaults, torture, murder, destruction of their villages, forced displacement, and other crimes under international law. Based on previous investigations for ICL purposes, it is reasonable to assume that these crimes will be given the necessary attention required for prosecution. However, the collection of evidence is not naturally gender-neutral, and all too often crimes that disproportionately affect women are given less consideration. In particular, for too long acts of sexual violence have been given little priority, seen as lesser crimes and cast as too hard to investigate because of the perceived difficulty of collecting “reliable” evidence.<sup>24</sup> There has also been a tendency for legal professionals to refuse to deal with allegations of sexual violence, neglect relevant evidence, or set a higher standard for evidence.<sup>25</sup> Louise Chappell, for one, has described this as an ongoing gender bias in international law; the effect being a “leakage” of discriminatory gender norms into seemingly neutral law and policy.<sup>26</sup> In order to combat these biases, deliberate efforts must be made to recognize, investigate, and prosecute crimes disproportionately affecting women under international law. Attention to careful collection of this evidence must be paid at an early stage, to ensure evidentiary inadequacies or omissions are not the reason for failure to prosecute down the line. The creation of an evidence base for acts of SGBV is necessary for ensuring women have the chance to hold their perpetrators accountable and ending impunity for these horrendous crimes. Without credible evidence from survivors and witnesses, it will be impossible to fulfill this objective.

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<sup>23</sup> **Please note that considerations with respect to the collection of physical evidence are not discussed in this thesis.**

<sup>24</sup> Xabier Agirre Arnburu, “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases” (2010) 35:4 Law & Soc Inquiry 855 at 857.

<sup>25</sup> *Ibid.*

<sup>26</sup> Louise Chappell, “Conflicting Institutions and the Search for Gender Justice at the International Criminal Court” (2014) 67:1 Polit Res Quart 183 at 185.

Recent years have seen significant achievements in the prosecution of wartime sexual violence, including the explicit prohibition of specific crimes under the Rome Statute, and the introduction of progressive victim-friendly rules of evidence and procedure at the ICC.<sup>27</sup> There have also been a limited number of successful prosecutions of sexual violence as war crimes, crimes of genocide, and crimes against humanity. Greater attention has also been paid to gendered crimes at the investigation stage, as evidenced by the number of recent publications detailing best practices for documenting gendered crimes and sexual violence for international prosecution. As will be discussed, these advancements can provide invaluable assistance and guidance to those documenting crimes committed against Rohingya women.

Specific attention to the SGBV committed during periods of conflict is further necessary to contribute to our increasing understanding of how sexual violence is often used as a deliberate military strategy. This recognition flies in direct contrast to previous conceptualizations of rape as “an unfortunate but inevitable by-product” of war, where women become “simply regrettable victims – incidental, unavoidable casualties – like civilian victims of bombing, lumped together with children, homes, personal belongings, a church, a dike, a water buffalo or next year’s crop”.<sup>28</sup> This outdated justification conceals underlying gendered assumptions about women as property to be ‘defended’ or ‘won’ by men through warfare,<sup>29</sup> thereby perpetuating patriarchal oppression of women in times of both war and peace. Acknowledging that sexual violence may be an informed strategy rather than an incidental or opportunistic act, allows us to hold leaders accountable for the actions of their soldiers. The codification in the Rome Statute that SGBV may amount to a crime against humanity, war crime, or act of genocide is therefore significant in the conceptualization of rape as a weapon of war. UNSC Resolution 1820 also acknowledged that “women and girls are particularly targeted by the use of sexual violence [in conflict], including as a tactic of war to humiliate, dominate, instil [*sic*] fear in, disperse and/or forcibly relocate members of a community or ethnic group”, and that the use of sexual violence in this deliberate manner can

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<sup>27</sup> Nicola Henry, “The Fixation on Wartime Rape: Feminist Critique and International Law” (2014) 23:1 Soc & Leg Stud 93 at 95.

<sup>28</sup> Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975) at 32.

<sup>29</sup> *Ibid* at 38.

“significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security”.<sup>30</sup> UNSC Resolution 1820 further

*stresses the need* for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.<sup>31</sup>

[Emphasis in original]

However, experience from both the ICC and the *ad hoc* tribunals shows that courts have tended to classify these crimes as falling outside of genocidal common plans, largely because there is no evidence that sexual violence was explicitly ordered or part of a plan as initially devised by leaders.<sup>32</sup> This has the effect of skewing or under-acknowledging the role that sexual violence plays in the destruction or displacement of the affected community. As such, widespread and deliberate documentation of the scope of sexual violence in conflict provides an opportunity for prosecutors to identify patterns and other evidence potentially relevant to understanding the command structure, or identifying the strategies involved. These efforts will contribute to ending impunity for sexual violence in conflict, sending a message that such military tactics will not be tolerated.

While the focus here is on the documentation of survivor testimonies, the allegations of Rohingya women regarding their experiences of SGBV at the hands of Myanmar state actors are objectively supported by the presence of recognized indicators of sexual violence in conflict situations. These include the prevalence of sexual violence in the recent history of conflict zones, “the existence of particularly prejudicial attitudes towards women within a military hierarchy or indeed within communities, and the use of sexualized representations of women as war propaganda.”<sup>33</sup> Aid organizations working in

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<sup>30</sup> *Resolution 1820 (2008)*, S/RES/1820(2008), UNSC, 5916th Mtg (2008).

<sup>31</sup> *Ibid.*

<sup>32</sup> Sarah Schwartz, “Wartime Sexual Violence as More than Collateral Damage: Classifying Sexual Violence as Part of a Common Criminal Plan in International Criminal Law” (2017) 40 U.N.S.W.L.J. 57 at 84.

<sup>33</sup> Michelle Jarvis & Elena Martin Salgado, “Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice” in Anne-Marie de Brouwer et al, eds, *Sexual*

refugee camps in Bangladesh have also reported the prevalence of medical evidence corroborating these claims, including significant trauma and physical injuries.<sup>34</sup> This evidence provides a strong indication that these offences can be prosecuted as crimes under international law. For example, a case may be made that the commission of widespread rape and sexual slavery, amounts to a crime against humanity, a (non-international) war crime, or even an act of genocide under international law.

This chapter seeks to provide an overview of the various considerations related to documenting SGBV crimes committed against Rohingya women, in order to ensure they are given appropriate consideration at the investigation stage. This path will pave the way for similar priority if Myanmar officials are one day brought before the ICC, a domestic court on the basis of universal jurisdiction, or some other legal mechanism. It advocates the necessity for those engaging in documentation to have a clear understanding of how, what, when, and where to gather evidence that will be legally admissible, and endeavors to contribute to this understanding. While my intention is not to draw legal conclusions based on individual accounts, which is better left to impartial judges who can assess the evidence first hand, I instead consider where to prioritize documentation efforts to support potential legal cases which give due primacy to seeking justice for the specific forms of violence committed against women. Although the focus here is on the context of crimes committed against the Rohingya, this case study will elaborate principles of documentation applicable to other conflict situations as well.

## **II. Documenting Evidence for International Prosecutions**

Given the unlikelihood of a domestic legal response to SGBV committed against Rohingya women, many have put their hopes in the international community to hold perpetrators accountable for what may amount to crimes against humanity, war crimes, or even genocide. While the ICC was designed for this specific purpose, such a path to justice is not straightforward given that Myanmar is neither a state party to the Rome Statute of the ICC, nor has cooperated with international investigation efforts. As discussed above, this matter is yet to be determined.

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*Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013) 101 at 110.

<sup>34</sup> *Supra* note 10 [Fortify] at 10.

Alternatives to the ICC may include the creation of mechanisms such as the *ad hoc* tribunals we saw following the genocides in Rwanda<sup>35</sup> and the former Yugoslavia,<sup>36</sup> or a hybrid tribunal such as those developed in agreement with the governments of Sierra Leone<sup>37</sup> and Cambodia.<sup>38</sup> Bob Rae’s report also recommends the possibility of establishing an international impartial and independent mechanism (“Triple I-M”) for potential crimes in Myanmar,<sup>39</sup> similar to what was established by the UN General Assembly to assist in investigating and prosecuting international crimes committed in Syria.<sup>40</sup> Cases against Myanmar officials may also be tried in other countries’ national courts on the basis of international jurisdiction, as was recently unsuccessfully attempted by lawyers in Australia against Aung San Suu Kyi.<sup>41</sup> While international politics may also play a role in the potential for these responses, documentation of gender and sexualized crimes to an international criminal law standard, as discussed below, will help ensure that relevant evidence is not lost or overlooked if an international mechanism takes up the challenge.

#### A. STANDARD OF DOCUMENTATION

According to international prosecutor Maxine Marcus, “[t]here is no higher legal standard or higher evidentiary standard which must be reached, or proven, when the subject matter of the evidence involves crimes of sexual violence rather than when the

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<sup>35</sup> International Criminal Tribunal for Rwanda (ICTR).

<sup>36</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY).

<sup>37</sup> Special Court for Sierra Leone (SCSL).

<sup>38</sup> Extraordinary Chambers in the Courts of Cambodia (ECCC).

<sup>39</sup> *Supra* note 2.

<sup>40</sup> **“This mechanism has two main tasks: one, to collect, consolidate, preserve and analyse evidence; and second, to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law”**: Remarks by Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights, “International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic”, 34<sup>th</sup> Session of the Human Rights Council (27 February 2017), online: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21241>>.

<sup>41</sup> **In March 2018, five Australian lawyers filed a private application in the Melbourne magistrates court seeking prosecution of Aung San Suu Kyi for crimes against humanity committed against the Rohingya in Myanmar, while she was visiting that country. The case was rejected by the Attorney General on the basis that she has complete immunity as the *de facto* leader of Myanmar’s government.** See Ben Doherty, “Aung San Suu Kyi cannot be prosecuted in Australia, Christian Porter says” *The Guardian* (17 March 2018), online: <<https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-cannot-be-prosecuted-in-australia-christian-porter-says>>.

subject matter of the evidence involves non-sexual crimes.”<sup>42</sup> The creation of an evidence base of SGBV crimes that meets an ICL standard therefore can be characterized as one of the most detailed, credible and reliable thresholds of documented information available.

The ICC is not intended to replace national courts, and is only permitted to take on cases where a national justice system is unable or unwilling to conduct its own investigations and prosecutions.<sup>43</sup> Cases must also meet the admissibility thresholds set out by the Court of having ‘sufficient gravity to justify further action’.<sup>44</sup> This gives rise to the need for thorough investigation strategies for SGBV crimes at the highest level from the outset, not just to meet the complementarity test but also to adequately prosecute these cases if they ultimately go to trial.

### **A. Sources of Law**

The prohibition of sexual violence under international law has roots in several authorities, and is now well established in international criminal jurisprudence. The following sources are applicable in addressing the crimes that have been committed against the Rohingya population in Myanmar.

#### ➤ *International Treaties*

The Geneva Conventions and their Additional Protocols are the foundational international treaties at the core of international humanitarian law, which place limits on the barbarity of war by protecting those not take part in the fighting.<sup>45</sup> Although rape was not explicitly included as a grave breach or violation of Common Article 3 of the four Geneva Conventions of 1949, jurisprudence of the ICTY and ICTR found rape was covered under these provisions as torture, an inhumane act, inhuman or cruel treatment, wilfully causing great suffering or injury, or an outrage upon personal dignity.<sup>46</sup> The Fourth Geneva Convention, relating to the protection of civilian persons during times of

<sup>42</sup> Maxine Marcus, “Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law, in Anne-Marie de Brouwer et al, eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013) 211 at 212.

<sup>43</sup> *Supra* note 5 at Art 17(1).

<sup>44</sup> *Supra* note 5 at Art 17(1)(d).

<sup>45</sup> International Committee of the Red Cross, “The Geneva Conventions of 1949 and their Additional Protocols” (1 January 2014), online: <<https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>>.

<sup>46</sup> Diana Lupig, “Investigation and Prosecution of Gender-Based Crimes before the International Criminal Court” (2009) 17 Am U J Gender Soc Pol’y & L 431 at 461.

war, explicitly prohibits sexual crimes under Article 27. However, it does not include these crimes under the “grave breaches” provisions listed under Article 147 which give rise to universal jurisdiction.<sup>47</sup> Article 27 calls for protection of women against sexual violence, including rape and enforced prostitution, in terms of an attack on a woman’s honour.<sup>48</sup>

The two Additional Protocols to the Geneva Conventions of 1977 do include prohibitions against rape and other sexually violent crimes during international and non-international armed conflicts, again, treating them as attacks on honour and dignity.<sup>49</sup> Article 76(1) of Additional Protocol I enumerates that “women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.”<sup>50</sup> Article 4(2)(e) of Additional Protocol II prohibits “outrages upon *personal dignity*, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”<sup>51</sup> Despite this clear language, there is concern that by characterizing rape as crimes of honour and dignity rather than crimes of violence, the Additional Protocols mischaracterize the offences, thereby perpetuating detrimental stereotypes and concealing the sexual and violent nature of the crimes.<sup>52</sup>

The Rome Statute, which entered into force on 1 July 2002, is the first international treaty to recognize a wide range of violent sexual crimes among the most serious international offences.<sup>53</sup> Under the Rome Statute, sexual violence and some gendered crimes are recognized as crimes against humanity and war crimes.<sup>54</sup> Importantly, Article 8 states that rape and other forms of SGBV constitute grave breaches

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<sup>47</sup> David S. Mitchell, “The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine” (2005) 15 *Duke J Comp & Int’l L* 219 at 237-238.

<sup>48</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, 12 August 1949, at Art 27 (entered into force 21 October 1950).

<sup>49</sup> *Supra* note 46 at 461. **Other crimes prohibited by the Geneva Conventions and their Protocols may also take a gendered form. The abduction of males and females, or the use of child soldiers, for example, may involve sexual and domestic enslavement:** *supra* note 46 at 472.

<sup>50</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 at Art. 76(1) (entered into force 1 March 1994).

<sup>51</sup> *Ibid* at Art. 4(2)(e).

<sup>52</sup> *Ibid*.

<sup>53</sup> *Supra* note 47 at 242.

<sup>54</sup> *Supra* note 5 at Art. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

of the Geneva Conventions;<sup>55</sup> however technically this cannot be taken as an amendment to the Geneva Conventions leaving its status as a grave breach discretionary.<sup>56</sup>

Persecution against any identifiable group or collectivity on the ground of gender, and the crime of enslavement (which may include trafficking in persons, in particular women and children), are prohibited as crimes against humanity under the Rome Statute.<sup>57</sup> While the Rome Statute's definition of genocide (taken from the 1948 Genocide Convention) does not include specific SGBV crimes amongst its acts, the ICC's guiding Elements of Crimes (EoC) do recognize that rape and SGBV could be prosecuted as such.<sup>58</sup> Other crimes prohibited under the Rome Statute such as torture, mutilation, persecution, inhuman acts, and outrages upon personal dignity, may also have a sexual or gender element.<sup>59</sup>

Other international treaties of relevance include the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which have informed the definitions and interpretations of international crimes.

#### ➤ *Customary International Law*

The status of rape as a violation of customary international law is evidenced by a number of international conventions and the practice of punishing rape as an international crime, indicating uniform state practice and *opinio juris*.<sup>60</sup> It has also been argued that rape constitutes an accepted norm of *jus cogens*;<sup>61</sup> a peremptory principle of international law for which no derogation is permitted.<sup>62</sup> While *jus cogens* norms are not always straightforward to identify, developing over time through the general consensus of the international community, they presumably include “genocide, crimes against humanity,

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<sup>55</sup> *Supra* note 5 at Art 8.

<sup>56</sup> *Supra* 46 at 243.

<sup>57</sup> *Supra* note 5 at Art 7(1)(h), 7(1)(c), 7(2)(g), 7(3).

<sup>58</sup> *Supra* note 5 at Art 6 (definition of genocide).

<sup>59</sup> See *Supra* note 5 at Art 7(1)(f), 7(1)(h), 7(1)(k), 8(2)(a)ii), 8(2)(b)(x), 8(2)(b)(xxi), 8(2)(c)(i), and 8(2)(c)(ii).

<sup>60</sup> *Supra* note 46 at 459.

<sup>61</sup> *Supra* 47 at 219.

<sup>62</sup> *Supra* 47 at 228.

war crimes, torture, aggression, piracy, and slavery.”<sup>63</sup> Sexual slavery is considered to have been prohibited as a form of enslavement and thereby a peremptory norm.<sup>64</sup> The *jus cogens* nature of the prohibition of rape under international humanitarian law arises from a number of sources, including the jurisprudence of the ICTR and ICTY recognizing sexual violence as war crimes, crime against humanity, genocide, and torture; the inclusion of sexually violent crimes in the Rome Statute; the attention given to sexual violence in international treaties and U.N. documents;<sup>65</sup> and, other efforts to provide redress for sexual violence in various international and domestic mechanisms.<sup>66</sup>

➤ *International Jurisprudence*

The jurisprudence of the ICC, ICTR, ICTY and other international tribunals, although not externally binding, serve as an important source of international law, either as international customary law or as a general principle of law pursuant to Article 38(1)(b) and (c) of the Statute of the International Court of Justice.<sup>67</sup> These cases provide guidance on how crimes of sexual violence can be defined, interpreted, and prosecuted under international law. As many provisions of the Rome Statute have not yet been litigated or resolved, the importance of this jurisprudence should not be underestimated.<sup>68</sup>

## **B. ELEMENTS TO PROVE**

Having reviewed the standard and sources of applicable law, this section seeks to identify the elements of the crimes punishable under the Rome Statute for which SGBV can be prosecuted as a war crime, crime against humanity, or act of genocide. In doing so, it looks to the text of the Rome Statute itself, case law from the ICC, ICTR and ICTY,

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<sup>63</sup> *Supra* 47 at 231-232.

<sup>64</sup> *Supra* note 46 at 462.

<sup>65</sup> **See for example, UN Security Council Resolutions: 1325, 1612, 1674, 1820, 1882, 1888, 1889, 1894, 1960, pertaining to sexual violence in conflict.**

<sup>66</sup> *Supra* 47 at 234.

<sup>67</sup> Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the practice of the ICTY and the ICTR* (Cambridge: Intersentia, 2005) at 27.

<sup>68</sup> **Indeed, crimes of sexual violence have only been successfully prosecuted once by the OTP: See *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Trial Chamber Judgement (21 March 2016) (International Criminal Court), online: ICC <www.icc-cpi.int>, **and that decision was recently overturned on appeal: *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber Judgement (8 June 2018) (International Criminal Court), online: ICC <www.icc-cpi.int>.****

and the ICC's EoC.<sup>69</sup> Investigators documenting SGBV for the purpose of international criminal proceedings must be knowledgeable regarding the specific evidentiary information required to charge and convict perpetrators of these crimes. Each case will ultimately be determined on a case-by-case basis, but this section will provide an overview of the types of facts that investigators need to document.<sup>70</sup>

#### **i. Contextual (or Common) Elements**

In order to prove a criminal act of international importance, there must be evidence that satisfies the common elements of the category of international crime. War crimes, crimes against humanity, and genocide each have their own contextual elements to prove. These contextual elements are codified in the Rome Statute.

#### *Crimes against Humanity*

Certain forms of SGBV may constitute a crime against humanity where the act was committed as part of (1) a widespread or systematic attack (2) upon a civilian population, (3) in furtherance of a state or organizational policy. The EoC describe this as “a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The attack need not constitute a military attack.”<sup>71</sup> The *Bemba* trial judgment before the ICC clarified that the “requirement that the acts form part of a ‘course of conduct’ shows that the provision is not designed to capture single isolated acts, but ‘described a series of overall flow of events as opposed to a mere aggregate of random acts’.”<sup>72</sup> While there is no exact threshold of the number of acts required to make up an attack, it requires “more than a few”, “several” or “many” acts.”<sup>73</sup> Importantly, “it is not the sexual violence itself which must be widespread or systematic in order for it to constitute a crime against humanity; it

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<sup>69</sup> **The EoC was drafted to assist ICC Judges in their application and interpretation of crimes, which set out the specific elements that must be proved for a conviction under the Rome Statute.** See *Supra* note 5 at Art 9; International Criminal Court, *Elements of Crimes* (The Hague, 2011).

<sup>70</sup> **It is worth noting that the Rome Statute is specific to the ICC, and other judicial forums may be subject to legislation that varies from what is presented here.**

<sup>71</sup> *Supra* note 69 at Art 7.

<sup>72</sup> *Supra* note 68 [trial] at para 149.

<sup>73</sup> *Supra* note 68 [trial] at para 150.

is the attack on the civilian population, and where the direct perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>74</sup> A single act of rape or other form of sexual violence can be a crime against humanity if it was committed as part of a widespread or systematic attack. The “widespread” nature of the attack requires that it be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.<sup>75</sup> The assessment is both quantitative and geographical, but the temporal scope does not impact this determination.<sup>76</sup>

In the context of *Tatmadaw* operations in Rakhine, there are numerous reports documenting the extensive nature of the attacks on Rohingya communities in both 2016 and 2017. According to Fortify Rights, there is evidence of

the mass movement of Myanmar Army battalions into at least 40 villages across a relatively vast geographic area in Maungdaw Township between October and December 2016, committing targeted attacks on a large number of Rohingya civilians. The attacks resulted in the displacement of at least 94,000 Rohingya civilians from Maungdaw Township over a three-month period. The Myanmar Army-led attacks in August and September 2017 spread across all three townships in northern Rakhine State, targeting hundreds of Rohingya villages and hundreds of thousands of civilians, displacing more than half a million.<sup>77</sup>

Amnesty International further reported that, starting from 25 August 2017,

the military, often working with Border Guard Police and local vigilantes, killed an undetermined number of Rohingya women, men and children; tortured and otherwise ill-treated Rohingya women and girls, including with rape and other forms of sexual violence; laid landmines; and burned hundreds of Rohingya villages [...].<sup>78</sup>

As such, investigators are likely to find significant evidence to establish that there has been a widespread and systematic attack against the Rohingya population.

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<sup>74</sup> International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (Outcome document of the UK-led 2014 Conference on Eliminating Sexual Violence in Conflict) at 24.

<sup>75</sup> *Supra* note 68 [trial] at 163.

<sup>76</sup> *Supra* note 68 [trial] at 163.

<sup>77</sup> *Supra* note 10 [Fortify] at 14.

<sup>78</sup> Amnesty International, “Amnesty International Report 2017/18, The State of the World’s Human Rights” (2018), online: < <https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/>> at 270.

“Civilian population” is defined in Article 50 of Additional Protocol I, and includes anyone who is not a prisoner of war or a member of the armed forces.<sup>79</sup> The presence of persons who do not fit this definition within the civilian population does not deprive the population of its civilian character.<sup>80</sup> In the case of an attack, factors relevant to determining the status of the population include “the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to which the attacking force complied with the precautionary requirements of the laws of war.”<sup>81</sup> The civilian population must be “the primary, as opposed to incidental, target of the attack.”<sup>82</sup> Reports on the current crisis in Myanmar have consistently found that attacks have been carried out against Rohingya communities indiscriminately, with women and children (who are not accused of membership with ARSA) frequently being the targets of the attacks.<sup>83</sup>

The third contextual element to establish a crime against humanity is that the attack against a civilian population be committed “in furtherance of a State or organizational policy to commit such attack”.<sup>84</sup> There must therefore be a nexus between the attack and the policy, and the attack must be actively promoted or encouraged by a state or organization.<sup>85</sup> In exceptional circumstances, the policy may “be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”<sup>86</sup> The policy “need not be formalized,” and may be inferred from the presence of a variety of factors, including

- (i) that the attack was planned, directed or organized; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organizational forces in the

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<sup>79</sup> **A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.**

<sup>80</sup> *Supra* note 50 at Art 50(3).

<sup>81</sup> *Supra* note 68 at para 153.

<sup>82</sup> *Supra* note 68 at para 154.

<sup>83</sup> Amnesty International, “‘My World Is Finished’ Rohingya Targeted in Crimes Against Humanity in Myanmar” (2017), online: <<https://www.amnesty.ca/news/myanmar-new-evidence-systematic-campaign-crimes-against-humanity-terrorize-and-drive-rohingya>> at 23-24.

<sup>84</sup> *Supra* note 5 at Art 7(2)(a).

<sup>85</sup> *Supra* note 68 at 159.

<sup>86</sup> *Supra* note 68 at 159.

commission of crimes; (v) statements, instructions or documentation attributable to the State or the organization condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.<sup>87</sup>

The course of conduct must also reflect a link to the policy, such as where “a perpetrator acts to further the policy,” or engages “in conduct envisaged by the policy, and with knowledge thereof.”<sup>88</sup>

The Myanmar government has repeatedly denied that it is operating under a policy of ethnic cleansing or committing any international crimes.<sup>89</sup> Nevertheless, it has been argued that such a policy can be inferred “by the coordinated nature of the attack, the recurrent pattern of violence, the commitment of public resources to facilitate the attack, and the involvement of state forces, as well as the underlying motivation for the attack.”<sup>90</sup> While it has been argued that the Myanmar government is constitutionally barred from dictating the actions of the *Tatmadaw*, their refusal to publicly condone or independently investigate the allegations, as well as the restrictions on media and humanitarian access to the conflict area may also lend weight to this inference.

Finally, there must be evidence that the perpetrator of the act of sexual violence had knowledge of the above-described attack against a civilian population. There are indications that this has been the case in Myanmar, as, for example, there has been documented evidence that sexual violence was systemically planned and used by the *Tatmadaw* as an instrument of terror, or a “push factor” to bring about large-scale displacement of the population.<sup>91</sup>

### Genocide

SGBV can constitute an act of genocide where the contextual elements of genocide are satisfied. This involves establishing that the acts were both (1) committed “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious

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<sup>87</sup> *Supra* note 68 at 160.

<sup>88</sup> *Supra* note 68 at 161.

<sup>89</sup> Hannah Beech, “Myanmar Rejects U.N. Findings: ‘No Ethnic Cleansing or Genocide in Our Country’” *New York Times* (14 March 2018), online: <<https://www.nytimes.com/2018/03/14/world/asia/un-myanmar-rohingya-genocide.html>>.

<sup>90</sup> *Supra* note 10 [Fortify] at 14.

<sup>91</sup> Rick Gladstone, “Rohingya Were Raped Systematically by Myanmar’s Military, Report Says” *The New York Times* (16 November 2017), online: <<https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html>>.

group” and (2) amounted to an underlying act of genocide by (a) killing members of the group, (b) causing them serious bodily or mental harm, (c) deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures on them intended to prevent births, or (e) forcibly transferring children of the group to another group.<sup>92</sup> Convictions for sexual violence as genocide will be more likely if prosecutors establish that the sexual violence crimes were not isolated events but were rather connected to other crimes aimed at destroying members of the group.<sup>93</sup> The *mens rea* element of genocide is that the perpetrator was aware that the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>94</sup>

There is strong evidence that the Myanmar government is specifically targeting the Rohingya ethnic group, and it has been argued that it has been with the intention to destroy them, in whole or in part.<sup>95</sup> Underlying acts, as discussed below, have included gang rape, murder (subsequent to, or caused by rape), significant bodily and mental injury (including caused by rape), deliberate infliction of conditions of life intended to bring about the Rohingya’s physical destruction, and imposing laws aimed at limiting marriages and reducing births.<sup>96</sup> In light of these indicators, Yanghee Lee (among others) has stated that the *Tatmadaw*’s violent operations against the Rohingya bear “the hallmarks of a genocide”, though this will ultimately need to be determined by a credible international tribunal.<sup>97</sup>

### War Crimes

An act of sexual violence may constitute a war crime, or a violation of the laws and customs of war, if committed in the context of and associated with an international or non-international armed conflict, by a perpetrator who is aware of the factual circumstances that make the situation one of armed conflict. Evidence therefore needs to

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<sup>92</sup> *Supra* note 5 at Art 6.

<sup>93</sup> *Supra* note 33 at 119.

<sup>94</sup> Case Matrix Network, “Legal Requirements Sexual and Gender-Based Violence Crimes” (June 2017), online: <<http://www.legal-tools.org/en/doc/c1c17c/>> at 17.

<sup>95</sup> *Supra* note 4 [Zarni] at 747.

<sup>96</sup> *Ibid* at 705-747.

<sup>97</sup> “UN says Myanmar’s treatment of Rohingya Muslims has the ‘hallmarks of genocide’ *Associated Press* (1 February 2018), <<http://www.businessinsider.com/un-says-myanmars-treatment-of-rohingya-muslims-has-the-hallmarks-of-genocide-2018-2>>.

be documented to show that (1) the sexual act was committed within the context of, and associated with the armed conflict, and (2) to support the conclusion that there was awareness of the armed conflict on the part of the direct perpetrators (*mens rea*).<sup>98</sup>

In determining whether war crimes should be investigated and prosecuted against Myanmar officials then, the first element to determine is therefore whether the violence is associated with an armed conflict. At present, there is no indication that other states are involved in the conflict, so this assessment focuses on the potential presence of an internal (non-international) armed conflict. Neither the Rome Statute nor the EoC define “armed conflict”, however the elements of war crimes must “be interpreted within the established framework of the international law of armed conflict.”<sup>99</sup> The ICTY’s Appeal Chamber in *Tadić* held that “an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>100</sup>

In the context of Rakhine State, the Myanmar government has asserted that their use of force has been in response to attacks carried out by ARSA against police outposts in October 2016 and August 2017. A preliminary assessment is therefore required with respect to whether ARSA may be characterized as an organized armed group. To be considered an “organized armed group”, the group must “have a sufficient degree of organization in order to enable them to carry out protracted armed violence.”<sup>101</sup> The following factors may also be considered: “the force or group’s internal hierarchy; its command structure and the rules applied within it; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.”<sup>102</sup> The exertion of control over a part of the territory by the concerned groups is not required.<sup>103</sup> With respect to the intensity of the violence, regard

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<sup>98</sup> *Supra* note 74 at 24.

<sup>99</sup> *Supra* note 69 at “Introduction to Art 8”.

<sup>100</sup> *Prosecutor v Dusko Tadic a/k/a “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1996) at para 70 (International Criminal Tribunal for the Former Yugoslavia), online: ICTY <[www.icty.org](http://www.icty.org)>.

<sup>101</sup> *Supra* note 68 at para 134.

<sup>102</sup> *The Prosecutor v Germain Katanga*, ICC-01/04-01/07, Trial Chamber Judgement (7 March 2014) at para 1186 (International Criminal Court), online: ICC <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>103</sup> *Ibid.*

must be paid to “the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilization and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed.”<sup>104</sup>

At this time, very little is known about ARSA, and its organizational structure. However, interviews with Rohingya by Fortify Rights suggest that ARSA “is not well organized, well funded, or well trained. Some members said they received sticks, knives, and small sums of money – approximately 20,000 kyats (US\$20) – in exchange for joining the group.”<sup>105</sup> The group not considered sophisticatedly armed, although Myanmar authorities claimed that after the October 2016 attacks, ARSA militants made off with “62 firearms and 10,000 rounds of ammunition.”<sup>106</sup> A 2016 report by International Crisis Group suggests that ARSA recruitment and training began after the 2012 violence, and that the group is led on the ground by approximately 20 Rohingya immigrants from Saudi Arabia, with several hundred local Rohingya men recruited to the cause.<sup>107</sup> However, a group spokesperson has denied any international connections and claim to only be fighting for the citizenship rights of Rohingya in Myanmar.<sup>108</sup> While the group has proved themselves capable of carrying out attacks leading to casualties, the extent and seriousness of their military involvement has been relatively minor. Further investigative efforts are required to reach any definitive conclusions on the nature of this conflict, however a preliminary review does not indicate that ARSA’s level of sophistication or organization reaches that envisioned by the Rome Statute. As a result, investigation of potential war crimes may not be the most economical use of scarce investigative resources. There may also be political reasons for not characterizing the current situation as an armed conflict, as some could argue that it distracts from the overwhelmingly one-sided nature of the state violence against Rohingya.

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<sup>104</sup> *Supra* note 102 at para 1187.

<sup>105</sup> *Supra* note 10 [Fortify] at 6.

<sup>106</sup> *Supra* note 10 [Fortify] at 6.

<sup>107</sup> International Crisis Group, “Myanmar: A New Muslim Insurgency in Rakhine State” (15 December 2016), online: <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state>> at 13, 15.

<sup>108</sup> “Myanmar: Who are the Arakan Rohingya Salvation Army?” *BBC News* (6 September 2017), online: <<http://www.bbc.com/news/world-asia-41160679>>.

### Evidence

According to Maxine Marcus, examples of evidence that could be gathered from individual survivors or witnesses that could serve to satisfy the common elements include:

- A particular repeated pattern or methodology to the attack(s) (eg. first the village is attacked from the air, then it is surrounded by tanks, and finally the perpetrators on camelback enter and violations are committed)
- Public statements related to the attacks
- Means and methods used in the attack
- Political or military involvement
- Persecutory or discriminatory remarks which the witness heard spoken by the perpetrator or those with the perpetrator
- Detailed descriptions of the hostilities and their scale and proximity to the incident
- Evidence of persons in coordinating/superior role suggesting organization/system
- Information regarding the scale and nature of the harmful acts
- Patterns targeting of particular persons (civilian/combatant, ethnic or religious group, etc)
- Geographic scope of the harmful acts
- Information regarding a policy or plan
- Organization of armed groups involved
- Involvement of national armed groups or foreign forces of any kind.<sup>109</sup>

These examples reinforce the need for diligent preparation prior to commencing investigative missions, specifically with respect to researching the political and military structures at play in the country under examination.

#### **ii. Specific Elements**

The specific elements of crimes of sexual violence are those underlying acts that show a particular crime was committed. Under the Rome Statute, SGBV crimes may underlie war crimes, crimes against humanity, and acts of genocide, as well as crimes that can be sexualized and charged based on facts that include sexual violence.<sup>110</sup> In general, the specific acts of SGBV to prove under international law may include: rape (including in public spaces), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence (such as forced fellatio, sexual

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<sup>109</sup> *Supra* note 42 at 231-232. **This list is intended to be illustrative rather than exhaustive.**

<sup>110</sup> *Supra* note 74 at 19.

mutilation, threats of rape or sexual mutilation, forced observance of rape, or forced nudity).

### Crimes against Humanity

Specific acts of SGBV can amount to crimes against humanity pursuant to Article 7(1)(g) when committed as part of a “widespread or systematic attack directed against any civilian population” with knowledge of the attack, including: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Of particular relevance to the situation affecting Rohingya women are rape, sexual slavery and other forms of sexual violence.

➤ *Rape* – The first element to establish is that the perpetrator must have “invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”<sup>111</sup> This definition is intended to be gender neutral, recognizing that both men and women can be victims and perpetrators of these crimes.<sup>112</sup> It is therefore not sufficient for a survivor to say that they had been “raped”; they must instead describe the specific nature of the penetration that occurred, including the part of the body that was entered, and with what. Understandably, this is often the most difficult element for survivors to recount in testimony, and as discussed above, euphemisms are sometimes used instead. As described above in the “Rohingya Context” section of this paper, there have been numerous reports of Rohingya women and girls being raped and gang-raped by *Tatmadaw* soldiers. While the specific acts of penetration are not described in these reports, they provide strong evidence that these acts have taken place.

The second element to establish is that the invasion was “committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving consent.”<sup>113</sup> It is understood that a person may be incapable of

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<sup>111</sup> *Supra* note 69 at Art 7(1)(g)-1(1).

<sup>112</sup> *Supra* note 69 at footnote 15.

<sup>113</sup> *Supra* note 69 at Art 7(1)(g)-1(2).

giving genuine consent if affected by natural, induced or age-related incapacity.<sup>114</sup> There is no requirement to prove the victim's lack of consent, establishing the coercive circumstances is sufficient.<sup>115</sup> The *Akayesu* trial chamber confirmed that "coercive circumstances need not be evidenced by a show of physical force." Rather, "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion," and coercion may be inherent in circumstances such as armed conflict or military presence.<sup>116</sup> Indeed, the *Katanga* case before the ICC held that "acts of a sexual nature committed by attackers during an armed offensive against civilians are necessarily coercive", especially given that "the crimes were committed collectively against a single victim."<sup>117</sup> Additionally, the ICC trial chamber in *Bemba* identified the following factors which may contribute to a coercive environment: "the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes."<sup>118</sup> As such, investigators must document evidence of the immediate circumstances surrounding the commission of rape to demonstrate the coercive nature of the event.

The allegations of rape of Rohingya women and girls described by Fortify Rights, Amnesty International and Human Rights Watch (to name a few), all paint the picture of the highly coercive environment of an armed offensive against civilian villages.<sup>119</sup> Acts of rape were also regularly accompanied by threats and/or violence to the women themselves, or their family members.<sup>120</sup> One woman interviewed by Human Rights Watch described:

First, they [shot and] killed my brother ... then they threw me to the side and one man tore my *lungi* [sarong], grabbed me by the mouth and held

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<sup>114</sup> *Supra* note 69 at footnote 16.

<sup>115</sup> International Criminal Court, *Rules of Procedure and Evidence* (The Hague: 2013) at Rule 70.

<sup>116</sup> *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgement (2 September 1998) (International Criminal Tribunal for Rwanda), online: ICTR <[www.unictt.unmict.org](http://www.unictt.unmict.org)> at para 688.

<sup>117</sup> *Supra* note 102 at para 990. **Although the Trial Chamber found beyond a reasonable doubt that crimes of rape and sexual slavery had taken place, Katanga was acquitted on these charges for insufficient evidence regarding his linkage to the crimes** (see paras 999, 1023 and p. 659).

<sup>118</sup> *Supra* note 68 at para 104.

<sup>119</sup> *Supra* note 10 [Fortify; Amnesty International; Human Rights Watch.]

<sup>120</sup> Human Rights Watch, "All of My Body Was Pain: Sexual Violence against Rohingya Women and Girls in Burma" (16 November 2017), online: <<https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>> at 16.

me still. He stuck a knife into my side and kept it there while the men were raping me. That was how they kept me in place. ... I was trying to move and [the wound] was bleeding more. They were threatening to shoot me.<sup>121</sup>

Such accounts indicate that these sexual encounters lacked consent and were necessarily coercive in nature.

As the Rome Statute and EoC do not provide a particular mental element for the crime of rape, the Article 30 requirements of intent and knowledge apply. There are therefore two *mens rea* elements to establish: (1) the perpetrator meant to invade the body of a person, or cause the invasion of the body of a person; or the person was aware that the invasion of the body of a person would occur in the ordinary course of events, and (2) the perpetrator was aware of the use of force, threat of force or coercion or taking advantage of a coercive environment or of a person's incapacity to give genuine consent.<sup>122</sup> This could include knowledge of the lack of consent of the victim.<sup>123</sup> Given the circumstances described above, there are reasonable grounds to infer that *Tatmadaw* soldiers would be aware of the lack of consent of their victims.

It should be noted that the Rome Statute's definition of rape differs from those used at the ICTY and ICTR. While the reported abuses committed by *Tatmadaw* soldiers would likely fulfill the requirements of each definition, this factor must be considered by investigators conducting documentation, as the required elements to prove will be dependant on the definition adopted by the mechanism in question.

➤ *Sexual slavery* – Documenters must collect evidence to establish that the perpetrator(s) “exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty” and “caused such person or persons to engage in one or more acts of a sexual nature.” Evidence of the exertion of powers associated with the right of ownership include factors such as “detention or captivity and their respective duration; restrictions on freedom to come and go or on any freedom of choice or movement; and, more generally, any measure to

<sup>121</sup> *Ibid* at 16-17 (interview with Fatama Begum, Balukali refugee camp, Bangladesh, October 2017).

<sup>122</sup> *Supra* note 94 at 20.

<sup>123</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgement (22 February 2001) at para 460 (International Tribunal for the Former Yugoslavia), online: ICTY <[www.icty.org](http://www.icty.org)>.

prevent or deter an attempt at escape”, as well as the use of “threats, force or other forms of physical or mental coercion, the exaction of forced labour, the exertion of psychological pressure, the victim’s vulnerability and the socioeconomic conditions in which the power is exerted”.<sup>124</sup> Article 30 *mens rea* requirements of intent and knowledge apply here as well.

The UN Special Representative on Sexual Violence in Conflict reported evidence of “sexual slavery in military captivity directed against Rohingya women and girls”; however, no further details were provided.<sup>125</sup> Amnesty International has also reported the abduction and enforced disappearance of Rohingya women and girls by *Tatmadaw* officers in Myanmar, which, along with widespread accounts of sexual violence, has given rise to concerns of sexual slavery.<sup>126</sup> As such, further investigatory attention will need to be given to the presence of these elements.

➤ *Sexual violence* – The perpetrator must have “committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”<sup>127</sup> The conduct in question must be of “a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions” and the perpetrator was “aware of the factual circumstances that established the gravity of the conduct.”<sup>128</sup> In Myanmar, there have been reports indicating that Rohingya women have been subject to multiple acts of SGBV. For example, in addition to rape, Amnesty International has reported other forms of sexual

<sup>124</sup> *Supra* note 102 at para 976.

<sup>125</sup> Letitia Anderson, “UN envoy urges greater support for Rohingya victims of sexual violence” *UN News* (16 November 2017), online: <<http://www.un.org/apps/news/story.asp?NewsID=58109#.WntHHiMwhcw>>.

<sup>126</sup> Amnesty International, “Myanmar: Fresh Evidence of Ongoing Ethnic Cleansing as Military Starves, Abducts and Robs Rohingya” (7 February 2018), online: <<https://www.amnesty.org/en/latest/news/2018/02/myanmar-fresh-evidence-of-ongoing-ethnic-cleansing-as-military-starves-abducts-robs-rohingya/>>.

<sup>127</sup> *Supra* note 69 at Art 7(1)(g)-6(1).

<sup>128</sup> *Supra* note 69 at Art 7(1)(g)-6(3).

violence against women, such as soldiers carrying out “humiliating body searches to look for and steal hidden money or valuables.”<sup>129</sup>

The Rome Statute also lists the following SGBV-related crimes against humanity, however there have been little or no reports to date that they have specifically been committed against Rohingya women and girls.<sup>130</sup>

➤ *Enforced prostitution* – The perpetrator must have “caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent”. Further, the perpetrator or another person must have “obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.”<sup>131</sup>

➤ *Forced pregnancy* – The perpetrator must have “confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”<sup>132</sup> The only case before the ICC where this crime has been charged is against Dominic Ongwen, a former commander of the Lord’s Resistance Army in Uganda.<sup>133</sup> While this case is still ongoing, the Pre-Trial Chamber has found that the essence of this crime “is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.”<sup>134</sup> The prosecution has argued that the ‘special intent’ of this crime relates “to the act of *confining* the woman (rather than the act of making her pregnant), and that the purpose of this confinement need to be *to keep the victim pregnant*; it will suffice that the perpetrator intended to ‘affect the ethnic composition or any population’ *or* ‘carry out

<sup>129</sup> Amnesty International, “‘My World Is Finished’ Rohingya Targeted in Crimes Against Humanity in Myanmar” (2017), online: <<https://www.amnesty.ca/news/myanmar-new-evidence-systematic-campaign-crimes-against-humanity-terrorize-and-drive-rohingya>>.

<sup>130</sup> **The general Article 30 *mens rea* requirements of both knowledge and intent apply to each of the elements of these crimes.**

<sup>131</sup> *Supra* note 69 at Art 7(1)(g)-3(1)-(2).

<sup>132</sup> *Supra* note 69 at Art 7(1)(g)-4.

<sup>133</sup> *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges (23 March 2016) (International Criminal Court), online: ICC <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>134</sup> *Ibid* at para 99.

other grave violations of international law’.”<sup>135</sup> While there are several reports of Rohingya women becoming pregnant as a result of rape by *Tatmadaw* officials, there have not been reported cases of these women being forcibly confined afterwards. However, in light of the abductions referred to above, as well as the known circumstances of rape followed by forced flight into Bangladesh whereby survivors may be unable to access reproductive health services, this may be an important line of inquiry for investigators.

➤ *Enforced sterilization* – The perpetrator must have “deprived one or more persons of biological reproductive capacity” (not including birth control measures of a non-permanent nature), and the conduct was “neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent”.<sup>136</sup> This does not include consent obtained through deception.<sup>137</sup>

Torture may also amount to a crime against humanity under Article 7(1)(f), which includes acts of rape and sexual violence, if the victim was in the custody or under the control of the perpetrator and the pain did not arise “only from, and was not inherent in or incidental to, lawful sanctions”.<sup>138</sup> Sexual violence may also constitute a crime against humanity within the context of persecution, if the victim(s) is targeted because of their political, racial, national, ethnic, cultural, religious, or gender identity, in connection with any act referred to in paragraph 7 or any crime within the jurisdiction of the court.<sup>139</sup> Persecution is defined as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>140</sup> Case law from the ICTY supports this interpretation:

In the *Kupreškić et al.* case, the Chamber finally held that persecution ‘included acts such as murder, extermination, torture and *other serious acts on the person such as those presently enumerated in Article 5*. By specifically referring to the other crimes enumerated in Article 5, which include rape and other inhumane acts, the Trial Chamber acknowledged that sexual violence crimes can be used for the persecution of people. In

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<sup>135</sup> Rosemary Grey, “The ICC’s First ‘Forced Pregnancy’ Case in Historical Perspective” (2017) 15 J Int Crim Justice 905 at 925.

<sup>136</sup> *Supra* note 69 at Art 7(1)(g)-5(1)-(2), footnote 20.

<sup>137</sup> *Supra* note 69 at footnote 68.

<sup>138</sup> *Supra* note 69 at Art 7(1)(f).

<sup>139</sup> *Supra* note 5 at Art 7(1)(h).

<sup>140</sup> *Supra* note 5 at 7(2)(g).

another case, the *Todorović* case, Todorović was convicted of the crime of persecution, including sexual violence, on a guilty plea. In the Plea Agreement, Todorović had agreed that ordering six men to perform fellatio on each other constituted, among other things, the factual basis for his guilty plea. Thereby he pleaded guilty to sexual assault used as a method of persecution, a crime against humanity.<sup>141</sup>

The inclusion of gender as a ground of persecution provides that a perpetrator can be found guilty when it has been proven that he raped a woman solely because she is a woman.<sup>142</sup> The criminal intent (*mens rea*) for the crime of persecution is “to forcibly discriminate against a group or members of a group by grossly and systematically violating their fundamental human rights.” This may be a line of inquiry for all forms of SGBV, including non-sexual gender-based crimes, amounting to persecution.

### Genocide

The connection between genocide and sexual violence remains unrecognized in the definition of the ICC Statute. However, case law from the ICTR and ICTY have demonstrated how sexual violence might make up the elements of each of the below enumerated acts, which, if committed against one or more person (a) with intent to “destroy, in whole or in part, a national, ethnic, racial or religious group”, and (b) in “the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”, may be prosecuted as genocide.<sup>143</sup>

a) *Killing members of the group* – The EoC clarifies that “killed” is interchangeable with “caused death”. In *Akayesu*, the Trial Chamber found in most cases, that rapes of Tutsi women were at times “accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed.”<sup>144</sup> This demonstrated an intent to “destroy the Tutsi group while inflicting acute suffering on its members in the process”.<sup>145</sup> Acts of sexual violence which indirectly lead to death, such as when women are gang raped and left without access to medical assistance, attacks against vulnerable women, such as the young, elderly, sick or pregnant, or acts of

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<sup>141</sup> *Supra* note 67 at 157.

<sup>142</sup> *Supra* note 67 at 160.

<sup>143</sup> *Supra* note 69 at Art 6(a)-(e).

<sup>144</sup> *Supra* note 117 at para 733.

<sup>145</sup> *Supra* note 117 at para 733.

sexual violence involving the insertion of sticks or weapons into a woman's genitals, may also be included.<sup>146</sup>

There have been many reports that Rohingya women who were raped were subsequently killed by the *Tatmadaw*, such as having their homes set on fire with them inside, or have died from injuries caused by sexual violence.<sup>147</sup> One woman interviewed by Fortify Rights revealed:

After they shot the men and boys, they selected some women from the group and put the women on the top of the hill. While the soldiers were killing and cutting the others, these women were then taken to the riverbank. Groups of around ten soldiers took about six women three times. They took them to the bushes of the bank. And then they came again and took six more. I couldn't see what happened to them but the women never came back. I believe they were raped and killed.<sup>148</sup>

This description, along with accounts of vicious gang rapes, indicate an intention to destroy the Rohingya by causing their death in a manner that involves sexual violence.

b) *Causing serious bodily or mental harm to members of the group* – A footnote to the EoC clarifies that this conduct may include “acts of torture, rape, sexual violence or inhuman or degrading treatment”. The *Akayesu* judgment also found that ‘serious bodily or mental harm’ may include acts of sexual violence and rape, or in fact simultaneous cause both.<sup>149</sup> In that case the acts of sexual violence were committed solely against Tutsi women, who were subjected to public humiliation, mutilation and public rape, often by more than one perpetrator.<sup>150</sup> “These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.”<sup>151</sup> In another case before the ICTR, a conviction for genocide flowed in part from the action of raping, killing, and then spreading the legs of a woman, saying “everyone passing by should see

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<sup>146</sup> *Supra* note 67 at 50.

<sup>147</sup> Nicholas Kristof, “They’re throwing babies onto fires in Myanmar. We need to recognize genocide is occurring” *National Post* (18 December 2017), online: <<http://nationalpost.com/opinion/theyre-throwing-babies-onto-fires-in-myanmar-we-need-to-recognize-genocide-is-occurring>>.

<sup>148</sup> *Supra* note 10 [Fortify] at 10-11.

<sup>149</sup> *Supra* note 117 at para 688, 731.

<sup>150</sup> *Supra* note 67 at 52; *supra* note 82 at para 731.

<sup>151</sup> *Supra* note 117 at para 731.

what the vagina of a Tutsi woman looks like”.<sup>152</sup> The consequences of sexual violence - which might include physical injuries, health complications including sexually transmitted diseases, unplanned pregnancies which may cause mental harm and stigmatization, emotional consequences and trauma, and social consequences such as isolation and stigma - may have the effect of contributing significantly to the destruction of a group in whole or in part.<sup>153</sup> However, the legal requirements of this element require proof only of the result of serious bodily or mental harm, not the effective destruction of a group.<sup>154</sup> Similar to Tutsi women, there are reports indicating that Rohingya women have been subject to brutal violence and psychological harm, so that there are anecdotal reports by medical professionals that the entire refugee population in Bangladesh is personally affected by trauma.<sup>155</sup>

c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part* – A footnote to the EoC states that “conditions of life” may include “deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.” No actual physical destruction is needed, the intentional infliction of the condition is sufficient.<sup>156</sup> This includes “circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care”.<sup>157</sup> It could therefore be argued that sexual violence and its consequences might constitute conditions of life calculated to bring about a group’s physical destruction.<sup>158</sup> Of concerning note from the Rwandan genocide, many women were raped by men who knew they were HIV-positive and were intentionally transmitting the virus to Tutsi women.<sup>159</sup> This infliction of a ‘condition of life’ may therefore be recognized as an intentional act amounting to genocide.

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<sup>152</sup> *Supra* note 67 at 53 [with reference to *The Prosecutor v Mikaeli Muhimana*, ICTR-95-1B-T, Trial Chamber Judgement (28 April 2005) at para 265 (International Criminal Tribunal for Rwanda), online: ICTR <[www.ictrcaselaw.org](http://www.ictrcaselaw.org)>].

<sup>153</sup> *Supra* note 67 at 55.

<sup>154</sup> *Supra* note 67 at 56.

<sup>155</sup> *Supra* note 93 at 0h:36m:48s.

<sup>156</sup> *Supra* note 67 at 56.

<sup>157</sup> *Supra* note 67 at 57; *The Prosecutor v Clement Kayishema*, ICTR-95-1-T, Trial Chamber Judgement (21 May 1999) at para 115 (International Criminal Tribunal for Rwanda), online ICTR <[www.unictt.unmict.org](http://www.unictt.unmict.org)>.

<sup>158</sup> *Supra* note 67 at 57.

<sup>159</sup> *Ibid.*

Even prior to the increase in state violence starting in 2016, there have been concerns that the social and economic conditions imposed on the Rohingya in Myanmar have been intended to bring about their physical destruction. According to Zarni and Cowley (writing in 2014),

The combined tactics of killings, violence, destruction of property and communities, accompanied by social and economic boycotts and hate campaigns against the Rohingya, are perceived by Rohingya communities both at home and in exile, as concerted state-backed attempts to destroy the Rohingya or drive them from their lands in Rakhine State. The Rohingya are, in effect, given a stark choice between starvation, death, or leaving their lands in Rakhine State.<sup>160</sup>

These socio-economic conditions, as well as the denial of access to medical care and food is of particular concern for women who may face complications in pregnancy and are responsible for caring for children.<sup>161</sup> The current conditions in Myanmar, in which the majority of Rohingya villages have now been burned, suggests that their lives will not improve if they are repatriated to Myanmar where they will likely be confined to internment camps.<sup>162</sup>

d) *Imposing measure intended to prevent births within the group* – The *Akayesu* case held that such measures may include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition on marriages” as well as deliberate impregnation by a man of a different ethnic group in societies where membership in a group is determined by the father.<sup>163</sup> Measures to prevent birth may also be mental, such as where a survivor of rape refuses to subsequently procreate, or where members of a group do not procreate due to threats or trauma.<sup>164</sup> Whether or not the measures succeeded in preventing births within the group is not of primary relevance; rather, what needs to be proven is that the measures were intentionally imposed, and were

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<sup>160</sup> *Supra* note 4 [Zarni] at 719-720.

<sup>161</sup> Francis Wade, *Myanmar's Enemy Within: Buddhist Violence and the Making of the Muslim 'Other'* (London: Zed Books Ltd, 2017).

<sup>162</sup> Yi-Mou Lee, “Myanmar Finalizes Rohingya Repatriation Preparations as Doubts Mount” *Reuters* (18 January 2018), online: <<https://www.reuters.com/article/us-myanmar-rohingya-repatriation/myanmar-finalizes-rohingya-repatriation-preparations-as-doubts-mount-idUSKBN1F71GB>>.

<sup>163</sup> *Supra* note 117 at para 507.

<sup>164</sup> *Supra* note 67 at 59; *supra* note 128 at para 508.

intended to prevent births within a group.<sup>165</sup> Discriminatory marriage and birth restrictions targeted only at the Rohingya population, as well as vicious rapes causing injury to reproductive organs, suggest that this factor in particular is relevant in the Myanmar context.<sup>166</sup>

e) *Forcibly transferring children of the group to another group* – Footnotes to the EoC clarify that “forcibly” may go beyond physical force to include “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power” or “by taking advantage of a coercive environment”; and “child” includes persons under the age of 18 years. An example of such acts might include the rape and forced impregnation by a man of a different ethnic group in societies where membership in a group is determined by the father.<sup>167</sup> This ground may not be applicable in the Rohingya context, as children born to Rohingya women regularly suffer the same violations of rights as their mothers.

There are also a number of specific rules of procedure regarding consent and corroboration in sexual violence crimes that documenters should keep in mind when gathering evidence to establish the specific elements. For example, Rule 70 stipulates the principles of evidence in cases of sexual violence, in particular the circumstances where consent cannot be inferred, including where there was a coercive environment.<sup>168</sup> As such, a survivor’s lack of consent does not need to be proven. While the evidence of other witnesses may be relevant for confirming or corroborating allegations of sexual violence against specific survivors, Rule 63(4) also provides that, without prejudice to Article 66(3) (regarding the presumption of innocence and need to prove the guilt of the accused beyond all reasonable doubt), a chamber shall not impose a legal requirement that corroboration is required to prove any crime within the Court’s jurisdiction, “in particular, crimes of sexual violence”.

### War Crimes

As discussed above, it may be unlikely that war crimes will be pursued in an investigation into the situation of the Rohingya, in light of deficiencies meeting the

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<sup>165</sup> *Supra* note 67 at 59.

<sup>166</sup> *Supra* note 4 [Zarni] at 727.

<sup>167</sup> *Supra* note 67 at 60.

<sup>168</sup> *Supra* note 115.

contextual elements of these crimes. However, in case additional information comes to light with respect to ARSA and the nature of the conflict in Rakhine, the following information may be relevant with respect to investigating and documenting SGBV as war crimes.

Article 8(2)(e)(vi) provides the most straight forward prohibitions of sexual violence committed as part of an internal armed conflict, including committing “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.<sup>169</sup> The specific elements of these crimes are set out in the EoC, and are applicable within the context of a non-international armed conflict of which the perpetrator was aware. The specific elements of these crimes are the same as described above as crimes against humanity; however, the contextual circumstances will differ as discussed in the previous section.

Article 8(2)(c) further sets out specific acts, which may amount to war crimes if committed against persons taking no part in hostilities (including members of armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention or any other cause). The ICTY in particular interpreted these provisions to include acts of sexual violence.

(i) *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture* – Both cruel treatment and torture involve the infliction of “severe physical or mental pain or suffering” upon one or more persons, however torture involves the specific purpose of “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”.<sup>170</sup> Case law from the ICTY has found that the acts of rape, including forced fellatio, and sexual mutilation “by means of a burning fuse around the body in the genital area or by biting off another person’s testicle” amount to cruel treatment as a war crime.<sup>171</sup>

Similarly, the ICTY Appeals Chamber found that “severe pain or suffering, as required by the definition of torture, can thus be said to be established once rape has been

<sup>169</sup> *Supra* note 5 at Art 8(2)(e)(vi).

<sup>170</sup> *Supra* note 69 at Art 8(2)(c)(i)-3, 8(2)(c)(i)-4.

<sup>171</sup> *Supra* note 67 at 206.

proved, since the act of rape necessarily implies such pain and suffering.”<sup>172</sup> Other forms of sexual violence recognized by ICTY case law include “threats of sexual mutilation, the fears and threats inherent to circumstances of detention where rapes are ongoing and victims are extremely vulnerable to the whim of their captors, and the forced observance of rape committed against friend or relative.”<sup>173</sup> To satisfy the specific elements of torture, the act causing severe pain or suffering must have been committed for a prohibited purpose including “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.” This list has been interpreted as non-exhaustive, and prohibitive purposes may also include “humiliation”, “gender-based discrimination”, and “creating an atmosphere of fear and powerlessness”.<sup>174</sup>

(ii) *Committing outrages upon personal dignity, in particular humiliating and degrading treatment* – the EoC clarifies that to fall under this provision, the perpetrator must have “humiliated, degraded or otherwise violated the dignity of one or more persons” and the severity was of “such degree as to be generally recognized as an outrage upon personal dignity”.<sup>175</sup> A footnote to the EoC further clarifies that “persons” can include the deceased, and that “the victim need not personally be aware of the existence of the humiliation or degradation or other violation”. This element also “takes into account relevant aspects of the cultural background of the victim.”<sup>176</sup> The seriousness of this act need not cause “lasting suffering”, but is to be determined based on both subjective and objective elements.<sup>177</sup> ICTY case law found that rape and sexual assaults committed publicly, threats of sexual mutilation, forced public nudity, and sexual exploitation, all amounted to outrages upon personal dignity.<sup>178</sup> Other acts, including

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<sup>172</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23 & IT-96-23/1, Appeals Chamber Judgement, (12 June 2002) at para 151 (International Tribunal for the Former Yugoslavia), online: ICTY <www.icty.org>.

<sup>173</sup> *Supra* note 67 at 187.

<sup>174</sup> *Supra* note 67 at 187-188; see *Prosecutor v Furundžija*, IT-95-17/1-T, Trial Chamber Judgement (10 December 1998) at para 162 (International Criminal Tribunal for the Former Yugoslavia), online: ICTY <www.icty.org>; *Prosecutor v Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, IT-96-21-T, Trial Chamber Judgement (16 November 1998) at paras 493 and 941 (International Criminal Tribunal for the Former Yugoslavia), online: ICTY <www.icty.org>.

<sup>175</sup> *Supra* note 69 at Art 8(2)(c)(ii).

<sup>176</sup> *Supra* note 69 at Art 8(2)(c)(ii).

<sup>177</sup> *Supra* note 67 at 212-213.

<sup>178</sup> *Supra* note 174 [Furundžija] at para 272, 275; *supra* note 186 at para 773.

forcing two brothers to perform fellatio on each other at gunpoint in front of laughing guards, have also been prosecuted under this provision.<sup>179</sup> The *mens rea* of this act does not require that the perpetrator intended to humiliate the victim; but it is sufficient that they knew it could have that effect.<sup>180</sup>

Establishing evidence to fulfil the specific elements of SGBV crimes therefore requires detailed descriptions of the violations committed against individual survivors, or as recounted by witnesses regarding the deceased.

### iii. Linkage Elements

Linkage elements are satisfied by information that describes the manner in which one or more alleged perpetrator(s) committed the specific act(s) of sexual violence within the required context to constitute an international crime.<sup>181</sup> There must be sufficient evidence that the accused was either directly (such as through commission, ordering, aiding and abetting, etc.) or indirectly (such as through command responsibility) allegedly responsible for the crimes.<sup>182</sup> This element is also referred to as “mode of liability”, and it describes the legal theory applied to attribute criminal responsibility to the accused for specific crimes.<sup>183</sup> It is important to bear in mind that the ICC’s mandate is to target those most responsible for core international crimes of concern to the international community as a whole. The following modes of liability are set out in the Rome Statute and applicable to those being prosecuted before the ICC.

*Responsibility of commanders and other superiors* (Article 28) can be prosecuted for crimes committed by forces or subordinates under their effective command/authority and control for crimes committed as a result of his or her failure to exercise such control properly.<sup>184</sup> This requires that the military commander or person “knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”; and “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the

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<sup>179</sup> *Prosecutor v Ranko Češić*, IT-95-10/1-S, Trial Chamber Judgement (11 March 2004) at para 13 (International Criminal Tribunal for the Former Yugoslavia), online: ICTY <www.icty.org>.

<sup>180</sup> *Supra* note 172 at para 774; *supra* note 5 at Art 30.

<sup>181</sup> *Supra* note 74 at 18.

<sup>182</sup> *Supra* note 47 at 232.

<sup>183</sup> *Supra* note 74 at 25.

<sup>184</sup> *Supra* note 5 at Art 28.

competent authorities for investigation and prosecution”.<sup>185</sup> Alternatively, a superior can be held liable for crimes committed by subordinates under their effective authority and control, as a result of their failure to exercise proper control, where the superior “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes”; the “crimes concerned activities that were within the effective responsibility and control of the supervisor”; and the superior “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”<sup>186</sup>

It is likely that those indicted under this mode of liability were not physically present at the scene of the crime. The challenge in establishing liability under these theories for sexual violence cases is therefore “proving that an accused person at least had reason to know of the risk that his subordinates would commit specifically sexual violence crimes, as opposed to other types of mistreatment.”<sup>187</sup> While both actual and constructive knowledge can be established through circumstantial evidence, some cases have required evidence of the superior’s direct knowledge of his subordinate’s actions, either through evidence of physical presence at the scene of the crime, or direct orders.<sup>188</sup> Documenters must therefore present sufficient evidence to establish a “presumption that the crime was so widespread that the accused must have known about it and did not use his position to prevent or punish the crime.”<sup>189</sup>

Article 25(3) of the Rome Statute sets out five ways in which an individual may be found criminally responsible for a crime within the jurisdiction of the ICC. These include the following.

➤ *Co-perpetration* (Article 25(3)(a)) applies to groups of persons who join together to plan and carry out crimes under international law.<sup>190</sup> An individual can be found liable

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<sup>185</sup> *Supra* note 5 at Art 28(a).

<sup>186</sup> *Supra* note 5 at Art 28(b).

<sup>187</sup> Anne-Marie de Brouwer, “The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes” (2015) 48 *Cornell Int’l L.J.* 639 at 663.

<sup>188</sup> *Supra* note 215 at 357. See *Prosecutor v Juvénal Kajelijeli*, ICTR-98-44A-T, Judgement and Sentence (1 December 2003) (International Criminal Tribunal for Rwanda), online: ICTR <[www.unictr.unmict.org](http://www.unictr.unmict.org)>.

<sup>189</sup> *Supra* note 67 at 168.

<sup>190</sup> *Supra* note 74 at 25.

under this mode even if the other person(s) involved are criminally responsible.<sup>191</sup> These theories are also known as “joint criminal enterprise”.

➤ *Ordering, soliciting or inducing* (Article 25(3)(b)) liability applies to situations where there is evidence that the alleged perpetrator had the authority to issue orders and expect that they would be carried out.<sup>192</sup> The subject of the order must in fact occur or be attempted. Evidence of inducing someone else to commit crimes of sexual violence would demonstrate that “the perpetrator encouraged, provoked, incentivized or convinced the direct perpetrators to commit the crimes”.<sup>193</sup> The jurisprudence from *ad hoc* tribunals makes clear that an order, even if implicit, may be inferred from circumstantial or pattern evidence, including from both acts and omissions of an accused; however, these tribunals were more reluctant to do so in cases of sexual violence and gender-based crimes.<sup>194</sup>

➤ *Aiding and abetting or otherwise assisting* (Article 25(3)(c)) liability applies to both the commission and attempted commission of a crime, including providing the means for its commission, such as evidence that the perpetrator provided a direct perpetrator practical assistance, encouragement or moral support.<sup>195</sup>

➤ *Common purpose liability* (Article 25(3)(d)) applies where there is evidence that an alleged perpetrator intentionally contributed to the commission or attempted commission of a crime, either with the aim of furthering the criminal activity or purpose of the group, or with the knowledge of the intention of the group to commit the crime.

➤ Regarding the crime of genocide, Article 25(3)(e) also criminalizes the direct and public incitement of others to commit genocide (Article 25(3)(e)).

Examples of evidence that could be gathered from an individual survivor or witness which could serve to satisfy the linkage elements include:

- descriptions of the perpetrator group and perpetrator “tools” (uniforms, insignias, other distinctive dress, weapons, boots, vehicles, flags or shields, etc);
- words spoken by perpetrators or co-perpetrators (in person, to each other, to the survivor, on radio, orders, code words, language used, ethnic or racial slurs);

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<sup>191</sup> *Supra* note 5 at Art 25(3)(a).

<sup>192</sup> *Supra* note 74 at 26.

<sup>193</sup> *Supra* note 74 at 26.

<sup>194</sup> *Supra* note 216 at 353. See *Prosecutor v Galić*, IT-98-29-T, Trial Chamber Judgement (5 December 2003) (International Criminal Tribunal for the Former Yugoslavia), online: ICTY <[www.icty.org](http://www.icty.org)>.

<sup>195</sup> *Supra* note 74 at 26.

- description of other persons present before, during, and after attack and their proximity to the incident; presence of persons in more than one relevant location;
- someone talking or sharing command, passing or following orders, enforcing discipline;
- someone passing up daily reports to superiors via radio or other means of communication;
- existence of a plan, discussion of aspects of this plan, persons involved in the planning and organization; someone helping the direct perpetrator commit the act – telling them to “go ahead”, or giving them a gun and pointing, using gestures of encouragement; and
- descriptions of coordination or methodology before, during, after the attack or incident (e.g. did the perpetrators come and leave together? Was there coordination among them?).<sup>196</sup>

The examples provided herein reflect significant international case law to date. However, documenters should endeavour to stay apprised of growing case law which will expand the scope of these crimes.

### C. GUIDELINES ON THE DOCUMENTATION OF SEXUAL VIOLENCE

Despite the well-established legal framework criminalizing SGBV crimes in conflict, there remain obstacles to the successful prosecution of these cases. Along with the patriarchal biases mentioned earlier, other practical challenges may inhibit the investigation and obtaining a conviction for these crimes. For example, prosecutors at the ICTY and ICTR have received criticism for

inadequate and incoherent investigation and prosecution policies that fail to include charges of sexual violence in the indictments against the accused, dropped charges of sexual violence over the course of proceedings, charges not being representative of the sexual violence committed and the inability to link the sexual violence crimes to the accused.<sup>197</sup>

These challenges reveal that care and caution must be given to the investigation and documentation of sexual violence if accountability for these crimes is to be given priority under international criminal law. Experts in this field have come together to create a number of guidelines and best practices to address these challenges when engaging in documentation of sexual violence during conflict. Most relevant are:

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<sup>196</sup> *Supra* note 42 at 232-233.

<sup>197</sup> *Supra* note 187 at 660.

- The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (“International Protocol”);<sup>198</sup>
- Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda;<sup>199</sup>
- The ICC’s Policy Paper on Sexual and Gender-Based Crimes;<sup>200</sup> and
- The World Health Organization’s Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies.<sup>201</sup>

Other useful manuals for general strategies for human rights monitoring and documentation include the Norwegian Centre for Human Rights’ *Manual on Human Rights Monitoring*,<sup>202</sup> and Folke Bernadotte Akademin’s *A Handbook on Assisting International Criminal Investigations*.<sup>203</sup>

This section will highlight some of the most relevant best practices identified within these guidelines. However, this review is non-exhaustive and those undertaking documentation should refer to these documents directly for complete guidance.

#### ➤ *Do No Harm*

When documenting information about sexual violence, investigators must first and foremost endeavor to minimize the harm they may inadvertently cause through their presence, actions or mandate. Indeed, the principle of ‘do no harm’ underlies and should inform all documentation efforts from both an ethical and practical viewpoint. At a minimum, the International Protocol recommends investigators should:

1. understand the risks involved in documenting sexual violence;

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<sup>198</sup> *Supra* note 74.

<sup>199</sup> Office of the Prosecutor of the ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014).

<sup>200</sup> Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes* (2014).

<sup>201</sup> World Health Organization, *WHO Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies* (2007).

<sup>202</sup> In particular, Morten Bergsmo and William H. Wiley, “Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes” in Norwegian Centre for Human Rights, *Manual on Human Rights* (2008), online: <<http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/manual/>>.

<sup>203</sup> Maria Nystedt, Christian Axboe Nielsen and Jann K. Kleffner, “A Handbook on Assisting International Criminal Investigations” *Folke Bernadotte Akademin* (2011), online: <<https://fba.se/en/how-we-work/research-policy-analysis-and-development/publications/a-handbook-on-assisting-international-criminal-investigations/>>.

2. ensure team members documenting sexual violence are appropriately trained;
3. ensure survivors and witnesses give their informed consent to participate in enquiries;
4. protect the information documented; and
5. take special precautions when working with child survivors and witnesses.<sup>204</sup>

Documentation efforts must therefore be informed, prepared, and as minimally intrusive as possible, in order to reduce the potential for harm that cooperation with investigators may pose to survivors and witnesses.

➤ *Investigation Team*

Diverse investigative teams, composed of both male and female members of different ages and nationalities or regional backgrounds, provide the greatest flexibility in reaching out to and soliciting cooperation from survivors and witnesses.<sup>205</sup> All team members should: undergo training on documentation to basic international criminal law standards; be knowledgeable in dealing with trauma and how to respond to post-traumatic stress disorders and risks of suicide and self-harm; have expertise and experience in dealing with cases of sexual violence; and, in particular, be familiar with proper interview techniques, terminology and strategies to respond sensitively to disclosure of sexual violence by both male and female survivors.<sup>206</sup> Survivors should be provided the choice of a male or female interviewer, wherever possible, to ensure that they feel most comfortable sharing their experiences of sexual violence.<sup>207</sup>

➤ *Preparation*

Witnesses should not be asked to recount painful experiences when there is no real prospect of conviction. Investigators should therefore work closely with lawyers from the outset to analyse the strength of a case and of the evidence to ensure that victims are not unnecessarily dragged through the process.<sup>208</sup> This requires a thorough

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<sup>204</sup> *Supra* note 74 at 29.

<sup>205</sup> *Supra* note 187 at 665.

<sup>206</sup> *Supra* note 74 at 29.

<sup>207</sup> *Supra* note 46 at 493.

<sup>208</sup> Linda Bianchi, “The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR” in Anne-Marie de Brouwer et al, eds, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge: Intersentia, 2013) 123 at 133.

understanding of the law on sexual violence and the elements of the crimes that need to be proven.

Prior to commencing documentation, investigators should also spend considerable time preparing the investigation plan and making arrangements for the interviews and evidence collection. This will include determining the manner in which documented information will be gathered, organized and stored; identifying intermediaries who will help identify and build connections with witnesses and survivors; and assessing what medical and psychosocial care is available to survivors or witnesses who may be impacted by the documentation process.

Preparation will also involve research into the situational context at the focus of the investigation, including the political environment, the history and pattern of the conflict, information about the rank and structure of the military, police and other security forces, and other geographical, economic and cultural considerations.<sup>209</sup> This preparation includes understanding the cultural implications of sexual violence in a particular society, including euphemisms used to describe body parts and sexual acts. At the ICTR, for example, some Rwandan rape victims referred “to rape or penetration by stating that the perpetrator ‘married me,’ ‘put his sex in me,’ ‘made me a woman,’ ‘spoiled me,’ ‘killed me with his thing,’ or ‘made me his wife.’”<sup>210</sup> Finally, preparation must involve both risk and security assessments.

#### ➤ *Investigative Plan*

One of the lessons learned from the Special Court for Sierra Leone is that gendered crimes may be complex, and seemingly gender-neutral crimes may contain gendered elements.<sup>211</sup> As such, a “gender perspective” or focused approach to SGBV crimes must be taken before any decision is made to initiate an investigation into a country.<sup>212</sup> This includes making appropriate selections with respect to the correct factual incidents or contexts on which to focus investigations of SGBV crimes, those most

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<sup>209</sup> *Supra* note 74 at 31-32.

<sup>210</sup> *Supra* note 199 at 13-14. **Further research is required to identify if specific language or euphemisms are used by Rohingya women to describe these acts.**

<sup>211</sup> Valerie Oosterveld, “Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes” (2009) 17 *Am U J Gender Soc Pol’y & L* 407 at 414.

<sup>212</sup> *Supra* note 46 at 435; *Supra* note 199 at 14.

responsible for the crimes, and the appropriate witnesses to interview.<sup>213</sup> According to Maxine Marcus, the key to including sexual violence crimes in indictments is an investigative plan that “includes and is open to evidence of these crimes, includes preparation in advance of the legal investigation, and relies on a checklist of elements of crimes to be proven.”<sup>214</sup>

The most well-known example of a failure on the part of a prosecutor to investigate and charge acts of sexual violence is the *Akayesu* case tried before the ICTR.<sup>215</sup> Paul Akayesu was one of the first arrested and brought to trial by the ICTR, originally charged with “direct responsibility for genocide, complicity in genocide, incitement to genocide, the crimes against humanity of extermination and murder, and the war crime of murder.”<sup>216</sup> It was not until witnesses mentioned rapes in their testimonies, and the only female judge on the bench inquired further (followed by advocacy by non-governmental organizations (NGO) and legal clinics), that the Prosecution requested leave to amend the indictment.<sup>217</sup> One witness in fact stated that she had never been questioned by the prosecution with respect to rape.<sup>218</sup> The amended indictment included new allegations of fact regarding sexual violence, which eventually led to a conviction for genocide based in part on acts of rape and sexual violence.<sup>219</sup> While the *Akayesu* decision ultimately provided one of the most progressive definitions of sexual violence by an international court,<sup>220</sup> significant judicial time and resources could have been saved if an investigative plan with a focused gender perspective had been available to the investigation team in advance.

Similarly, the ICC’s prosecutors were criticized for failing to include charges for sexual violence in the indictment against Thomas Lubanga, despite allegations that girls had been kidnapped into his militia and were often raped or kept as sexual slaves. Former investigators anonymously admitted that the first series of investigations undertaken by

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<sup>213</sup> *Supra* note 46 at 495.

<sup>214</sup> *Supra* note 42 at 211-42.

<sup>215</sup> *Supra* note 117.

<sup>216</sup> Susan SáCouto & Katherine Cleary, “The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court” (2009) 17 *Am U J Gender Soc Pol’y & L* 339 at 349.

<sup>217</sup> *Ibid* at 350.

<sup>218</sup> *Supra* note 216 at 349.

<sup>219</sup> *Ibid*.

<sup>220</sup> *Supra* note 117 at paras 598, 688.

the Prosecution were launched without sufficient planning, resulting in the lack of an effective strategy regarding the investigation of sexual violence and gender-based crimes.<sup>221</sup>

These examples demonstrate the necessity of developing a comprehensive gender-inclusive investigative plan before any documentation efforts begin.

➤ *Risk and Security Assessments*

Investigators must assess threats that could potentially cause harm to survivors and witnesses, as well as the level of risk that these threats could be carried out.<sup>222</sup> Potential risks might include retaliation, intimidation or threats by the alleged perpetrators or their families; punishment including physical violence by members of their own families or communities; re-traumatization; rejection by spouses, other family members or the community; loss of livelihood or access to school; and criminalization of survivors such as in countries with laws prohibiting adultery or homosexuality.<sup>223</sup> Special consideration for child survivors and witnesses is particularly important.

Further, investigators need to determine whether there are medical facilities nearby that will serve those being interviewed if necessary; whether the documentation will take place in an area with ongoing hostilities; or if offenders will still be present in the area.<sup>224</sup> Consideration as to whether there are risks to survivors or witnesses for their association with investigators should also be made. Survivors and witnesses should be consulted throughout this process. Strategies will need to be developed to mitigate or overcome these obstacles if possible, but ultimately documentation should not go ahead if serious risks cannot be avoided.

Similar assessments must be conducted with respect to the investigation team as well. In particular, assessing whether there is a risk of the investigation team being physically targeted specifically, or if there are environmental risks such as floods or other hazards. For example, in refugee camps in Bangladesh, recent concern has grown regarding the risk of monsoon flooding and public health outbreaks. Assessment of whether there is a risk associated with being found in possession of any information or

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<sup>221</sup> *Supra* 216 at 341-342.

<sup>222</sup> *Supra* note 74 at 33.

<sup>223</sup> *Supra* note 74 at 33.

<sup>224</sup> *Supra* note 74 at 33.

evidence that may be gathered, or more personally, a risk of vicarious trauma to investigators, should also be conducted. Again, mitigation strategies will need to be assessed while determining whether to proceed.

➤ *Health and Psychosocial Assessments*

Prior to commencing an interview, documenters must ensure that the person they are interviewing is medically fit to participate. This might require having a psychologist on the investigation team, if local support is unavailable. For ICC investigations, a preliminary psychosocial assessment is mandatory for all witnesses of sexual and gender-based crimes.<sup>225</sup> This assessment is conducted by a psychosocial expert, who will “consider the welfare of the witnesses, and their ability both to undergo an interview process and testify without undue personal or psychological harm.”<sup>226</sup> This best practice should be budgeted in to the investigation expenses to ensure that further trauma is not inflicted.<sup>227</sup>

➤ *Prior Informed Consent*

All survivors and witnesses must give their informed consent to be interviewed and examined, recorded, or have their information and contact details shared with third parties. All persons providing information about sexual violence or consenting to data collection must be informed about, and understand:

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<sup>225</sup> *Supra* note 200 at 27.

<sup>226</sup> *Ibid.*

<sup>227</sup> **This precaution is of particular relevance in the Rohingya context, as there have been reports of severe trauma among refugees in Cox’s Bazaar:** Hannah Beech, “Rohingya Children Facing ‘Massive Mental Health Crisis’” *New York Times* (31 December 2017), online: <<https://www.nytimes.com/2017/12/31/world/asia/rohingya-children-myanmar.html>>; Annette Ekin, “The mental health toll of the Rohingya crisis” *Al Jazeera* (10 October 2017), online: <<https://www.aljazeera.com/indepth/features/2017/10/mental-health-toll-rohingya-crisis-171010111603004.html>>. **Currently, MSF has set up 19 medical clinics in the camps, and provide mental health services alongside all in and outpatient care:** MSF, “Beyond the Exodus: Rohingya Struggle for Survival” (3 April 2018), online: Livestream <<https://livestream.com/doctorswithoutborders/WebcastRohingya2018>> at 0h:34m:30s. **UNHCR also has a very small number of psychologists on site,<sup>227</sup> however they are likely overburdened and will not be able to work in tandem with investigators:** Tim Gaynor, “Mental Health First Aid on the Frontlines of the Rohingya Crisis” *UNHCR* (26 October 2017), online: <<http://www.unhcr.org/news/stories/2017/10/59de22951b/mental-health-first-aid-frontlines-rohingya-crisis.html>>. **Humanity & Inclusion has also set up “parents clubs” in camps for therapeutic support:** Humanity & Inclusion, “Rohingya Crisis in Bangladesh, Psychological Support for Rohingya Refugees”, online: <<https://reliefweb.int/report/bangladesh/psychological-support-rohingya-refugees>>.

- the purpose and content of the data collection exercise;
- the meaning of confidentiality and how it applies, or not, to the information they provide;
- the procedures that will be followed, including that the information may need to be disclosed in future, and its intended use; and
- the risks and benefits to themselves of participating.<sup>228</sup>

It is therefore critical that investigators are aware of all of the specific uses of the information and evidence gathered so that consent will not need to be re-sought at a later date. According to Maxine Marcus, informed consent requires finding a balance between

on the one hand, building confidence and reasonable trust in the witness such the s/he feels comfortable to share his/her experiences, feels empowered through the telling, and opts to seek justice for the crimes of which s/he was a victim; while on the other hand, taking care to ensure that the witness does not unduly rely upon the ability of the investigators to protect them, to achieve justice for them, or in fact, to make any even small promise or assurance at all – even the promise to come visit them again.<sup>229</sup>

Informed consent is also a primary consideration for managing expectations among survivors with respect to the chances of them seeing any forms of justice through their cooperation, as well as how long such processes might take. As far as possible, investigators must therefore be “clear and direct about what can be done and what cannot be done, what the protections are – and what they are not, what the process involves and what it does not”.<sup>230</sup>

➤ *Interpreters*

Interpreters should be carefully selected, and must be provided training on how to interact with survivors and witnesses, including familiarization with cultural norms and euphemisms around sexual violence.<sup>231</sup> ICC investigators, for example, select interpreters based, where possible, on their prior experience in interpreting for victims of SGBV crimes, and provide briefings on methods such as adopting non-judgmental behaviour,

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<sup>228</sup> *Supra* note 74 at 45.

<sup>229</sup> *Supra* note 42 at 227.

<sup>230</sup> *Supra* note 42 at 227.

<sup>231</sup> *Supra* note 199 at 16-17.

and using verbatim translations.<sup>232</sup> Interpreters' specific role should be carefully explained in advance, and they should not be asked to act as note-takers.

➤ *Specific Interview Techniques*

Generally speaking, interviews should begin by developing trust and rapport with the witness or survivor (which could take more than one meeting); eliciting a free narrative; and following up with open-ended and specific non-leading questions. Inconsistencies should be challenged and clarified. Diagrams of the body may be used where necessary.<sup>233</sup> Interviews should be conducted in teams of two people – with one acting as the primary note-taker at any given time.<sup>234</sup>

In conflict situations, acts of sexual and gender-based violence rarely occur in isolation from other crimes. The survivor's experience should therefore be understood and documented in a comprehensive manner, as well as with a specialized focus on SGBV crimes.<sup>235</sup> It is also important to emphasize that gender-based crimes are not always manifested as a form of sexual violence.<sup>236</sup> Other crimes may include “non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.”<sup>237</sup> It is therefore imperative that documenters do not focus solely on crimes of a sexual nature when taking a gendered approach to documentation. This will allow for a broader conversation to take place regarding the different ways that men and women are affected by conflict, and the varying means of support they may require throughout stages of recovery and redress. Similarly, while the focus of this thesis has been on SGBV committed against women, fieldworkers documenting sexual violence should also interview men. Any stigmas or assumptions about who might experience this manner of violation should be dispelled to ensure that certain categories of survivors are not further victimized in the documentation process.<sup>238</sup>

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<sup>232</sup> *Supra* note 46 at 491.

<sup>233</sup> *Supra* note 46 at 492-493.

<sup>234</sup> *Supra* note 202 at 17.

<sup>235</sup> *Supra* note 200 at 27.

<sup>236</sup> *Supra* note 200 at 12.

<sup>237</sup> *Supra* note 200 at 12.

<sup>238</sup> Sandesh Sivakumaran, “Sexual Violence Against Men in Armed Conflict” (2007) 18:2 *The European Journal of International Law* 253 at 276.

#### D. WHERE TO DOCUMENT

Having reviewed the specific content of documentation, as well as best practices for obtaining reliable evidence, I now examine geographical factors relevant to documentation. To date, the government of Myanmar has restricted access to the international fact-finding mission, who are not able to conduct their investigation inside the country. A complete ban on entry has also recently been implemented against UN Special Rapporteur to Myanmar, Yanghee Lee, who was accused of being ‘biased and unfair’ for her statements criticizing the security forces and limitations placed on her access during a July 2017 visit.<sup>239</sup> Bob Rae, was allowed to enter Myanmar as part of his mission in late 2017; however, his visit to Rakhine State was limited to Sittwe rather than the northern part of the state where the majority of Rohingya reside.<sup>240</sup> Some international diplomats have also previously been granted access to certain parts of Rakhine State in guided visits, but even then mobility and access were tightly constrained, and they did not form part of an investigative mission.<sup>241</sup> In a surprising move, Myanmar has recently agreed to allow a delegation from the UNSC to enter the country, however the scope of the visit, and the extent of access they will be given to Rakhine State, has not yet been confirmed.<sup>242</sup> Media and humanitarian access to the areas of conflict in northern Rakhine State has also been highly restricted, in particular for foreign journalists and aid workers.<sup>243</sup> In light of these restrictions, it has been very difficult for international actors to conduct independent investigations into the situation in Rakhine. Nevertheless, investigative efforts inside Myanmar would be invaluable for understanding the full extent of the assault against Rohingya.

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<sup>239</sup> “Myanmar bars UN human rights envoy Yanghee Lee” *Al Jazeera* (20 December 2017), online: <<http://www.aljazeera.com/news/2017/12/myanmar-bars-human-rights-envoy-yanghee-lee-171220145600876.html>>.

<sup>240</sup> *Supra* note 2.

<sup>241</sup> U.S. Embassy in Burma, “Statement on the Diplomatic Trip to Northern Rakhine on 2 October 2017” (2 October 2017), online: <<https://mm.usembassy.gov/statement-diplomatic-trip-northern-rakhine-2-october-2017/>>; U.S. Embassy in Burma, “Statement on the Diplomatic Visits to Rakhine State in February 2018” (19 February 2018), online: <https://mm.usembassy.gov/statement-diplomatic-visits-rakhine-state-february-2018/>.

<sup>242</sup> Lawi Weng, “Myanmar Agrees to UN Security Council Visit; Where, When to be Decided” *The Irrawaddy* (6 April 2018), online: <<https://www.irrawaddy.com/news/burma/myanmar-agrees-un-security-council-visit-decided.html>>.

<sup>243</sup> Advisory Commission on Rakhine State, “Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State” (August 2017), online: <[http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf)>.

In view of these circumstances, the majority of documentation will instead need to take place among Rohingya refugees outside of Myanmar. The refugee camps in Bangladesh's Cox's Bazaar have registered over one million inhabitants,<sup>244</sup> and therefore contain a wealth of information about the situation in Rakhine. Countries such as Malaysia and Thailand also host Rohingya refugees who could provide information toward these efforts.

However, special considerations must be born with respect to the collection of evidence in refugee camps. For example, caution may need to be exercised, first because “there may be a possibility of obtaining an unbalanced account of events if the population of the camp consists mainly of one group” and second, while less likely to be the case in the current context, “perpetrators may also have concealed themselves in the camp and may give misleading information.”<sup>245</sup> Moreover, there is the unfortunate reality that “tragedy is commodified” in refugee camps, where aid groups are more inclined to help the “neediest cases”.<sup>246</sup> This may provide an incentive for survivors or witnesses to embellish or falsify accounts to fit the narrative they believe the investigator is expecting, or that which will help them to secure resources to survive in a very difficult environment. This will pose particular challenges to documenters who have to balance sensitivity with scrutiny in the search for credible accounts. The prevalence of trauma, both from experiences in Myanmar and ongoing assaults against women in refugee camps,<sup>247</sup> may also impact the ability or willingness of refugees to tell their stories. Further, among the Rohingya, access to the women in these camps may be restricted by

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<sup>244</sup> **1,066,088 people were registered by Bangladesh Immigration and Passport Department as of 10 February 2018:** Inter Section Coordination Group, “Situation Report: Rohingya Refugee Crisis” (11 February 2018), online: <<https://www.humanitarianresponse.info/en/operations/bangladesh/document/situation-report-rohingya-crisis-coxs-bazar-11-february-2018>>.

<sup>245</sup> Camille Gifford and Polona Tepina, *The Torture Reporting Handbook*, 2nd ed., Human Rights Centre – University of Essex (2015), Part B at 20-21.

<sup>246</sup> Hannah Beech, “The Rohingya Suffer Real Horrors. So Why Are Some of Their Stories Untrue?” *The New York Times* (1 February 2018), online: <<https://www.nytimes.com/2018/02/01/world/asia/rohingya-myanmar-camps.html>>.

<sup>247</sup> David Longstreath, “UN warns of trafficking, sexual abuse in shadow of Rohingya refugee crisis” *UN News* (14 November 2017), online: <<http://www.un.org/apps/news/story.asp?NewsID=58082#.WntQGyMwhcw>>. Chris Buckley and Ellen Barry, “Rohingya Women Flee Violence Only to be Sold into Marriage” *New York Times* (2 August 2015), online: <<https://www.nytimes.com/2015/08/03/world/asia/rohingya-women-flee-violence-only-to-be-sold-into-marriage.html>>.

religious and cultural norms regulating men and women's spaces. This consideration exemplifies the need for a diverse investigation team, as not all members may be granted the same access.

A final consideration relates to the transient nature of refugee communities, and the possibility that they will be relocated,<sup>248</sup> or repatriated to Myanmar where access is more difficult. This may create an obstacle if, for example, prosecutors later wish to call a witness to testify in a legal proceeding and they are unable to locate them.

## E. WHO SHOULD DOCUMENT

As discussed above, documentation of evidence for international legal proceedings needs to be systematically conducted to ensure compliance with judicial rules of admissibility. It is therefore crucial that anyone engaging in documentation of human rights violations in conflict environments is properly trained and prepared to undertake their specific mandate. There is some debate as to who is qualified to undertake this important task, in particular with respect to the role of NGOs.

NGOs often arrive long before court investigators, who may face diplomatic, legal, or pragmatic obstacles to reaching atrocity sites. Furthermore, the ICC does not have the resources to immediately deploy investigators in every conflict situation that may one day become the focus of a criminal trial.<sup>249</sup> It may therefore be years before an official investigation begins, by which time crucial evidence could be lost or destroyed. For example, HRW's satellite imagery has revealed that since late 2017, the Myanmar government has bulldozed at least 55 Rohingya villages of all structures and vegetation using heavy machinery, which has inevitably resulted in the loss of significant evidence.<sup>250</sup> In situations such as the one described in Myanmar, international

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<sup>248</sup> **Bangladesh has stated an intention to voluntarily move approximately 100,000 Rohingya refugees to Bhashan Char, a recently formed sedimentary island in the Bay of Bengal, starting in June 2018:** "Bangladesh Plans to Begin Moving Rohingya Refugees to Remote Island in June" *Radio Free Asia* (5 April 2018), online: <<https://www.rfa.org/english/news/myanmar/island-04052018171219.html>>.

<sup>249</sup> Human Rights Center, "First Responders: An International Workshop on Collecting and Analyzing Evidence of International Crimes" (UC Berkeley, 2014) at 4.

<sup>250</sup> *Human Rights Watch*, "Burma: Scores of Rohingya Villages Bulldozed" (23 February 2018), online: <<https://www.hrw.org/news/2018/02/23/burma-scores-rohingya-villages-bulldozed>>. **The Myanmar government claims this is to prepare for the repatriation of refugees because of the damage caused by fires, however some villages appeared to be completely intact prior to this destruction.**

investigators may also not be allowed access to key crime scene locations, while some NGOs may be already on site. Where state cooperation is not forthcoming, NGO assistance may be all the more important. For these reasons, capable and willing NGOs may be vital to the documentation process to ensure the preservation of valuable evidence.

The inquiries made by the investigative arms of international criminal mechanisms will start with the reports and other information generated by NGOs and human rights organizations in order to determine, based on the standards set in the Statute for jurisdiction, admission, and gravity, whether there is a legal basis for the investigation.<sup>251</sup> The quality of these reports will help determine whether to commit additional investigative resources to an inquiry.<sup>252</sup> For example, by documenting and submitting significant properly collected evidence of SGBV crimes, NGOs may influence criminal prosecutors' investigative plans and ultimately which charges are laid. As elements of sexual crimes are difficult to prove and the collection of evidence is time consuming, the prospects for the prosecution of sexual crimes are generally better with the documentation support of human rights professionals.<sup>253</sup>

Due to the wealth of their local contacts and knowledge, NGOs may also help to establish reliable and secure in-country contacts,<sup>254</sup> thereby acting as intermediaries for investigators who arrive at a later date. More significantly, NGOs already on the ground or with access to Rakhine may be the only ones capable of documenting and providing evidence about the circumstances in that region to international courts, should they be willing and capable of taking on that challenge. This may require negotiating internal biases or ethnic relations (such as widespread prejudices against Muslims, even among some members of the local Civil Society Organization (CSO) community),<sup>255</sup> as well as significant safety concerns. For example, the Myanmar government has clearly expressed a distaste for external investigations into the situation, and recently arrested two Myanmar journalists working for Reuters who uncovered indisputable evidence of the

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<sup>251</sup> *Supra* note 46 at 434.

<sup>252</sup> *Supra* note 202 at 9.

<sup>253</sup> *Supra* note 202 at 21.

<sup>254</sup> *Supra* note 249.

<sup>255</sup> Author's personal observations and conversations with CSO workers in Myanmar.

*Tatmadaw*'s mass summary execution of ten Rohingya men.<sup>256</sup> Local CSOs may also face restrictions, including on travel, from authorities if they are seen to be engaging in documentation that casts the government in a negative light. Significant risk assessments will therefore need to be carried out prior to conducting these efforts.

In situations where the ICC has initiated an investigation, the OTP will dispatch trained criminal investigators and lawyers to collect physical evidence and conduct interviews with survivors and witnesses. If NGOs or other interested parties have already taken statements from witnesses, one approach is to have OTP investigators review these statements to determine whether they are sufficient to meet evidentiary or procedural requirements, or if there is a need to interview the survivor again.<sup>257</sup> This would reduce the impact on survivors who may find it difficult to recount their experiences numerous times. It would also address the concern that if NGOs conduct in-depth interviews with a key witness who signs a statement and then submits it to the ICC, rules of disclosure may require that the statement form part of the evidentiary record, even if it contradicts information later provided to trained investigators. This could damage the credibility of the witness and the strength of the evidence.

However, in situations where the ICC is likely to investigate, some argue that NGOs should limit and coordinate their engagement in documentation to tasks that support of OTP investigators, rather than conducting interviews or collecting physical evidence themselves. There are several reasons for this position. First, most NGOs are not trained in legal documentation techniques, and therefore may not record information about crimes in a manner that will be admissible in court.<sup>258</sup> Similarly, NGOs may not have the capacity to confidentially store evidence, or to protect witnesses and survivors from potential risks associated with participation. Second, even where NGOs have conducted documentation, OTP investigators will still have to carry out their own investigations, which, as discussed above, could create inconsistencies in evidence and unnecessary trauma to survivors and witnesses forced to repeat their experiences.<sup>259</sup>

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<sup>256</sup> “Two Reuters journalists arrested in Myanmar, face official secrets charges” *Reuters* (13 December 2017), online: <<https://www.reuters.com/article/us-myanmar-journalists/two-reuters-journalists-arrested-in-myanmar-face-official-secrets-charges-idUSKBN1E71CO>>.

<sup>257</sup> *Supra* note 199 at 38.

<sup>258</sup> *Supra* note 249.

<sup>259</sup> *Supra* note 249 at 5.

Finally, NGOs will also have their own independence and mandates to preserve, which may not be consistent with the practices of court investigators.<sup>260</sup> Others may be concerned about jeopardizing their ability to work in certain areas if they are seen to be cooperating with international investigators. In Darfur, for example, thirteen prominent international NGOs were expelled by Sudan's government over allegations that they were cooperating with the ICC's investigation of the President.<sup>261</sup> For similar reasons, in order to discharge its mandate effectively, the International Committee of the Red Cross has been granted special legal status, which includes immunity from disclosing information regarding its field activities in judicial proceedings.<sup>262</sup> NGOs will also not always be independent or impartial, and some may be vulnerable to interference in their work from outside agencies.<sup>263</sup> This may create a risk of coercion or selective reporting on the part of these NGOs, raising questions of reliability and credibility. It may also be that NGOs are documenting for non-legal purposes, such as advocacy or creating a historical record, and have not obtained informed consent from witnesses to share their stories with those associated with the Court. In such cases, the ability of these records being used for prosecutions will depend on the strength of the NGOs' connections within the survivors/witnesses' communities, and whether they kept records of personal contact information of those they interviewed. This may raise concerns around promises made about confidentiality, or safety considerations related to re-establishing contact.

Despite these cautions, it is clear that NGOs have an important role to play in contributing to early documentation efforts, which could greatly assist court prosecutors. However, efforts must be made to train and support NGOs to ensure they are knowledgeable on how to proceed cautiously and responsibly. For all involved, coordination of documentation efforts is vital to ensuring that the impact and risks to survivors and witnesses from having to retell their experience is mitigated, and the quality and admissibility of documented information is not diminished.

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<sup>260</sup> *Ibid.*

<sup>261</sup> Louis Charbonneau, "NGO Expelled from Darfur Considered ICC Cooperation" *Reuters* (16 March 2009), online: <<https://www.reuters.com/article/us-sudan-warcrimes-ngo/ngo-expelled-from-darfur-considered-icc-cooperation-idUSTRE52F6SX20090316>>.

<sup>262</sup> International Committee of the Red Cross, "Tools to do the job: The ICRC's legal status, privileges and immunities" (17 February 2016), online: <<https://www.icrc.org/en/international-review/article/tools-do-job-icrcs-legal-status-privileges-and-immunities>> at 330.

<sup>263</sup> *Supra* note 249 at 6.

### III. Conclusion

In the wake of the recent release of Bob Rae's final report, and the recommendation that Canada should take the lead in the documentation of evidence for future criminal prosecutions, it has never been more pertinent to begin a discussion on how this form of documentation should be carried out. The focus on documenting crimes against women in particular is relevant in light of Canada's Feminist International Assistance Policy, and its stated intention to help address SGBV by "supporting survivors and bringing perpetrators to justice".<sup>264</sup> Encouragement must therefore be levied on the Canadian government to implement this recommendation, ensuring that a gender focus is applied, both for the benefit of Rohingya women, and to align with our national priorities. In the words of Bob Rae, "[w]hat we do, or don't do, in response to the Rohingya crisis will be a litmus test for Canada's foreign policy."<sup>265</sup>

This section has attempted to provide guidance on pertinent considerations relevant to the investigation and documentation of sexual violence committed against Rohingya women by the *Tatmadaw*. It has argued that early and systemic documentation at an ICL standard is a critical first step in ending impunity for these unspeakable crimes. NGOs have a vital role to play in the documentation process, however it is imperative that they receive proper training and are clear on their purpose and organizational mandate. The collection and creation of an evidence base of SGBV will help ensure these crimes are recognized, and given their deserved primacy in international criminal proceedings.

The ICL standard of documentation may therefore serve a number of purposes, including providing women the opportunity to receive some form of recognition for the harms suffered. For those who testify, bearing witness to mass atrocities is "deeply connected to the ideals of justice, fundamentally premised on the notion that wrongdoing will be addressed and that all persons will be treated with dignity, fairness and

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<sup>264</sup> Government of Canada, "Canada's Feminist International Assistance Policy", online: <[http://international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/priorities-priorites/policy-politique.aspx?lang=eng](http://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng)>.

<sup>265</sup> *Supra* note 2.

respect.”<sup>266</sup> Henry describes the moral and emotional symbolism of an international criminal trial: “To speak for the dead is memorialization of loved ones who were killed in war; it represents a form of recognition and acknowledgement.”<sup>267</sup> Further, “[a]n official condemnation of the perpetrator’s actions may lessen feelings of complicity and self-blame.”<sup>268</sup> In this way, “[s]hame and humiliation can be transformed to dignity and virtue, and individuals can be instilled with a sense of empowerment and control.”<sup>269</sup> This official “objective” recognition has the further potential to disrupt the official state narrative of the purpose and nature of military action against the Rohingya population in Rakhine State, which may pave the way for inter-communal reconciliation.

International prosecutions may additionally act as deterrence for future perpetration of this crime by state officials. However, putting rapists in jail is only part of the motivation. The recognition of SGBV as a serious harm worthy of criminal proceedings, and the recognition that these acts were committed against individual women, are just as significant and perhaps serve a greater purpose. Indeed, witnesses who testified before the ICTR noted their motivations in doing so as a means for “receiving communal acknowledgement of their pain.”<sup>270</sup>

Finally, such detailed documentation will create a high standard credible evidence-base that may also be used by the international community to inform political, diplomatic and aid responses to the crisis. These measures have the potential of contributing to the end of violence, and thereby positively affecting the lives of Rohingya women. All of these forms of “justice” are internationally valued, and respond to direct calls for international engagement in resolving this humanitarian crisis. In this way, along with humanitarian aid, support for peace-building, and refugee resettlement, international criminal prosecutions can play an important role in resolving the crisis in Myanmar, and paving a path for transformative justice for the Rohingya.

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<sup>266</sup> Shanee Stepakoff, G. Shawn Reynolds, Simon Charters & Nicola Henry, “Why Testify? Witnesses’ Motivations for Giving Evidence in a War Crimes Tribunal in Sierra Leone” (2014) 8 *The International Journal of Transitional Justice* 426 at 428.

<sup>267</sup> Nicola Henry, “Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence” (2009) 3 *The International Journal of Transitional Justice* 114 at 128.

<sup>268</sup> *Ibid* at 121.

<sup>269</sup> Jonathan Doak, “The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions” (2011) 11 *Int’l Crim L Rev* 263 at 271.

<sup>270</sup> *Supra* note 266 at 434.

However, the ICL standard of documentation and response to justice is not without its limitations or critiques. The following section will identify some opposing views to this approach, and in doing so, begin to imagine alternative mechanisms for providing justice to Rohingya women and girls, which may or may not be complementary to the legal approach. It will then identify and discuss alternative methods of documentation and investigation to be used in accordance with these mechanisms.

## **Chapter III: Critical Perspectives, Rethinking Justice and Documentation**

### **I. Introduction**

The ICL standard of documentation discussed in the previous section has the potential to contribute to specific forms of retributive justice. However, it must be recalled that access to international justice is not an inevitability for the Rohingya. It may be the case that the UNSC does not refer Myanmar to the ICC, or resolve to create an alternative mechanism for the case to be heard. Perpetrators may never travel to a country willing or able to prosecute based on universal jurisdiction. Even if the matter is brought before an international mechanism, there are a number of reasons why an individual survivor's case may never end up in court. These might include not knowing one's attackers, escape or death of the perpetrator, or a lack of evidence which implicates the senior-level accused standing trial.<sup>1</sup> The collective form of justice envisioned by the ICL model may not resonate with individual survivors when their personal experiences are not vindicated. Furthermore, the remoteness of the ICC located in the Hague from Myanmar or Bangladesh, may make engagement impossible for the majority of impoverished Rohingya.

Given this uncertainty, consideration as to the purpose and process most appropriate for documentation is required. One could easily argue that the creation of an evidence-base through documentation conducted to the ICL standard could be used to pursue other non-retributive avenues, such as transitional justice mechanisms, and diplomatic or political advocacy for social justice. Indeed, the degree of detail and factors considered through this approach will inevitably create a comprehensive record that contains sufficient information for these purposes. However, it is the effect of the *process* of documentation to this standard that should be considered to determine its appropriateness, compared to the likelihood of it being used for its intended purpose of international prosecutions. For if documentation is to be conducted for informing non-judicial purposes alone, it may be more appropriate to take a less invasive approach and avoid potential negative impacts on those affected by the documentation process.

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<sup>1</sup> Anne-Marie de Brouwer, "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes" (2015) 48 Cornell Int'l L.J. 639 at 655.

It is therefore understood that justice may take different shapes, and documentation of mass atrocities is not gender or value neutral. Questions of who documents what or whose experiences and when, as well as the medium of documentation, and the overall objective of the efforts, will inform and guide the ultimate compilation and framing of evidence, narratives, and history. Importantly, these choices will also determine the silences and exclusions in the historical record. Documentation at an ICL standard is therefore not without its problems or critiques. This section will identify some of the concerns with this form of documentation that arise from a variety of perspectives, including: feminist legal theories, Third World Approaches to International Law (TWAIL), and some views and approaches of Rohingya women themselves. These perspectives raise questions of the different ways that “justice” is conceived, and the ultimate impact an ICL approach will have on the lives of Rohingya women. In doing so, they allow us to envision alternative mechanisms for pursuing justice, which have the potential to pave the way for more holistic or transformative outcomes. The final section in this chapter will then discuss the specific forms of documentation required for these alternative mechanisms.

## II. Critical Perspectives

### A. FEMINIST LEGAL THEORIES<sup>2</sup>

There is no general feminist legal theory pertaining to how to respond to mass violence against women. This helps explain why some legal feminists advocate for the increased visibility of harms against women, in particular sexual violence, within international prosecutions; while others concentrate on the inability of law to capture the full experiences of harm against women, and the violence law itself can impose on women who encounter it. In response to recognition of this variety of perspectives, many feminists “stress the importance of attentiveness to particularity and context, even while highlighting a larger pattern of unequal power and respect on the basis of traits such as

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<sup>2</sup> **Feminist legal theory is a set of ideas about the relationship between law and gender, which has revealed the male bias in formal law and legal processes, and argued for the reform of law from a gender-neutral perspective:** Genevieve R. Painter, “Feminist Legal Theory” in *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed by James D. Wright (Elsevier, 2015).

gender, race and class.”<sup>3</sup> Indeed, intersectionality is now an important element of many contemporary international feminist critiques, recognizing that women around the world experience various overlapping and intersecting sources of disempowerment and exclusion.<sup>4</sup>

One common theme that has emerged with respect to ICL prosecutions of crimes against women is the increased attention and singular focus on acts of sexual violence. The increased prosecution of sexual violence, and its recognition as among the most heinous of international crimes, are hard-won achievements of feminist lawyers and activists. However, there are now concerns that this limited focus has come with negative consequences for other forms of violence against women. Recognizing that law has the power to dictate which harms are seen as the most extraordinary, there is fear that the fixation on wartime rape has in effect diminished or blocked any consideration of other gender-based violence that occurs in conflict, particularly the protection of economic, social, and cultural rights of women.<sup>5</sup> A focus on certain experiences of violence and not others “translate to a prescient reality in which the dominance of sexual violence and specifically rape excludes multilayered engagement with wide-ranging structural discrimination and exclusions for women.”<sup>6</sup> In particular, for women who experience intersectional sources of systemic discrimination, the law may further act to conceal their complex encounters with gendered violence. Harms which women identify as integral to their individual sense of violation may therefore have no status, or limited status, within the ICL framework.<sup>7</sup>

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<sup>3</sup> Martha Minow, “Between Vengeance and Forgiveness: Feminist Responses to Violence Injustice” in Nancy E. Dowd & Michelle S. Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, 2003) 383 at 384.

<sup>4</sup> Margaret Davies, “Unity and Diversity in Feminist Legal Theory” (2007) 2:4 *Philos Comp* 650 at 657.

<sup>5</sup> Nicola Henry, “The Fixation on Wartime Rape: Feminist Critique and International Law” (2014) 23:1 *Soc Legal Stud* 93 at 98; Hilary Charlesworth, “Feminist Methods in International Law” in Nancy E. Dowd & Michelle S. Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, 2003) 78 at 83.

<sup>6</sup> Fionnuala Ní Aoláin, “The Gender Politics of Fact-Finding in the Context of the Women, Peace, and Security Agenda” in Philip Alston & Sarah Knuckey eds, *The Transformation of Human Rights Fact-Finding* (London: Oxford University Press, 2016) 89 at 91.

<sup>7</sup> Fionnuala Ní Aoláin, “Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflicted Societies” (2009) 35 *Queen’s LJ* 219 at 234.

While on the one hand, widespread media coverage of sexual violence during conflict has in some cases served as a valuable means of mobilization and advocacy; on the other, survivors may become reduced to targets of one particular crime and constructed as perpetual victims, or the objects of voyeurism in human rights activism and academia.<sup>8</sup> They are deprived of a more nuanced portrayal as “the complete and multi-faceted women that they are – women suffering from many kinds of injuries, only one of which is rape, and surviving.”<sup>9</sup> The implications for documentation efforts which focus on establishing evidence of the specific elements of crimes codified in the Rome Statute, is that offences against women not of a sexual nature will generally be excluded from the documentation process. As a result, documentation will contribute to the depiction of crimes against women as solely of a sexual nature, and a silencing of the variety of other systemic forms of violence women continue to face during times of conflict and relative peace. In this way, short-sighted ideas “about what the gendered impacts of conflict are, and how they should be repaired” are perpetuated.<sup>10</sup> The significance of this distinction may manifest in who has access to reparations, as well as who receives emotional or symbolic benefit of ‘recognition’ for their injuries or experiences.

The way survivors are able to tell their stories in formal legal proceedings may also limit the psychological benefits of public recognition. Stepakoff et al describe a fundamental tension between “the need to adhere to the rigorous demands of legal process and victims’ need to exercise some measure of control over the narration of their experiences.”<sup>11</sup> In this regard, Henry distinguishes between two types of testimony.

The first is centered on the description of the actual rape (which is required by the Prosecutor as evidence for the case); and the second is the

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<sup>8</sup> *Supra* note 5 at 92; *Surpa* note 4 at 101 and 103.

<sup>9</sup> Amy E. Ray, “The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries” in Nancy E. Dowd & Michelle S. Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, 2003) 326 at 326.

<sup>10</sup> Sanne Weber, “From Victims and Mothers to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions” (2017) 12 *International Journal of Transitional Justice* 88 at 101.

<sup>11</sup> Shanee Stepakoff, G. Shawn Reynolds, Simon Charters & Nicola Henry, “Why Testify? Witnesses’ Motivations for Giving Evidence in a War Crimes Tribunal in Sierra Leone” (2014) 8 *IJTJ* 426 at 433.

story of the impact and emotional aftermath of rape (which is not typically required for the case).<sup>12</sup>

While the legal process focuses on the first type, this is probably not the narrative that survivors would want (or feel comfortable) to tell.<sup>13</sup> In this way, criminal trials do not provide survivors an opportunity to construct their own narratives, and they cannot use their own language to talk about the impact of sexual violence.<sup>14</sup> It is also relevant that other forms of expression, such as artwork, poetry, or songs, are generally not accepted on par with verbal testimony, which further limits survivors' choices for expressing meaning.<sup>15</sup> The effect of this silencing of certain aspects of women's experiences may have psychological or emotional impacts on those brave enough to tell their stories. It may also affect their perceptions of whether "justice" was ultimately achieved.

Along related lines, a primary concern of documentation at the ICL standard is the risk of re-traumatization for survivors and witnesses in the re-telling, both to investigators and later in court if called to testify. This is a potential risk at any stage of re-telling; however, the ICL standard requires a level of meticulous detail, which may cause additional trauma. Although the ICL approach emphasizes "do no harm", there is the potential that harm is inherent in the process. For example, to establish the specific elements of rape, a survivor will have to recount the explicit details of penetration, which may cause emotional distress, especially in cultures such as Myanmar where sexual acts are not discussed openly or are regarded with shame or embarrassment.<sup>16</sup> Conversely, the use of a less intrusive euphemism, or even the descriptor "rape" might be sufficient to convey the meaning of harm for other documentation purposes.<sup>17</sup>

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<sup>12</sup> Nicola Henry, "The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice" (2010) 16:10 *Violence Against Women* 1098 at 1106.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> **However, it is noteworthy that in November 2007 the ICC accepted 500 children's drawings depicting the conflict in Darfur, as contextual evidence in the prosecution of Ahmad Harun and Ali Kushayb:** Claudia Aradau & Andrew Hill, "The Politics of Drawing: Children, Evidence, and the Darfur Conflict" (2013) 7 *Int Polit Sociol* 368.

<sup>16</sup> Shamima Akhter and Kyoto Kusakabe, "Gender-based Violence among Documented Rohingya Refugees in Bangladesh" (2014) 21:2 *Indian J Gend Stud* 225 at 228.

<sup>17</sup> **According to Human Rights Watch, a statement that soldiers "repressed" a woman, is a common euphemism for rape among the Rohingya:** HRW, "Burma: Rohingya Recount Killings, Rape, and Arson" (21 December 2016), online: <<https://www.hrw.org/news/2016/12/21/burma-rohingya-recount-killings-rape-and-arson>>.

Significant attention has also been paid to the potential harm that public disclosure and participation in legal proceedings may have on the women who come forward. In cases where perpetrators and survivors continue to live in the same communities, the potential for reprisal against those who speak out may create a serious physical risk. In some communities, stigma and shame are borne by the survivors rather than the perpetrators of such crimes, and publicly sharing such experiences may therefore have social ramifications for survivors and their families. On top of this, because of displacement and widespread death inherent in conflict-affected regions, support structures may not be in place to assist survivors through the process of grief and recovery in the aftermath of trauma and emotional harm that may occur in the re-telling.<sup>18</sup>

Some feminists further question the extent to which legal processes can ever effectively deter abuses or address the root causes of violence against women. It has been noted that the criminalization of sexual violence in conflict “has not inevitably led to any redistributive justice for survivors of such crimes”, nor “have the representations of women’s experiences within these spaces always embodied complexity, nuance or context.”<sup>19</sup> Trials tend to be limited in focus to large-scale abuses, understood as violations of civil and political rights, and therefore fail to recognize the violations of economic, social, or cultural rights, which often make up the root causes of conflict.<sup>20</sup> Indeed, international criminal processes “do not generally articulate the broader, systemic forms of injustice as the origins of armed conflict”, and trials do not result in “substantive” or transformative justice for women in post-conflict societies.<sup>21</sup> Nor have there been significant improvements for survivors with respect to their experiences of stigma and social harms commonly associated with speaking out about sexual violence.<sup>22</sup> For the Rohingya then, an international criminal trial is unlikely to resolve the extreme prejudice towards them among the majority population in Myanmar, nor assist in

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<sup>18</sup> Nicola Henry, “Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence” (2009) 3 *The International Journal of Transitional Justice* 114 at 124.

<sup>19</sup> *Supra* note 4 at 105.

<sup>20</sup> Madeleine Rees and Christine Chinkin, “Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights” (2016) 48:4 *NYU J Int’l L & Pol* 1211 at 1219.

<sup>21</sup> *Supra* note 4 at 105.

<sup>22</sup> *Supra* note 5 at 92.

granting them citizenship rights or non-discriminatory treatment. For Rohingya women, a trial is further unlikely to address the overall gendered attitudes towards women in Myanmar society. As such, there is reason to question the value and appropriateness of this retributive form of justice for women who have experienced conflict-related harms.

## **B. THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TWAIL)**

At least in one respect, TWAIL is similar to feminist perspectives on international law, in that both are “deeply committed to understanding more about how law serves elite interests,” with the hope of coming “to a more effective understanding of law’s emancipatory potential and how we might assist in its realization.”<sup>23</sup> According to TWAIL however, the system of international law is inherently Eurocentric, in that it is “derivative of European values, culture and economic imperatives,” which influences its credibility as a global justice mechanism.<sup>24</sup>

From a TWAIL perspective, the primary concern about international documentation of human rights abuses is its inherently problematic dynamic, in which Western countries pass judgment on “Third World” crimes. This practice fosters and reproduces a “binary dichotomy that ruptures the globe into two conceptual communities, the one ‘heavenly’ and the other ‘hellish’.”<sup>25</sup> ICL documentation efforts risk reproducing this binary by disproportionately focusing on human rights abuses committed in the so-called “Third World”, with very little attention given to the violations committed in powerful Western states.<sup>26</sup> The lack of attention given to human rights achievements in these “Third World” countries also contributes to this binary. This dynamic creates a “one way traffic” paradigm, in which

human rights knowledge, scrutiny, and supervision tends to flow from those parts of the world that supposedly invented human rights (i.e., the West) and that observe it almost perfectly, to those regions of the world

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<sup>23</sup> Dianne Otto, “The Gastronomics of TWAIL’s Feminist Flavourings: Some Lunch-Time Offerings” (2007) 9 Int CL Rev 345 at 348.

<sup>24</sup> Sue Robertson, “‘Beseeching Dominance’: Critical Thoughts on the ‘Responsibility to Protect’ Doctrine” (2005) 12 Aust ILJ 33 at 41.

<sup>25</sup> Obiora C. Okafor, “International Human Rights Fact-Finding Praxis: A TWAIL Perspective” in Philip Alston & Sarah Knuckey eds, *The Transformation of Human Rights Fact-Finding* (London: Oxford University Press, 2016) 49 at 52.

<sup>26</sup> *Ibid.*

that tend to know very little – if anything – about it (i.e., the Third World), and that hardly ever observe it.<sup>27</sup>

In this way, “Third World” countries have largely come to be stereotyped as human rights abusers, or “savages”, while Western states are erroneously depicted as human rights champions, or “saviors”.<sup>28</sup>

TWAIL proponents are also concerned about the role of the “Western gaze” in determining the perceived legitimacy of “Third World” statehood, governance, practices, and by extension the need for documentation for ICL purposes.<sup>29</sup> Concurrently, what does not capture the attention of the Western gaze, or what it decides to remain ignorant of, does not garner the same international response. In Myanmar, this may be a relevant concern with respect to the relative international disinterest in the ongoing armed conflicts in Shan and Kachin States (where state sanctioned sexual violence has been committed for decades), as compared to the media attention given to the current offensive against the Rohingya in Rakhine State.

The concern regarding the scope of the “Western gaze” may further be extended to the deficit of recognition and circulation of ideas and intellectual materials of scholars from the global South.<sup>30</sup> As Connell poignantly notes, this scarcity is particularly relevant in the realm of feminist theory.

This is a structural problem in feminist thought on a world scale. If the only versions of theory that circulate globally and hold authority are those that arise from the social experience of a regional minority, there is a drastic impoverishment of gender studies as a form of knowledge.<sup>31</sup>

This significant observation is particularly relevant to assessing the competing conceptions of appropriate “justice” responses for women who have experienced SGBV, as there is little indication that the ideas of Rohingya women, or any voices from their geographical proximity, have been included in the ongoing theoretical debates.

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<sup>27</sup> *Ibid* at 53.

<sup>28</sup> See Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 *Harv Int’l LJ* 201.

<sup>29</sup> *Supra* note 25 at 54.

<sup>30</sup> See Satya P. Mohanty ed, *Colonialism, Modernity, and Literature: A View from India* (New York: Palgrave Macmillan, 2011).

<sup>31</sup> Raewyn Connell, “Meeting at the edge of fear: Theory on a world scale” (2015) 16:1 *Fem Theor* 49 at 52.

Upon reflection on the practical implementation of documentation efforts, there is unease that documentation missions tend to have too short of a temporal scope which has the effect of de-contextualizing and distorting investigators' understanding of the situation under scrutiny.<sup>32</sup> There is also concern that those engaging in documentation too often base their findings on arm's length or third party reporting, rather than in-depth fieldwork.<sup>33</sup> Furthermore, a TWAIL view takes note of the power asymmetry between those conducting documentation (which may include UN personnel), and those who are the subjects of such efforts who may be financially and/or socially subordinate.<sup>34</sup> This can foster an atmosphere of undue deference to the documenter, especially where the witness/survivor feels intimidated, which could influence the information provided.<sup>35</sup> Finally, the tendency of documentation teams to be made of up Western, or Western-trained personnel, bears similarity to a colonial Western 'saviour' ideology.<sup>36</sup> With respect to international NGOs in particular, "[a]lthough they promote paradigmatic liberal values and norms, they present themselves as neutral, universal, and unbiased."<sup>37</sup> This concealing of cultural ideology may bias documentation efforts by imposing only one perspective, disguised as objective. These concerns question the overall reliability of international documentation efforts, which is problematic given the significant impact such reports can have on the countries under examination.

Ultimately, the TWAIL perspective does not aim to end human rights documentation for ICL purposes, but instead seeks to address the shortcomings of current documentation practices. This includes longer field missions, more in-depth ethnographic research, and a more diverse team of experts from a variety of perspectives conducting the documentation.<sup>38</sup> This would also involve an expansion of the scope of ICL investigations and prosecutions – both geographically (beyond the usual Third World suspects) and with respect to the types of human rights abuses included. As described by Reynolds and Xavier:

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<sup>32</sup> *Supra* note 25 at 56.

<sup>33</sup> *Supra* note 25 at 57.

<sup>34</sup> *Supra* note 25 at 58.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Supra* note 28 at 240-241.

<sup>38</sup> *Supra* note 25 at 61-62.

If international criminal law is to take seriously its claim to be part of a project of global justice, it must at some point begin to tackle the economic contexts of war, exploitation and scarcity: ‘to reconsider the boundaries of criminalization’ and question, for example, ‘the legality of sanctions regimes, the role of structural adjustment and austerity programs imposed by international financial institutions, the competition between China and Western states for access to resources in third states, or the propriety of reparations for slavery and colonialism’.<sup>39</sup>

This expansion would have particular impacts on women in “Third World” countries who experience adverse consequences from the “liberalization/privatization” of their economies.<sup>40</sup> It could further involve a shift in prioritization within international accountability mechanisms from certain civil and political rights towards economic, social and cultural rights, which are more likely to be of prominent concern in women’s lives.

### C. ROHINGYA PERSPECTIVES

While there has been significant coverage of the sexual crimes perpetrated against Rohingya women’s bodies, unfortunately very little international attention has been given to the ideas and opinions of Rohingya women on how to respond to the ongoing violence in Myanmar. There have been two notable exceptions to this trend. The first is Razia Sultana, a Rohingya “lawyer, researcher, and educator specializing in trauma, mass rape, and trafficking of Rohingya girls and women.”<sup>41</sup> Sultana argues that the international community, and especially the UNSC, has failed the Rohingya by not preventing the current humanitarian crisis, despite warning signs since 2012.<sup>42</sup> She encourages the UNSC to meet with Rohingya women and girls during their upcoming visits to Bangladesh and Myanmar, and to “pressure the Myanmar Government and senior officials to cooperate with the UN Fact Finding mission, and insist on unrestricted

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<sup>39</sup> John Reynolds and Sujith Xavier, “‘The Dark Corners of the World’ TWAAIL and International Criminal Justice” (2016) 14 JICJ 959 at 980 (with reference to A. Kiyani, “International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion”(2015) 47 NYU J Int’l L & Pol 129 at 200.)

<sup>40</sup> Mosope Fagbongbe, “The Future of Women’s Rights from a TWAAIL Perspective” (2008) 10 Int’l Crim L Rev 401 at 405.

<sup>41</sup> *Statement by Ms. Razia Sultana at UN Security Council Open Debate on Sexual Violence in Conflict* (16 April 2018), online: NGO Working Group on Women, Peace and Security <[http://www.womenpeacesecurity.org/files/NGOWG\\_UNSC\\_OpenDebate\\_Statement\\_Sultana\\_04-2018.pdf](http://www.womenpeacesecurity.org/files/NGOWG_UNSC_OpenDebate_Statement_Sultana_04-2018.pdf)>.

<sup>42</sup> *Ibid.*

humanitarian access across Rakhine State.”<sup>43</sup> In light of Myanmar being listed for the first time on the Secretary General’s Report on Sexual Violence in Conflict, and the ongoing impunity of the *Tatmadaw*, she argues that “the Security Council must refer the situation in Myanmar to the International Criminal Court without delay”.<sup>44</sup> However, she states that this referral must not be limited to the crimes against the Rohingya, but should also consider violations against other ethnic groups across the country who have long made similar allegations.<sup>45</sup> So while Sultana does advocate for a traditional international legal response, she notably does not depict the “international community” as saviours of the Rohingya. Instead, she points out

It is hypocritical to condemn the human rights violations and express horror at the new violence, while then also selling arms to Myanmar and seek explorative licenses to mine its natural resources. Member States committed to conflict prevention and sustaining peace cannot turn a blind eye to state-sanctioned ethnic minority persecution, discrimination or other human rights violations including sexual violence, for trade.<sup>46</sup>

Sultana simultaneously calls on the international community to “support political and legal reform” to end the oppression of all ethnic groups in Myanmar.

A second voice that has been given a limited platform is that of Wai Wai Nu, another Rohingya lawyer, human rights activist, and former political prisoner. According to Wai Wai Nu, responses to crimes committed against the Rohingya must be viewed within the broader struggle for peace and democracy in Myanmar. It is noteworthy that she gives little attention to international interventions or international justice for these crimes. Her work and advocacy instead focus on how to change attitudes among the younger Myanmar generation to promote acceptance, advance democratic principles, and build a country where everyone’s “lives and dignity are respected,” and where “minorities are protected and given opportunities to participate” alongside the majority population.<sup>47</sup> She posits that civilians need not wait for world leaders to bring about these improvements; rather normal people can work together in solidarity for social change.<sup>48</sup>

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Oslo Freedom Forum, “Wai Wai Nu, My Struggle for Burma’s Future, 2017” (20 July 2017), online: <[https://www.youtube.com/watch?v=nyYE\\_o6dTmw](https://www.youtube.com/watch?v=nyYE_o6dTmw)>.

<sup>48</sup> *Ibid.*

With respect to specific crimes against all women in Myanmar, she advocates for a domestic criminal law response, and stresses the need for public legal education in order for women to be more aware of the legal options available.<sup>49</sup>

Wai Wai Nu cautiously acknowledges a place for international assistance in these efforts, but is clear that this assistance must come in the form of support as identified by local people rather than the Myanmar government or international agendas. She expresses concern that international support often comes tied to investment and development interests.<sup>50</sup> Further, she notes that in the past, the Myanmar government has been able to influence the international community's approach to the Rohingya, which can lead to problematic results.<sup>51</sup> When she has called for outside assistance, it has specifically been directed at ASEAN members, and has focused on pressuring the Myanmar government to promote human rights and equal treatment for Rohingya within Myanmar, rather than international forms of justice.<sup>52</sup> In particular, she stresses the need for citizenship rights, and access to necessities of life such as shelter, food, water, health and education.<sup>53</sup> These views suggest that her priority is therefore a 'home-grown' holistic response to preventing and mitigating the impacts of conflict, which focuses on education, civic engagement, and the promotion of basic human rights improvements.<sup>54</sup> Her views

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<sup>49</sup> Projekt Birma, "Access to Justice for Women", online: <<https://projektbirma.wordpress.com/together-for-burma-civic-education-2014/justice-for-women-three-women-lawyers-united-in-the-struggle-to-combat-violence-against-women/>>. **Unfortunately, the Myanmar government has refused to make serious efforts to investigate allegations of sexual violence committed by military officers against Rohingya women, and there are noted obstacles for women to accessing criminal justice for these crimes. Therefore, in my opinion a domestic legal response is unlikely to be forthcoming for Rohingya women at this time.** See: Women's League of Burma, "Same Impunity, Same Patterns" (January 2014), online: <[http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern\\_English-final.pdf](http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf)>.

<sup>50</sup> The Freedom Collection, "Wai Wai Nu: International Support" (8 July 2015), online: <<https://www.youtube.com/watch?v=3C3AeXhHsrg>>.

<sup>51</sup> "Rohingya Voices from Inside Myanmar, Wai Wai Nu (continues), Oslo Conference" (20 June 2015), online: <<https://www.youtube.com/watch?v=TgfhkwloBO4>>.

<sup>52</sup> Wai Wai Nu, "A Rohingya voice on violations and remedies" (19 April 2014), *Rohingya Blogger* (blog), online: <<http://www.rohingyablogger.com/2014/04/a-rohingya-voice-on-violations-and.html>>.

<sup>53</sup> *Ibid.*

<sup>54</sup> **This summary of views is taken from a thorough review of statements made by Wai Wai Nu available to the public in English. I am aware of limitations of this methodological approach, primary of which is the lack of a first-hand empirical interview. She may have expanded on her views in Burmese forums, and she may also be engaged in self-censorship for public statements given that she often returns to Myanmar and is likely monitored by authorities.**

thereby present the concept of ‘social justice’ as an alternative to a focus on international criminal justice, which is retributive in nature.<sup>55</sup>

It is relevant to note that Rohingya communities in refugee camps in Bangladesh have engaged in their own forms of documentation of their experiences of persecution by Myanmar authorities. Rather than legal narratives, these efforts have taken the form of songs and artwork depicting their collective struggles. Songs in particular are a significant source of expression of collective memory, “a medium for a non-literate community to keep alive their history,” and passing it on to younger generations.<sup>56</sup> One song described by a Rohingya woman expresses specific sources of fear, including “the torture at the hands of the Burmese government, the military men, and the Mogs (Rakhines)”. It also

raised the issue of difficulty living in a land surrounded by Buddhist Rakhines who are entitled to all the economic, social, and political facilities in life, while the Muslim Rohingyas remained completely deprived. In particular, it raised the issue of hunger caused by poverty, especially when watching their babies starve to death. It also indicates their joblessness and poor economic condition in life due to discrimination in education and job opportunities between the Rakhine and Rohingya communities.<sup>57</sup>

While some songs call for peace in Arakan (now called Rakhine State), their messages are generally not action-oriented.<sup>58</sup> Nevertheless, they are a medium that allows Rohingya “to avoid direct confrontation with their persecutors and oppressors while at the same time [enabling] them to express their resentments and frustrations.”<sup>59</sup>

Drawings and paintings are also produced by Rohingya refugees to “tell their stories to their children and to those outside interested in their case.”<sup>60</sup> It is important that the Rohingya who engage in this artwork have complete control over their productions, and their depicted experiences are not forced through an external framework.<sup>61</sup> Drawings

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<sup>55</sup> **Social justice is a broad concept, which, as she notes, may contain an element of criminal justice – though this is not the primary objective.**

<sup>56</sup> Kazi Fahmida Farzana, “Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands” (2011) *ASEAS* 4(2) 215 at 220-225.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* at 223.

<sup>59</sup> *Ibid* at 225-226.

<sup>60</sup> *Ibid* at 226.

<sup>61</sup> *Ibid* at 233.

may also have the ability to express more than words for certain unspeakable crimes, such as those depicting experiences of rape at gunpoint.<sup>62</sup>

These mediums of documentation are therefore important and relevant sources for understanding the experiences of Rohingya refugees, and shed light on alternative methodologies for the process of documentation itself.

### **III. Re-Thinking Justice**

While the ICL standard of documentation may pave the way for the distribution of a certain form of justice, it is clear that not all harms affecting Rohingya women will be addressed or remedied by this process. In particular, given that the Rome Statute prioritizes sexual violence over other forms of gendered harms, it is likely that significant violations of a non-sexual nature will not be recognized. This form of documentation therefore risks silencing the variety of experiences of women in conflict, which may have equal or greater importance to the women themselves, as well as ignoring the greater systemic and global forces which may contribute to the harms women face. For those who continue to engage in the ICL documentation methodology, there is, therefore, value in spending additional time and attention capturing women's experiences more holistically, as a first step in advocating for a greater scope of responsibility through international mechanisms. TWAIL has also offered specific recommendations on how this methodology might be improved, such as through the diverse composition of documentation teams, and expansion of the length of missions.

However, there are sure to be questions about whether these 'reforms' are the most effective places to focus energy and resources. For example, it has been argued that, across jurisdictions globally, "the impact of rape law reform has been negligible, with little change to reporting, prosecution and conviction rates, and little improvement in procedural justice for both victims and accused persons."<sup>63</sup> Ultimately, nothing will undo the damage caused by SGBV. Nevertheless, it is worthwhile considering whether there are other forms of justice that may more appropriately respond to these concerns.

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<sup>62</sup> *Ibid* at 233.

<sup>63</sup> Nicola Henry, Asher Flynn & Anastasia Powell, "The Promise and Paradox of Justice: Rape Justice Beyond the Criminal Law" in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Hampshire, 2015) 1 at 3.

The question, ‘what constitutes justice for victims of SGBV’, is not likely to have a single unified response. Indeed, in grappling with this question, Clare McGlynn has asked:

Is it seeing the perpetrator convicted and imprisoned for a significant period of time? Is it being believed and treated with respect by prosecuting authorities? Is it receiving compensation, from the offender or the state? Is it having the opportunity to tell one’s story in a meaningful way, perhaps directly to the offender? The answer, of course, is that justice for rape victims can take any or all of these forms, as well as many more possibilities.<sup>64</sup>

These concepts were largely corroborated and expanded upon by Amy Kasparian, who summarized:

For some, justice is simply the perpetrator’s conviction and incarceration. For others, justice is receiving compensation from the offender or the state to help with civil matters like securing safe housing, affording counseling, or repairing property damage. To others, it is having a meaningful opportunity to tell one’s story to the community, or perhaps directly to the offender. And yet still, to other victims, justice is having the offender publicly acknowledge and apologize for the harm caused. In short, justice to rape victims can manifest itself in many diverse forms that often do not necessarily rely on the traditional justice idea of punishment.<sup>65</sup>

While the international criminal justice model may in theory provide space for these various elements of justice, the question is whether it is the best method of meeting all of these justice goals in every post-conflict situation. Nicola Henry et al add a further element to this discussion:

The issue is whether sexual violence and the diverse justice responses to it should be understood as an individual or collective problem. In other words, should justice mechanisms be directed towards ensuring individual culpability and responsibility, or should energy instead be invested in tackling deep-seated gender inequality as one of the underlying causes of sexual violence?<sup>66</sup>

Indeed, which of these two approaches best meets the justice needs of women and girls?

Generally speaking, the elements of justice described above can be divided into four categories: punishment, accountability, recognition, and redistribution. Each will be

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<sup>64</sup> Clare McGlynn, “Feminism, Rape and the Search for Justice” (2011) 31:4 Oxford J Legal Stud 825 at 825.

<sup>65</sup> Amy Kasparian, “Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault” (2014) 37:2 Suffolk Transnat’l L Rev at 2-3.

<sup>66</sup> *Supra* note 63 at 3.

discussed below, with particular attention to ideals of justice for women who have experienced SGBV. The intention is for this discussion to raise questions regarding the ICL model's capacity to meet the justice needs of women and girls in conflict and post-conflict societies.

**Punishment** is associated with the retributive criminal justice model, where the primary goal is to try and convict those responsible under law. As Hannah Arendt noted

the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes...can only detract from law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.<sup>67</sup>

An element of retribution is therefore invoked, which “denotes that all wrongdoers deserve punishment, and the amount or kind of punishment must fit the wrong done, in terms of both the degree of wrongfulness of the act and the criminal degree of responsibility for it.”<sup>68</sup> As Eric Blumenson reasons

To allow Pol Pot, Pinochet, and others guilty of such crimes to go unpunished is a form of legal amnesia that appears to excuse the most egregious deeds, betray the victims who endured them, and encourage similar crimes against others.<sup>69</sup>

Punishment thereby addresses concerns about ending impunity, as well as acting as a form of deterrence or prevention. Deterrence is “premised on the rationale that failure to deter today will open the door for abuse tomorrow.”<sup>70</sup> It therefore establishes a normative framework for acceptable behaviour in a global society.

**Accountability** might involve an admission of guilt or responsibility by either the perpetrator(s) themselves, or a declaration of such by an objective third party. This may or may not involve an encounter between the survivor and the offender, in which the former is able to confront the latter, or obtain further information or an apology. Punishment is not necessarily required to follow a finding of accountability, as for example, in a

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<sup>67</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994) 253 (as cited in *Supra* note 9 at 432).

<sup>68</sup> Ken Gee-kin Ip, “Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) – An Evaluation through the Prism of Victims’ Rights” (2013) 13 *Int'l Crim L Rev* 865 at 874.

<sup>69</sup> Eric Blumenson, “The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court” (2006) 44 *Colum J Transnat'l L* 801 at 819.

<sup>70</sup> Jamie Malamud-Goti, “Transitional governments in the breach: Why punish state criminals?” (1990) 12:1 *Hum Rts Q* 1.

restorative justice model the offender is expected to accept responsibility in order for them to work with the survivor and the community to rebuild the social fabric that was breached by the offence.<sup>71</sup> True accountability does not always flow from the retributive model, as despite a finding of guilt by a judge, the perpetrator may never accept full responsibility for their actions or the damage they have caused.<sup>72</sup> A finding of accountability does some of the work of shifting the shame and stigma away from the survivors, onto those deemed responsible. Accountability may also extend beyond individual offenders to encompass states, or various non-state actors. Public state apologies, for example, may amount to one form of accountability. Admissions by external governments for their responsibility in failing to protect, or supporting offending governments through economic relations, may also serve important accountability-justice needs. This could help shed light on the global forces and structural factors that contributed to the conflict in which injury occurred.

**Recognition** or acknowledgement is about having the opportunity to meaningfully speak of your experience to perpetrators, community members or the larger public. Bearing witness to mass atrocities is “deeply connected to the ideals of justice, fundamentally premised on the notion that wrongdoing will be addressed and that all persons will be treated with dignity, fairness and respect.”<sup>73</sup> The process of speaking one’s truth, or having another acknowledge a trauma by hearing one’s story, is said to have psychological benefits for survivors.<sup>74</sup> Nancy Fraser has described recognition as

a reciprocal relation between subjects, in which each sees the other both as its equal and also as separate from it. This relation is constitutive for subjectivity: one becomes an individual subject only by virtue of recognizing, and being recognized by, another subject. Recognition from others is thus essential to the development of a sense of self. To be denied recognition is to suffer both a distortion of one’s relation to the self and an injury to identity.<sup>75</sup>

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<sup>71</sup> *Supra* note 65 at 23-24.

<sup>72</sup> See Haley Clark, “A Fair Way to Go: Justice for Victim-Survivors of Sexual Violence” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Hampshire, 2015) 18 at 24.

<sup>73</sup> *Supra* note 11 at 428.

<sup>74</sup> *Supra* note 18 at 128.

<sup>75</sup> Nancy Fraser, “Rethinking Recognition,” (2000) 3 *New Left Rev* 107 at 109.

Failing to recognize survivors, or “misrecognizing” them, risks further harm, “because survivors need to reconnect to a society and world that seem to have been lost.”<sup>76</sup> Therefore, “in order for women survivors to move forward and to reconstitute a sense of self, they need to be able to tell their traumatic stories in all their complexity.”<sup>77</sup>

Telling one’s story may also be seen as a form of resistance, an expression of agency, or a challenge to dominant narratives.<sup>78</sup> It becomes an opportunity to express resentments or frustrations, and paves the way for history to be re-written. In an ideal form, recognition will flow from an interaction in which women are able to narrate their experiences holistically, focusing on the elements most significant to them, in their own language. This could move beyond the specific offences of the Rome Statute, to include other forms of gendered harm, or larger social, political or economic factors. True recognition would allow women to be seen as complex actors, operating with agency, beyond the limited victim framework. While recognition may follow verbal testimony or story-telling, this is not an inherent requirement. Other methods of conveying meaning and experience, such as songs, poetry and various forms of artwork, may also provide avenues for receiving recognition.

**Redistribution** is a term applied in this context by Nancy Fraser, which describes a remedy for economic injustice that might involve “redistributing income, reorganizing the division of labour, subjecting investment to democratic decision-making, or transforming other basic economic structures.”<sup>79</sup> It is used here to refer to a range of economic measures distributed in recognition of injury suffered. It might take the form of reparations, from either the offenders or the state, issued individually or on a collective basis. For example, the ECCC allows victims to seek both ‘collective and moral reparations’ against a convicted person,<sup>80</sup> which could include measures within the

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<sup>76</sup> Selma Leydesdorff, “Distortions in Survivors’ Narratives from Srebrenica: The Impossibility of Conveying Their Truth” in Amy E. Randall, ed, *Genocide and Gender in the Twentieth Century: A Comparative Survey* (London: Bloomsbury Academic, 2015) 258 at 269.

<sup>77</sup> *Ibid* at 271.

<sup>78</sup> *Supra* note 4 at 103-104.

<sup>79</sup> Nancy Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age” (1995) 212 *New Left Rev* 68 at 73.

<sup>80</sup> Extraordinary Chambers in the Courts of Cambodia, *Internal Rules*, rev 9, at r 23(1)(b) and r 12(4).

categories of remembrance, rehabilitation, documentation, and education.<sup>81</sup> Alternatively, it might involve some other form of socio-economic restructuring to address the structural causes of violence in the first place. Addressing structural issues could also encompass the type of social justice envisioned by Wai Wai Nu, including education and protection of basic human rights.

It is important to reiterate that justice will have different meanings in different contexts, and while many of these elements are interrelated, not every one will be necessary or desired for all justice-seekers. Recognition may be unwanted by some women, for example, while redistribution may not be possible in other scenarios. The following section explores some alternative models of justice, and the nature of documentation required to pursue them, which focus on three of these justice elements: accountability, recognition and redistribution; leaving aside the notion of punishment inherent to the legal model.

#### **IV. Documenting for Alternative Justice Models**

If the section above has allowed us to expand our conceptual understanding of justice, it is now possible to identify alternative mechanisms through which these specific justice needs can be pursued. In particular, this section identifies mechanisms which may be achievable without the active involvement of the state that is responsible for the survivors' experiences of violence in the first place. Some may find this untenable, as it negates the possibility of reconciliation through these processes. This is a valid concern. However, given the long-standing persecution of the Rohingya inside Myanmar, and the ongoing denials of any wrongdoing, it may be a long time before the state voluntarily takes responsibility for the mass atrocities it has inflicted. Nevertheless, as a fundamental premise, this section accepts the accounts of Rohingya women already documented by human rights groups referred to throughout this thesis, with respect to the nature of harms they have suffered by the state. As such, this section endeavours to identify mechanisms that may be accessible to the Rohingya without the state's involvement, so that survivors' justice needs may in some way be met.

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<sup>81</sup> Victim Support Section, *ECC Reparation Program 2013-2017 for the Victims of the Khmer Rouge Regime 1975-1979* (14 January 2013), online: ECCC <<http://vss.eccc.gov.kh/images/stories/2014/Reparation.pdf>>.

For this reason, I do not engage with the ample material of restorative justice models, which have great value in post-conflict transitional settings. In brief, restorative justice is a “blanket term that describes a range of practices focused on repairing the harm resulting from crime by involving the main parties to the dispute, most notably, by giving the victim and offender key roles in the process and the outcome”; emerging from an

examination of the ways in which the state had ‘stolen’ conflicts from the victim and offender, which had the twofold effect of shutting the victim out of the process and removing the opportunity for an offender to truly express remorse or be forgiven.<sup>82</sup>

The requirement of offender involvement and acceptance of responsibility is likely to be a significant challenge in the current Myanmar context. However, restorative justice should be explored as a valuable approach from bridging the transition, if the climate should change in the future. The following is a non-exhaustive overview of some justice-oriented mechanisms,<sup>83</sup> which prioritize the specific justice needs of survivors and their families, in particular with respect to the elements identified above.

#### **A. TRUTH COMMISSIONS AND ISSUE SPECIFIC INQUIRES**

The primary task of truth commissions is to provide the full picture of human rights violations.<sup>84</sup> Testimonies are collected from survivors, witnesses, and occasionally perpetrators, in order to discern explanations about the onset of conflict, patterns of violations, and their consequences.<sup>85</sup> They are intended to “give voice” to “those experiences and memories that were forced into silence and oblivion,”<sup>86</sup> and promote public awareness. There will be considerable variation across truth commissions with respect to how they situate human rights investigation within a historical context, which may be shaped by moral and political considerations.<sup>87</sup> As Onur Bakiner explains,

Historical explanation is a crucial step for interpreting the data on violations within a broader context and connecting individual stories of suffering to national tragedy. Furthermore, the claim that confronting past

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<sup>82</sup> Asher Flynn, “Sexual Violence and Innovative Responses to Justice: Interrupting the ‘Recognisable’ Narrative” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Hampshire, 2015) 92 at 103.

<sup>83</sup> *Supra* note 63 at 6-7.

<sup>84</sup> Onur Bakiner, “One truth among others? Truth commissions’ struggle for truth and memory” (2015) 8:3 Mem Stud 345 at 347.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* at 352.

<sup>87</sup> *Ibid* at 348.

wrongs prevents future conflict, a foundational premise for truth commissions, requires knowledge about the circumstances that made violence and violations possible in the first place.<sup>88</sup>

Ultimately, the final report of a truth commission will be the product of adjudication of contending social memories, and may serve to reject state propaganda or widely held misperceptions.<sup>89</sup>

In Canada, an example to draw from is the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG). Commenced in 2016, the inquiry's intention is to address the high number of missing and murdered Indigenous women and girls in Canada,<sup>90</sup> by examining and reporting on the systemic causes of all forms of violence by looking at patterns and underlying factors.<sup>91</sup> The inquiry is set up to provide survivors and/or families<sup>92</sup> the opportunity to tell their stories through a variety of mediums, including both public or private hearings, or through artistic expressions such as artwork, photography, dance, song, poetry, quilts, or a video or audio tape.<sup>93</sup> Taking a trauma-informed approach, health care professionals are made available to support participants at all stages of the process.<sup>94</sup>

This process largely focuses on the justice element of recognition, with the opportunity to share stories and experiences through a variety of mediums. Those narratives will then be taken into account when the inquiry produces its final report, which will outline the systemic factors that have contributed to this crisis. While this will not serve the purpose of individual accountability, it does have the potential to assign accountability to various state actors (such as the police force, child protection services, *et cetera*). If these findings are translated into political action, this could pave the way

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<sup>88</sup> *Ibid* at 347.

<sup>89</sup> *Ibid* at 351.

<sup>90</sup> **Including two-spirited, lesbian, bisexual, transgendered and queer.** See MMIWG, *Background*, online: <<http://www.mmiwg-ffada.ca/en/about-us/background/>>.

<sup>91</sup> MMIWG, *Basic Information About Who We Are*, online: <<http://www.mmiwg-ffada.ca/files/who-we-are.pdf>>.

<sup>92</sup> **Families are defined broadly to include “blood relatives, adopted family members, foster care relatives, close friends, [and] family of the heart”:** MMIWG, *Fact Sheet: What is the National Inquiry?* online: <[mmiwg.editmy.website/files/fact-sheet-what-is-the-national-inquiry.pdf](http://mmiwg.editmy.website/files/fact-sheet-what-is-the-national-inquiry.pdf)>

<sup>93</sup> MMIWG, *This is how you can participate in the National Inquiry*, online: <<http://www.mmiwg-ffada.ca/files/how-to-participate-en.pdf>>; MMIWG, *National Inquiry announces Call for Submissions of artistic expression* (19 September 2017), online: <<http://www.mmiwg-ffada.ca/files/national-inquiry-announces-call-for-submissions-of-artistic-expression.pdf>>.

<sup>94</sup> *Supra* note 93 [*This is how*].

towards a form of social redistribution – a change in the current structures that perpetuate violence in lives of Indigenous women and girls.

Documentation for this initiative largely comes during the process of participation in the inquiry. However, the process of establishing the MMIWG inquiry benefited from contributions of information which focused on identification of potential participants, as well as consultations into the design of the inquiry with respect to its objectives, scope and format. In particular, the public was asked questions such as: Who should lead the inquiry? Who should provide views or have an opportunity to participate in an inquiry? What are the key issues that need to be addressed by the inquiry? How can cultural practices and ceremonies be incorporated into the design of the inquiry? How is it best to involve the families, loved ones and survivors in the inquiry? What supports may be needed during the inquiry for those who are participating?<sup>95</sup> As such, early documentation can be more consultative in nature, ensuring that women have a voice in the design of this alternative justice mechanism.

## **B. ONLINE TRUTH-TELLING, ACTIVISM, AND CONSCIOUSNESS-RAISING**

Recognition may also be possible through informal initiatives, such as online story-telling and activism. Anastasia Powell has written about SGBV survivor engagement with communications technologies in what she calls ‘technosocial’ practices for facilitating informal justice.<sup>96</sup> She argues that using online forums such as YouTube to share experience of sexual violence, or social media to ‘name and shame’ offenders, can be seen as not only tools for vigilantism and activism, but also open space for new meanings and possibilities of citizen-led or informal justice.<sup>97</sup> Powell suggests that in light of “the persistent failure of conventional, state-sanctioned justice in response to sexual violence (and gender-based violence more broadly)” it must be considered that some survivors’ justice needs “may be met through their engagement with online

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<sup>95</sup> Government of Canada, *Full summary of what we heard: Final report of the pre-inquiry engagement process* (19 May 2016), online: <<https://www.aadnc-aandc.gc.ca/eng/1463677554486/1463677615622>>.

<sup>96</sup> Anastasia Powell, “Seeking Justice Online: Vigilantism, Activism and Resisting a Rape Culture in Cyberspace” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (London: Hampshire, 2015) 218 at 226.

<sup>97</sup> *Ibid* at 227.

counterpublics in ways rarely fulfilled in formal, criminal justice settings.”<sup>98</sup> Powell emphasizes the recognition element at play in this form of engagement:

Testifying to one’s experience of rape in online counterpublics, where victim-survivors can have control over the extent and nature of their participation; tell their account in their own voice; and receive validation, even vindication, by a community of peers who understand the nature of sexual violence, is potentially a powerful mechanism for seeking justice.<sup>99</sup>

Conversely, however, this approach also creates a potential risk of negative feedback by anonymous online commenters, which could lead to a result completely opposite than that intended.

An interesting example of this form of activism in fact comes from the Rohingya crisis itself. In March 2018, American photographer Brandon Stanton, who runs the popular Facebook page ‘Humans of New York’, visited Rohingya refugee camps in Bangladesh.<sup>100</sup> During his visit, he photographed and interviewed Rohingya women and men, and shared their stories on his Facebook page, along with a link to a GoFundMe page for collecting donations to build houses for the refugees. The images were liked, shared, and commented on by his more than 17 million followers, with over two million dollars in donations raised over a one-month period.<sup>101</sup> While this example may not ultimately meet justice goals of allowing survivors to fully tell their stories in their own voices and then receive recognition (as the format is pre-established in ‘snapshots’ of people’s lives amenable and appealing to social media, and the viewer comments are in English which not all Rohingya will be able to read), it does carry that potential if specific shortcomings are addressed. This example further meets the justice element of collective redistribution, through the provision of funding to build homes for the refugee community, despite not being supported by those actually responsible.<sup>102</sup>

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<sup>98</sup> *Ibid* at 227.

<sup>99</sup> *Ibid* at 228.

<sup>100</sup> *See for example*, Humans of New York, “They came to our house first because it’s closest to the road” (7 March 2018) posted on *Humans of New York*, online: Facebook <<https://www.facebook.com/humansofnewyork/photos/a.102107073196735.4429.102099916530784/2186744054733016/?type=3&theater>>.

<sup>101</sup> *Houses for Rohingya Refugees* (4 March 2018), online: GoFundMe <<https://www.gofundme.com/houses4rohingya>>.

<sup>102</sup> **As of 28 June 2018, more than 2500 homes had been built with this funding by the group ‘Love Army’ along with 1500 paid Rohingya volunteers. Each house is equipped with solar panels, lights, fans, cooking stoves, and chimneys:** Humans of New York, “Really incredible update for everyone who donated to our Rohingya” (28 June 2018), posted on *Humans of New York*,

Documentation for these purposes can in theory be done by Rohingya themselves, so long as they have access to recording technology and an internet connection.<sup>103</sup> The manner and content of what is documented is very flexible, which is a benefit of this approach. International documenters can provide Rohingya a platform to tell their stories in this manner by conducting interviews which allow refugees to narrate in the language and manner in which they choose, and uploading audio-visual, photography or written accounts onto a compiled platform for public consumption and response. This form of documentation can take place on an ongoing basis, as survivors feel more comfortable and ready to speak of their experiences. However, risk assessments and legal advice may need to be sought to ensure refugees who participate do not put themselves at risk through this public exposure.

### C. TRANSFORMATIVE REPARATIONS

While sometimes associated with international criminal proceedings, such as the ICC's Trust Fund for Victims, reparations, compensation or restitution can be provided to survivors outside of the judicial system, in recognition of their 'right to a remedy' under international law.<sup>104</sup> This might involve "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property"; compensation for physical or mental harm, lost opportunities, material damages and loss of earnings, moral damage, or legal costs; medical or psychological rehabilitation; or other measures such as a public apology, commemorations or tributes to victims, and inclusion of violations into educational materials and legal training.<sup>105</sup> The concept of 'transformative reparations' specifically

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online:

Facebook

<<https://www.facebook.com/humansofnewyork/photos/a.102107073196735.4429.102099916530784/2362040740536679/?type=3&theater>>.

<sup>103</sup> **There are reports that mobile phones with internet access have been a lifeline for Rohingya refugees who use them to communicate with family in different camps and still in Myanmar, as well as a way for activists to smuggle out news and videos to the outside world: see "Weaponizing social media: The Rohingya crisis" (19 March 2018) CBS News, online: <<https://www.cbsnews.com/news/rohingya-refugee-crisis-myanmar-weaponizing-social-media-main/>>.**

<sup>104</sup> *Basic Principle and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, GA res 60/147, at Art 11.

<sup>105</sup> *Ibid* at Arts 19-22.

recognizes that restoration to previous conditions may not be possible or desirable, and instead aim to address the structural causes of conflict.<sup>106</sup> These measures may be individual or collective in nature.

There has been increasing recognition in recent years that reparations programs have historically failed to recognize the unique needs and concerns of women, and efforts have therefore been made to ‘engender’ these initiatives.<sup>107</sup> Advocates for gender-just transformative reparations argue that “reparations should aim to transform structures of gender inequality, since failing to do so would risk returning women to a situation of structural discrimination which facilitates gender-based violence.”<sup>108</sup> There is some debate over what form these reparations might take, or how they should be implemented. These range from a focus on direct support in response to the crimes suffered, to a combination of direct support with “wider support measures which are crucial for women, such as healthcare, education, skills training and access to land and financial resources”.<sup>109</sup> Some also advocate for the further inclusion of measures to encourage women’s active participation in both the reparation process and in society more generally, thereby increasing their social and economic agency.<sup>110</sup> Unfortunately, we are yet to see a reparations model that has successfully implemented a fully “gender-just” reparations project, however there is a wealth of feminist expertise and innovative ideas available to states wishing to take on this task.<sup>111</sup>

A reparations project that may nevertheless serve as a useful case study comes from Colombia, where, after five decades of war, the government enacted the 2011 *Victims and Land Restitution Law* providing for a reparations and restitution initiative “with the goal of providing administrative reparations to millions of people through individual and collective reparations.”<sup>112</sup> The government has also launched a land redistribution program. The reparations and restitutions have been carried out through a

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<sup>106</sup> Sanne Weber, “From Victims and Mothers to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions” (2017) 12 Int J Transit Just 88 at 89.

<sup>107</sup> Ruth Rubio-Marin and Pablo de Greiff, “Women and Reparations” (2007) 1 Int J Transit Just at 319.

<sup>108</sup> *Supra* note 106 at 90.

<sup>109</sup> *Ibid* at 91.

<sup>110</sup> *Ibid*.

<sup>111</sup> *See for example*, Weber *supra* at 106.

<sup>112</sup> Pamina Firchow, “The Implementation of the Institutional Programme of Collective Reparations in Colombia” (July 2014) 6:2 J HR Prac 356 at 356.

series of pilot projects in targeted communities, with the coordination assistance of government, private companies and international agencies.<sup>113</sup> This has included implementing minimum living standards, health and education facilities, and community centres.<sup>114</sup> These measures are intended as a form of transformative justice. As Pamina Firchow explains, “[e]ven without formal apologies, state recognition through reparations of these human rights abuses fortifies the relationship between the state and its citizens and bolsters the social fabric of communities.”<sup>115</sup>

Saane Weber has analysed the reparations project in Colombia, and expressed concern over the ways that the process has reinforced gender norms, rather than challenged them.<sup>116</sup> In at least one pilot project, ‘gendered’ collective reparations were limited to reparations for women’s groups, rather than encompassing an underlying strategy for the process as a whole.<sup>117</sup> She therefore recommends the “employment of gender specialists throughout local and national teams to include a gender perspective across programs” as a necessary first step to “gendering” these reparations.<sup>118</sup> Attention to non-direct forms of violence against women, such as social and economic rights violations, is a necessary component to addressing the needs of women within this model as well.

This case study, with the recommended gendered modifications, may be relevant to Myanmar, as it provides an example of how reparations can work in a country that is not yet in a post-conflict phase, but still attempts to implement collective reparations as peacebuilding instruments.<sup>119</sup> In particular, along with providing direct support for harms suffered, reparations in this context could incorporate some of the specific recommendations set out in the Advisory Commission on Rakhine State’s (ACRS) report,

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<sup>113</sup> *Ibid* at 371.

<sup>114</sup> *Ibid* at 364.

<sup>115</sup> *Ibid* at 372.

<sup>116</sup> For example, rather enabling women to actively participate in community meetings to discuss the reparations projects, women were expected to prepare the lunch, which was ordinarily served at the end of the meeting. *Supra* note 106 at 100.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Supra* note 112 at 361.

if implemented with a gendered lens.<sup>120</sup> This might include, for example, the economic and social development of Rakhine State. The Myanmar government has already indicated a willingness to implement some, though not all, of these recommendations through the creation of the *Committee for the Implementation of the Recommendations on Rakhine State*.<sup>121</sup> In this way, the justice element of redistribution could be realised.

However, the ACRS report is very careful not to apportion blame in its recommendations, and the government may not be as receptive to a reparations model which positions the Rohingya as victims. In that case, a transformative reparations model would have to secure external funding, such as through international donations. While still a potential tool for transformative justice, the drawbacks of such an approach include the lack of accountability or reconciliation outcome, as well as potential resentment from other communities in Rakhine State, who have already expressed dissatisfaction with the perceived bias of the international community towards assisting the Rohingya over other impoverished ethnic groups.<sup>122</sup> A careful risk management assessment would therefore be required to navigate this complex landscape.

Collective reparations such as memorial sites or monuments, and other forms of commemorations (including art, film and literature), may also play a role in achieving recognition and even accountability or deterrence. According to the International Centre for Transitional Justice (ICTJ),

Memorials allow for mourning, but they also facilitate dialogue and learning. They can mobilize educators, artists, religious leaders, and other constituencies whose participation is critical to affect societal transformation. The importance of memorializing is critical not only to the

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<sup>120</sup> Advisory Commission on Rakhine State, “Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State” (August 2017), online: <[http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf)>.

<sup>121</sup> President Office, The Republic of the Union of Myanmar, “Advisory Board for the Implementation of Recommendations on Rakhine State, Committee for Implementation of Recommendations on Rakhine State hold meeting” (23 January 2018), online: <<http://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8388>>.

<sup>122</sup> Tim Hume, “Medecins Sans Frontieres banned in Myanmar state for alleged ‘Rohingya bias’ (3 March 2014) *CNN*, online: <<https://www.cnn.com/2014/03/03/world/asia/myanmar-rakhine-doctors-without-borders/index.html>>.

relatives of the disappeared but to new generations focused on a future free of abuse.<sup>123</sup>

Historical memory processes can also assist communities to “identify how conflict changed gender roles and use this to foster understanding of the need to enhance women’s agency in the present.”<sup>124</sup> In this way, memorialization and commemoration can actively contribute to transitional elements of justice for those concerned.

Documentation in these cases should focus on precisely what the legal standard excludes, that is, the effect that the acts of criminal violence has had on the survivors’ lives. Further still, documentation efforts should seek to look beyond direct harms such as sexual violence, to identify the other ways that conflict has violated women’s social and economic rights. It should ask what has been lost, and what is needed to move forward? What are the specific individual harms that need to be addressed, and what can be recognized and addressed for the community as a whole? What are the specific events or people that the community wishes to memorialize? Documenters should allow survivors to speak of their experiences comprehensively, and share ideas about what forms of reparations or restitution would specifically help them to move ahead. Careful attention to the specific cultural and social context of the community is especially important for ensuring that reparation projects are designed to meet the specific interests expressed. Managing expectations will be especially important in these efforts, as it is unlikely that every need of every survivor will be provided through the reparations project.

The intention in selecting these examples is not to endorse or set them out as the perfect solution in all post-conflict scenarios, as certainly each are not without criticisms in their own national context. For example, Canada’s MMIWG inquiry has been highly criticized for lengthy bureaucratic delays.<sup>125</sup> Some of the same challenges of the legal model, such as the trauma inherent in re-telling, will be present in any model that relies on survivor testimony. Reparation schemes risk re-victimization if they are not carried

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<sup>123</sup> ICTJ, “Beacons of Truth, Spaces of Remembrance: The Role of Memorials for the Disappeared”, online: <<https://www.ictj.org/multimedia/photo/beacons-truth-spaces-remembrance-role-memorials-disappeared>>.

<sup>124</sup> *Supra* note 106 at 103.

<sup>125</sup> Geordon Omand, “Troubled inquiry into missing, murdered Indigenous women seeks two more years” (6 March 2018), online: <<https://www.ctvnews.ca/politics/troubled-inquiry-into-missing-murdered-indigenous-women-seeks-two-more-years-1.3831204>>.

out comprehensively,<sup>126</sup> and memorials risk co-opting individual mourning through the imposition of national myths.<sup>127</sup> There will inevitably be some concern that not employing or prioritizing a traditional criminal justice model will be perpetrating impunity and ultimately failing survivors of mass violence. Indeed, Hilary Charlesworth and Christine Chinkin warn against the creation of a “women’s ghetto”, where specific mechanisms for women have fewer resources, lower priority, or fail to address underlying gender inequalities.<sup>128</sup> We also know that not every initiative will meet the needs and interests of everyone affected by a given conflict scenario. It bears repeating that justice is context specific. Further research is therefore required into the specific justice needs of Rohingya survivors, in particular the women and girls, to enable resources to focus on the most appropriate model as indicated by those most affected. It should also be noted that these examples could be carried out simultaneously, or even alongside international criminal proceedings to meet the justice needs that that forum is less equipped to deliver. However, those engaging in documentation should endeavour to coordinate their efforts to avoid duplication and the potential for inflicting additional unnecessary trauma to those sharing their experiences.

With respect to the specific process of documentation, it is recommended that anyone conducting documentation efforts follow the best practices guidelines discussed in Part I. In particular, the principles of ‘do no harm’, carefully selecting the documentation team, diligent preparation, developing an investigation plan, conducting risk, security health assessments, obtaining prior informed consent, and carefully selecting interpreters, are extremely important for anyone documenting violence against women. NGOs, in particular local organizations including Rohingya themselves, will be especially well-suited to carry out these forms of documentation, so long as they familiarize themselves with best practices, and always prioritizing the interests of survivors above all else.

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<sup>126</sup> *Supra* note 112 at 372.

<sup>127</sup> Jenny Edkins, *Trauma and the Memory of Politics* (New York: Cambridge University Press, 2003) at 115.

<sup>128</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 219.

## V. Conclusion

Justice is an intangible concept that is context and even individual specific. It is as much a feeling or process, as it is any measurable outcome. It may never be possible to identify one justice model that will meet all survivors' needs and interests in a given conflict or post-conflict scenario. International criminal justice mechanisms may have become our collective default when conceptualizing justice, and may in fact be the most straightforward response; but this one-size fits all approach has been shown to be inadequate in meeting all justice needs, particularly for women survivors of SGBV. As such, identifying the specific justice needs of various intersectional survivor groups is necessary to ensure that valuable time and resources are targeted at the most effective and appropriate processes for the context in question.

A further consideration will be whether women survivors' justice needs should be addressed in the same forums as the larger Rohingya communities that have been impacted by mass violence. After all, many women have experienced a variety of harms, not limited to gendered or sexualized violence. Developing separate mechanisms risks creating divisions within communities, especially if some are perceived as having access to more resources (reparations, psychosocial support, *et cetera*), or seen as carrying a higher status of recognition. However, this approach has the potential value of engaging both men and women in the work of gender-justice. If a gender-integrated approach is used, a careful and deliberate gender strategy will be necessary to ensure that specific offences against women remain visible, and women's unique justice needs are met. Again, careful consultation with relevant communities will be essential in designing and implementing these processes.

The level and nature of engagement of the international community will also require careful consideration. While it may be appropriate to offer assistance through funding and technical support, these 'alternative' justice mechanisms will miss their mark if they are not directed by and with Rohingya communities, who maintain a sense of ownership over the process. The involvement of the government of Myanmar is more desirable, as these mechanisms could greatly assist in the transition to peace and reconciliation. However, it is understood that this genuine implicit acceptance of responsibility may still be a long way off, given current concerns that it is still unsafe for

Rohingya to repatriate. Myanmar is not yet a 'post-conflict' society. It must therefore be decided whether to move forward with these approaches now, without the support or involvement of the Myanmar government or society, or wait until transition to peace may be more amenable. This will largely depend on what the Rohingya decide are the most important of their justice needs, as well as future decisions regarding repatriation and access to citizenship rights upon return.

In the meantime, whether used on their own, or alongside a formal legal justice approach, these types of processes and mechanisms have the potential to contribute towards feelings of justice, particularly with respect to recognition, accountability and redistribution. Early consultation and coordination will ensure that Rohingya have a voice in how international action and assistance is carried out in their name. In this way, one hopes that the global community can take responsibility for its previous inaction, and offer support to the Rohingya in recognition of their specific needs. By taking a leadership role in these initiatives, Canada can also act to uphold our national feminist foreign policy objectives.

## **Chapter IV: Conclusion**

The Rohingya population of Myanmar have been called one of the most persecuted ethnic minorities on earth.<sup>1</sup> Beyond the systemic discrimination and ongoing violations of basic human rights, *Tatmadaw* operations against Rohingya communities in Rakhine State in recent years have amounted to ethnic cleansing, if not genocide. Reports of widespread sexual violence by security forces have garnered significant international attention, increasing our collective awareness of how rape is used as a weapon of war. Rohingya women and girls have disproportionately suffered the impact of these military strategies; and now, just over nine months since the August 2017 offensive, babies are being born in refugee camps at a rate of 60 per day.<sup>2</sup> The long-term physical, psychological, social, and economic impacts of this violence is immeasurable.

While it cannot yet be said that Myanmar is a post-conflict society, international dialogue is well underway on how to bring about justice for the harms experienced by the Rohingya. With much attention on the UNSC and the ICC, many have focused their advocacy towards an ICL prosecution. Indeed, there would be tangible significance to such a response, sending a clear message to Myanmar and similar offenders that such violations of international law will not be tolerated within the current global order. Above the specific form of justice that successful prosecutions could bring to the Rohingya population, the symbolic and political implications of this approach also carry substantial value in terms of preventing future harm. While such an approach would be seen by many as a major achievement in ending the *Tatmadaw*'s long time impunity, this thesis has raised questions as to the appropriateness of an exclusive reliance on ICL to meet the diverse justice needs of Rohingya women survivors of SGBV. Of particular concern is the lack of primacy given to crimes of SGBV by prosecutors and investigators, as well as the further harm that the legal model may cause to survivors repeatedly asked to recount their experiences to fit a legal narrative. Additional feminist concerns include the singular

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<sup>1</sup> UNHRC, Special Sess, "Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar" (5 December 2017), online: <https://ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E>

<sup>2</sup> UNICEF, "More than 60 Rohingya babies born in Bangladesh refugee camps every day – UNICEF" (17 May 2018), online: < <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day%E2%80%93-unicef>>.

focus on sexual violence as a gendered crime, to the silencing of other forms of harms women experience in conflict settings; the construction of women as perpetual victims, or the objects of voyeurism for an international audience, and thereby deprived of agency and complexity; negative consequences associated with public disclosure, including social stigma, physical risk of reprisal; and, the legal model's failure to address the root causes of violence against women. There is also critique from a TWAIL perspective that the ICL model is inherently problematic in that it largely involves Western countries passing judgment on the actions of states in the global South, thereby perpetuating a neo-colonial global dichotomy in which "Third World" countries are solely and erroneously depicted as human rights abusers in need of saving by human rights champions of the West. This model may also be based on the priorities and interests of the international community rather than the Rohingya themselves, who might have other specific priorities in resolving this conflict. A different model of justice may therefore be needed, either in place of, or to work alongside a formal legal approach, to ensure that women's justice needs are equally met.

In order to begin envisioning alternative justice approaches to meet the needs of Rohingya SGBV survivors, this thesis has discussed the nature of 'justice' and the expectations associated with that intangible concept. It has argued that SGBV survivors generally seek four broad elements in their pursuit of justice: punishment, accountability, recognition (or acknowledgement), and redistribution. While punishment is reserved for the legal model, alternative forums have the potential to contribute to meeting survivors' other justice needs. A select number of non-judicial justice-oriented mechanisms were therefore identified and discussed. Truth commissions and issue specific inquiries, such as Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls, for example focus on the elements of recognition, as well as the potential assignment of accountability. Online truth-telling, activism and consciousness-raising may also satisfy the element of recognition, or in some cases even provide sources of redistribution through fundraising campaigns. Redistribution through collective transformative reparations is also achievable outside of the legal model, though challenges will arise in the Myanmar context if the state is unwilling to support such an initiative. These examples are not exhaustive, but may provide a starting place for imagining mechanisms

designed to address specific justice needs. However, this approach is not without its critiques, as some may argue that these alternatives represent a lesser form of justice, and reliance on them would only amplify the lack priority given to these gendered crimes in transitional justice. Careful consultation with Rohingya women is therefore necessary to determine what elements of justice are most important to them, and what methods of achieving these needs would be most appropriate in their socio-cultural context.

In light of these various approaches to justice, the purpose of this thesis has been to provide guidance on how documentation can be conducted now, while evidence of atrocities is still fresh and available, to ensure that the evidentiary record includes the specific types of harm suffered by women and girls. This will help ensure that their interests are taken into consideration in transitional justice responses. As such, Chapter II of this thesis has set out a detailed account how to document testimonies of women who have experienced SGBV at a standard that will be admissible in ICL proceedings. It has taken into consideration the elements of specific offences prohibiting sexual violence set out in the Rome Statute, as well as case law from the ICC and *ad hoc* tribunals to determine the precise information needed to meet the legal requirements. It also reviewed best practices guidelines to ensure that the manner of documentation is ethical, professional, and strives to ‘do no harm’ to those providing testimony. Careful preparation, training and informed consent are of the utmost importance in these efforts.

Chapter III of this thesis has discussed the documentation considerations relevant to non-traditional justice mechanisms. Careful preparation, and early documentation and consultation are also valuable for these initiatives, however a different approach to documentation may be appropriate. Indeed, the flexibility in process is a primary value of alternative justice approaches, as it allows for a break from the confines and risks associated with the legal standard. In particular, survivors should be given greater flexibility to speak of their experiences in conflict in the manner most comfortable for them, unrestricted by the focus on legal elements and free to address experiences of other forms of harm and their after-effects.

A significant issue remaining for consideration is how to reconcile these two approaches to documentation, in recognition that additional or unnecessary documentation efforts may cause further harm to the survivors who are sharing their

stories. This thesis has highlighted that there is not one process of documentation that will address all survivors' diverse justice needs while also preventing specific forms of harms associated with each standard. There has also been insufficient consultation with Rohingya women themselves in order to determine their specific wishes and interests with respect to transitional justice responses. Indeed, while international attention has focused on whether an ICC prosecution will be viable, little consideration has been given to other forms of justice. As such, preliminary consultations among Rohingya women is an important first step in order to determine what forms of justice are most important to them. Documentation strategies can then be carefully planned to establish coordination amongst various actors engaging in documentation work, thereby avoiding duplication where possible and maximizing use of resources. Exploring the possibility of establishing a repository or database for survivor testimony may complement this process.

A further strategy for consideration in determining the appropriate justice response in this context may involve conducting fact-finding and consultations among Cambodian women who experienced gendered violence during the Khmer Rouge regime. As a country in geographical proximity, which has gone through a period of transitional justice involving ICL proceedings, Cambodians may be well positioned to offer insights into the benefits and downfalls of various justice responses. This may also provide an opportunity for South-to-South knowledge sharing and assistance, thereby limiting the effect of the "Western gaze" or problematic North-South power dynamics.

It may be that a multi-tiered approach to justice and documentation is necessary to ensure that women's diverse interests are recognized as relevant and significant, alongside the justice interests of the Rohingya population as a whole. Rohingya women are not a homogenous group, and their diversity of experiences may result in a variety of perspectives on this issue. Of the utmost importance is that those directly impacted are included in the planning and decision-making associated with documentation and potential justice responses. This priority will have the added value of recognizing and supporting the agency of this group who have been so long oppressed.

Further empirical research among Rohingya refugees would greatly contribute to this discussion, and provide guidance to all actors involved in documentation and

implementing mechanisms for justice. In particular, qualitative research on what “justice” means to Rohingya women and girls, is paramount. Research into traditional forms of dispute resolution within Rohingya communities would also be beneficial in determining whether alternative forms of justice would be accepted or appropriate in this context.

Thorough, coordinated and ethical documentation of allegations of sexual violence committed against Rohingya women and girls has the potential to open doors for a variety of justice responses. While justice is only one of the many needs and challenges facing Rohingya communities waiting in overcrowded refugee camps in Bangladesh, it is an important element in the process of reconciliation, rebuilding, and moving forward in the wake of their experiences of violence and persecution. The international community can play an important role in supporting these efforts, so long as a “nothing about them without them” approach to consultation and planning is invoked in the process. Just as we cannot allow the injustice facing the Rohingya to continue, neither too can we be complicit in the further oppression of Rohingya women’s agency, interests or opportunities by imposing responses that do not reflect their own priorities and wishes. Our collective response to this crisis will be a true test of our global commitment to gender equality in all stages of conflict resolution.

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