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Myanmar, Colonial Aftermath, and Access to International Law

Morten Bergsmo



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Myanmar, Colonial Aftermath, and Access to International Law

Morten Bergsmo*

1. Investigating in an Unusually Polarised Climate

On 4 July 2019, the Prosecutor of the International Criminal Court ('ICC') requested a designated pre-trial chamber to authorise an investigation into alleged crimes in Rakhine State in Myanmar since 9 October 2016.¹ The request was widely anticipated following a decision by ICC Pre-Trial Chamber I on 6 September 2018,² statements by the Prosecutor,³ and var-

* **Morten Bergsmo** is Director, Centre for International Law Research and Policy (CILRAP). The author thanks Antonio Angotti, CHAN Ho Shing Icarus, Wolfgang Kaleck, Claus Kress, Kyaw Yin Hlaing and SONG Tianying for their comments.

¹ ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar ('Situation in Bangladesh/Myanmar'), Office of the Prosecutor ('OTP'), Request for authorisation of an investigation pursuant to article 15, 4 July 2019, ICC-01/19-7 (146 pp.) (<http://www.legal-tools.org/doc/8a47a5/>) ('ICC Prosecutor's Request'). The Prosecutor quotes a United Nations report which states that the objectives of the attacks by the Arakan Rohingya Salvation Army ('ARSA') in August 2017 "may not have been military, but aimed at eliciting a response by the [Myanmar Defense Services] (as in October 2016), with the broader goal of drawing renewed global attention to the Rohingya situation" (para. 64). She nevertheless holds that the alleged crimes committed by ARSA members "appear to fall outside the personal and territorial jurisdiction of the Court" (para. 65), seemingly excluding the possibility of forcible displacement.

² ICC, Situation in Bangladesh/Myanmar, Pre-Trial Chamber ('PTC') I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37 (<http://www.legal-tools.org/doc/73aeb4/>), in response to a request by the ICC Prosecutor on 9 April 2018 (ICC-RoC46(3)-01/18-1) (<http://www.legal-tools.org/doc/4af756/>). The Decision held that "acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute" (para. 73), and if "at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute" (para. 74). The Prosecutor's Request follows this logic.

³ See, for example, ICC OTP, "Statement of ICC Prosecutor, Mrs Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people

ious human rights reports.⁴ It describes very serious allegations in tragic detail, centred around the crimes of deportation, persecution, and other inhumane acts. International accountability for alleged crimes in Rakhine in 2017 has become a rallying cry of the international human rights movement. While recognising the gravity of the allegations that have been made, this paper is not about these allegations or the ongoing processes of accountability, but about how they may need to be supplemented.

The former United Nations High Commissioner for Human Rights, Mr. Zeid Ra'ad al-Hussein, has played a leading role in condemning Myanmar for the alleged crimes in Rakhine and demanding international accountability. His rhetoric made headlines around the world after he publicly shamed Myanmar's Ambassador to the United Nations in Geneva on 4 July 2018.⁵ Mr. al-Hussein has continued his line on Myanmar after his term as High Commissioner ended, including by suggesting that genocide may have occurred in Rakhine.⁶ Two of the Myanmar human rights mandates operating during his tenure adopted similar rhetoric.⁷ Together, these

from Myanmar to Bangladesh", 18 September 2018 (<http://www.legal-tools.org/doc/32a147/>).

⁴ Amnesty International's report "*We Will Destroy Everything*": *Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar*, June 2018, ASA 16/8630/2018, stands out as being particularly thorough (<http://www.legal-tools.org/doc/1358e2/>).

⁵ See, for example, "'Have You No Shame?' Myanmar Is Flogged for Violence Against Rohingya", in *The New York Times*, 4 July 2018.

⁶ See, for example, his audio-visual op. ed. "I Will Not Stay Silent. Our Leaders Are Failing Human Rights.", in *The New York Times*, 6 May 2019. His co-authored op. ed. "The International Criminal Court Needs Fixing", in *Atlantic Council*, 24 April 2019 has also been seen as controversial. Observers have asked how Mr. al-Hussein could publicly attack the ICC in this manner when he served as the President of the Bureau of the Assembly of States Parties of the Court during the most critical period of its history. Indeed, no one contributed more to the election of the first ICC Prosecutor – widely considered the source of many of the problems that have plagued the Court since – than Mr. al-Hussein, as confirmed by the first Prosecutor in a recent publication, see Luis Moreno-Ocampo, "6. The International Criminal Court", in David M. Crane, Leila N. Sadat and Michael P. Scharf (eds.), *The Founders*, Cambridge University Press, 2018, pp. 95–125. There is a need to look more closely at possible diplomatic failures around the ICC, and not to unfairly complicate the work of the incumbent Prosecutor and Judges. See Morten Bergsmo, "Institutional History, Behaviour and Development", in Morten Bergsmo *et al.* (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 1–31 (<http://www.legal-tools.org/doc/1c93aa/>).

⁷ The United Nations ('UN') independent international fact-finding mission on Myanmar, chaired by Mr. Marzuki Darusman, has suggested that "there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to

actors have contributed to the forging of a global moral narrative on Rakhine. This narrative is a part of the unusually blunt polarisation between the demand for international accountability by members of the international community, and the authorities of Myanmar.

This polarisation could become a problem for the ICC. For one, an exceptionally polarised environment can aggravate the challenge of group-think in refugee camps in Bangladesh,⁸ cementing the risk of confirmation bias.⁹ Potential witnesses may not adequately describe the crowd dimension of violations to life and the person in northern Rakhine communities from 25 August 2017.

An excessively polarised climate may also weaken recognition of the importance of turning every stone in making national investigations and prosecutions in Myanmar work. It would seem particularly important in the Myanmar context to avoid a general externalisation of accountability given the relative resourcefulness of its Office of the Judge Advocate

the situation in Rakhine State”, see Report of the independent international fact-finding mission on Myanmar, 12 September 2018, UN Doc. A/HRC/39/64, para. 87 (<http://www.legal-tools.org/doc/61cb49/>). It is difficult to understand how this respects the definition of the crime of genocide in the 1948 Genocide Convention as interpreted by the case law of the ex-Yugoslavia and Rwanda Tribunals. The ICC Prosecutor “has relied extensively” on the detailed report of the mission, see her Request, *supra* note 1, para. 29. UN Special Rapporteur for Myanmar, Ms. LEE Yanghee, also resorts to the genocide classification (“she is increasingly of the opinion that the events bear the hallmarks of genocide”, see Report of the Special Rapporteur on the situation of human rights in Myanmar, 24 May 2018, UN Doc. A/HRC/37/70, para. 65 (<http://www.legal-tools.org/doc/98d0a4/>)). Moreover, by calling upon the authorities of Myanmar “to initiate a credible investigation into the killings in Kayah State by a body that is independent of the Tatmadaw” (*ibid.*, para. 39), she would seem to contradict Article 20(b) of the 2008 Constitution of Myanmar (<http://www.legal-tools.org/doc/ea9567/>). It may be that the anthology *Quality Control in Fact-Finding* (Torkel Opsahl Academic EPublisher, Florence, 2013 (<http://www.toaep.org/ps-pdf/19-bergsmo>)) remains relevant for the UN Office of the High Commissioner for Human Rights.

⁸ See, for example, Hannah Beech, “The Rohingya Suffer Real Horrors. So Why Are Some of Their Stories Untrue?”, in *The New York Times*, 1 February 2018: “In any refugee camp, tragedy is commodified”.

⁹ Moa Lidén, “Confirmation Bias in Investigations of Core International Crimes: Risk Factors and Quality Control Techniques”, in Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (eds.), *Quality Control in Criminal Investigation*, Torkel Opsahl Academic EPublisher, Brussels, 2019 (forthcoming); see also Moa Lidén, *Confirmation Bias in Criminal Cases*, Uppsala: Department of Law, Uppsala University, 2018, ISBN 978-91-506-2720-6 (doctoral thesis).

General¹⁰ as well as the security and constitutional realities of the country.¹¹

The Prosecution Request relies on the 6 September 2018 decision's¹² understanding of the crime of deportation and that a denial of the right to return may amount to the crime of other inhumane acts.¹³ Both are welcomed as innovative by the international human rights community. This paper does not engage with the jurisdictional assumptions underlying this understanding. It rather aims at highlighting that the Prosecutor's legal approach necessarily turns the spotlight on the demographic background of the conflict in northern Rakhine. That is a complex story, if not a minefield.

¹⁰ The Office has more than 90 staff members according to an e-mail message from the Office to the present author dated 10 July 2019 (including representatives based in regional commands). The military investigation into Rakhine allegations announced on 18 March 2019 (<http://www.legal-tools.org/doc/03cf51/>) falls under this Office. The ICC should welcome a possible prosecution by this Office of the Rakhine regional commander of the Myanmar Defence Services from 25 August 2017, who has already been discharged as an administrative sanction. The ICC Prosecutor's Request says that "the Prosecution will continue to review its assessment [of the military investigation] in light of new information as it becomes available", *supra* note 1, para. 246.

On the Independent Commission of Enquiry ('ICOE'), the ICC Prosecutor's Request expresses that "it remains unclear if and how it is envisaged the ICOE's investigation will lead to criminal proceedings", but nevertheless makes assumptions about Myanmar law, *supra* note 1, paras. 251, 248. Under relevant laws of Myanmar, which are publicly available, the ICOE is a special investigations procedure, based on the Investigation Committees Act of 1 August 1949 (<http://www.legal-tools.org/doc/039bfb/>) whose earlier application and British colonial origin can be ascertained. It is understandable that the ICC Office of the Prosecutor is uncertain given that the ICOE's Chairperson has not referred to the Commission as a special investigation. Nevertheless, the Court's characterisations of Myanmar law relevant to her ability to investigate and prosecute core international crimes require careful quality-control.

¹¹ In this context, the ICC Prosecutor's Request sweepingly claims that no "investigations or prosecutions are being, or have been undertaken by Myanmar authorities or in relevant third States, in relation to the potential case(s) identified in this Request and confidential *ex parte* Annexes 5 and 7, related to those who appear most responsible for the most serious crimes", *supra* note 1, para. 228. It is not for this paper to discuss the accuracy of this description of the ongoing military investigation. But does it encourage domestic investigation in Myanmar that the lists of potential cases and suspects are being withheld? Does this reflect a deeper understanding of the purpose of the principle of complementarity? We should avoid any perception of competition between international and national criminal justice.

¹² *Supra* note 2.

¹³ ICC Prosecutor's Request, *supra* note 1, para. 75.

2. Transfers of Civilians into Burma

In navigating this terrain, persistent narrowing of the scope of analysis or sources entails risks.¹⁴ A properly anchored understanding of Rakhine's demography should take into account relevant sources going back in time, not excluding the 1970s,¹⁵ the 1950s,¹⁶ and the late colonial period.¹⁷ It is

¹⁴ Francis Wade's *Myanmar's Enemy Within: Buddhist Violence and the Making of a Muslim 'Other'*, Zed Books, London, 2017, is a popular reflection on identity, nationalism and history of Myanmar, so gripping that one almost does not realise that his analysis is virtually without footnotes. He barely touches on the British colonial period.

¹⁵ To illustrate, this includes documents such as the 23 December 1975 minutes by the British Embassy in Rangoon of a meeting with the Bangladesh Ambassador K.K. Kaiser, during which the latter refers to "upward of ½ million Bangalee trespassers in Arakan whom the Burmese had some right to eject", quoted by former United Kingdom Ambassador to Myanmar, Derek Tonkin, in "Exploring the Issue of Citizenship in Rakhine State", in Ashley South and Marie Lall (eds.), *Citizenship in Myanmar: Ways of Being in and from Burma*, Chiang Mai University Press, Chiang Mai, 2018, p. 232. Ambassador Tonkin has pointed out to the author that this number may be described as higher than was stated due to confusion by the British Embassy at the time.

¹⁶ Such as the United Kingdom Foreign Office, Research Department report "The Mujahid Revolt in Arakan", 31 December 1952 (<http://www.legal-tools.org/doc/851b1e/>). The report observes in paragraph 5 on pages 2-3:

The great pressure of population in Bengal has led over the years to a steady movement southwards, with the result that the Chittagong district has become predominantly Indian-Muslim in character and has also become over-populated in relation to its resources; and there has naturally been an overspill into Northern Akyab [in Myanmar]. Particularly in the nineteenth century, when not only had the frontier been eliminated but also the extension of the Pax Britannica over India as a whole led to a rapid growth of population, this movement southwards developed and accelerated. In normal times, every year saw a large seasonal influx from Chittagong into Akyab district of coolies coming to work in the rice-fields: some went by sea direct to the port of Akyab, but many crossed the Naf river to Maungdaw and spread thence on foot. Naturally, some of them finally settled in the country, especially in the parts nearest their former homes, so that in 1917 the Settlement Officer reported that "Maungdaw township has been overrun by Chittagong immigrants. Buthidaung township is not far behind". [...] by 1931, the last year for which details of population are available, Indian Muslims, nearly all originating in Chittagong, formed 57 per cent of the population of the Maungdaw township and 56 per cent of the population of Buthidaung [...].

The ICC Prosecutor's Request notes that "according to statistics allegedly collected in 2016 by Myanmar's General Administration Department ("GAD"), Rohingya accounted for 93% of the population in Maungdaw Township in 2016, 84% of the population in Buthidaung Township", *supra* note 1, para. 38.

For Rakhine State as a whole, Frank S.V. Donnison wrote that the "population of Arakan in 1941 was slightly over a million, of whom some 600,000 were Arakanese and some 200,000 Chittagonian Indians, the rest being accounted for by various hill peoples and by minor communities in the plains. [...] The Chittagonian population had immigrated from

not for this paper to offer such a detailed chronicle, only to highlight relevant trends.

In his significant history of Myanmar, Dr. Thant Myint-U – grandson of the late U Thant, the third Secretary-General of the United Nations – soberly describes an important aspect of the current situation in Myanmar, including Rakhine State: “At the beginning of the [twentieth] century Indians were arriving in Burma at the rate of no less than a quarter million people a year. The numbers rose steadily until, in the peak year of 1927, immigration reached 480,000 people, with Rangoon exceeding New York City as the greatest immigration port in the world. This was out of a total population of only 13 million, the equivalent of the United Kingdom today taking 2 million people a year”.¹⁸ It may be appropriate to reflect on the sheer numbers for a moment. They only started to abate in the years after 1927. Aung San Suu Kyi referred in a 1991 publication to “a well-justified apprehension” among the Burmese late in the colonial period that “their very existence as a distinct people would be jeopardized if the course of colonial rule was allowed to run unchecked”.¹⁹

Chittagong, some families many generations back, others recently. There was in addition, in peacetime, a seasonal and temporary immigration of agricultural labourers for the harvest. The Chittagonians were Muslim by religion and spoke the language of Chittagong”, see his detailed study *British Military Administration in the Far East 1943-46*, Her Majesty’s Stationary Office, London, 1956, p. 18 (part of the British government’s multi-volume “History of the Second World War: United Kingdom Military Series”, and as such described by the author as “contemporary history under official auspices”, p. xiv).

¹⁷ Ambassador Tonkin remarks that ‘Rohingya’ is “an ethnic designation unknown to the former British administration”, see *idem*, 2018, *supra* note 15, p. 222. He continues: “I have found not a single reference to the term ‘Rohingya’ in any shape or form in any documents or correspondence, official or private, recording the 124 years of British rule in Arakan from 1824 to 1948” (p. 224); and adds: “The reason for this must surely be that the word means no more than ‘Arakaner’ and is derived from the Bengali word for Arakan which is ‘Rohang’ with a family taxonomic suffix – ‘gya’” (*ibid.*). There are obviously other views on this question. The argument of this paper does not depend on any particular position or source on this or other historical details it touches upon. Azeem Ibrahim debates Tonkin on the origins of ‘Rohingya’ identity, see his monograph *The Rohingyas: Inside Myanmar’s Genocide*, Hurst & Company, London, 2018, pp. 30-31. But Ibrahim agrees with the specific trend discussed in this section, namely, large-scale migration “from British-ruled India to Burma before 1937” (p. 7).

¹⁸ Thant Myint-U, *The River of Lost Footsteps: A Personal History of Burma*, Faber and Faber, London, 2007, pp. 185–86. Further research would probably provide more exact figures, taking into account immigration and emigration numbers, not limited to the port in Rangoon, but all major ports as well as land migration, to the extent such data is available.

¹⁹ Aung San Suu Kyi, *Freedom from Fear*, Penguin Books, London, 2010, pp. 103–04 (first published in 1991).

The Burmese – who became a minority in their main city, Rangoon – had no say in this demographic transformation of their country. Britain fought three wars in order to occupy all of Burma and establish colonial rule by armed force.²⁰ To fuel her economic interests in rice production²¹ and other sectors,²² Britain allowed the transfer of millions of persons from her colonial India into Burma,²³ also leading to some con-

²⁰ In the words of Aung San Suu Kyi: “British annexation of Burma [...] was accomplished in three clear-cut phases spread out over little more than half a century. The first Anglo-Burmese War of 1824-6 ended with Arakan and Tenasserim passing under British rule; the second Anglo-Burmese War of 1852 added the province of Pegu to the British possessions; and, finally, the third Anglo-Burmese War of 1885 led to the subjugation of the whole country and brought an end to the Burmese monarchy”, see *ibid.*, p. 84. The violence continued, starting with “a huge military deployment throughout the Irrawaddy Valley and continued with the large-scale and forced relocation of people. [...] Colonial magistrates were granted wide-ranging powers to move suspected rebel sympathizers, and dozens of villages were simply burned to the ground. Summary executions, sometimes by the half dozen or more, became routine, as did the public flogging of captured guerrillas”, see Thant Myint-U, 2007, p. 29, *supra* note 18. To be sure, this refers to alleged conduct in 1886, not in Rakhine in 2017.

²¹ “Incomparably the most important [project for the re-occupation administration in Burma] was that for the revival of the rice trade” after the end of World War II, wrote Donnison, who explained that the concern at the time was that “no time whatever should be lost in reaching and developing the rice supplies of these exporting areas as soon as they were re-occupied”, see *idem*, 1956, p. 263, *supra* note 16. Burma had become the largest exporter of rice in South-East Asia. Arakan was “a considerable rice-exporting area” (p. 264), since the “opening of the Suez Canal [in 1869] had favoured the production and the export of rice”, see Jacques P. Leider, “Conflict and Mass Violence in Arakan (Rakhine State): The 1942 Events and Political Identity Formation”, in South and Lall (eds.), 2018, p. 195, *supra* note 15.

²² Albeit facilitated by the British government, the basis of the British mass-transfers was commercial or military, not ideological. The South-East Asia Command “was concerned to import, for the period of [military administration at the end of World War II], a labour force of 150,000 to 200,000 men”, as “labour required for the military forces”, see Donnison, 1956, p. 316, *supra* note 16. For the situation where settlement could in part be based on ideological or religious conviction, see Morten Bergsmo, “Integrity as Safeguard Against the Vicissitudes of Common Justice Institutions”, lecture presented in the Peace Palace, The Hague, 1 December 2018 (www.cilrap.org/cilrap-film/181201-bergsmo/).

²³ Aung San Suu Kyi refers to this as an “unchecked influx of foreigners” which was “a major cause of the disintegration of traditional society”, see *idem*, 2010, p. 101, *supra* note 19. She wrote in 1991 that “the increasing acreage of land brought under cultivation gave rise to a need for indentured labour which was supplied by India” (*ibid.*). Further: “Under British rule there was no control on the members of Indians and Chinese who came to seek their fortune in Burma” (*ibid.*, p. 66). Donnison refers to “unrestricted migration” from India, see *idem*, 1956, p. 315, *supra* note 16.

flicts between the Burmese and the immigrants.²⁴ In other words, Britain transferred many more people into Burma than the overall number of Jewish settlers on the West Bank as of 1 January 2019, estimated at 449,508.²⁵ Why is this a relevant comparison?

The ICC Prosecutor has conducted a preliminary examination of alleged crimes in Palestine since 16 January 2015. Her annual reports on preliminary examination suggest that her main focus is “the settlement of civilians onto the territory of the West Bank” or so-called “settlement-related activities”.²⁶ It is exactly this alleged transfer of civilians into the West Bank which human rights non-governmental organisations and some

²⁴ For example, “in 1938, on the pretext of an insult to the Buddhist religion, anti-muslim riots and massacres broke out, over most of the country, resulting in the death of some 200 Indians and the wounding of some 750 more”, see *ibid.*, pp. 315–16. In May 1942, when the British forces withdrew from Rakhine as the Japanese advanced, “[c]ommunal strife and plundering [...] spread all over Arakan, Arakanese Buddhists massacring Chittagonians and Chittagonian Muslims massacring Arakanese each in the areas in which they predominated. [...] in the Muslim sphere all Buddhist pagodas and monasteries were razed to the ground, and the Burmese and Arakanese languages dropped out of use” (p. 21). Muslims had acted with “fanatical zeal to exterminate Arakanese Buddhists or to expel them from the areas of Muslim majority” (p. 22). Trying to analyse the impact of the 1942 events, Leider opines that in the “collective psyche of the Arakanese/Rakhine, the experience of 1942 toughened the perception of a demographic threat”, see *idem*, 2018, p. 216, *supra* note 21.

Despite this background, the British decided to recruit an irregular force in north Rakhine from September 1942 “to collect intelligence and to absorb the first pressure of any Japanese advance in the area” from “local Muslims who were ready to give their somewhat doubtful loyalty to the British as being the only allies in sight who might aid them to protect themselves against the Arakanese Buddhists” (see Donnison, 1956, pp. 21–22, *supra* note 16). This “V Force gained fame as an indispensable support for the British war effort in Arakan between late 1942 and 1945”, and the Muslim “sacrifices for the British served as one of the main arguments to call for the creation of an autonomous Muslim zone in North Arakan” (see Leider, 2018, p. 202, *supra* note 21). Leider continues: “Informal suggestions and opinions to grant the Muslims such an autonomous territory had circulated among British military ranks during the war as they highly valued the contribution of V Force to the war effort” (*ibid.*). Some Muslim leaders were disappointed and blamed the United Kingdom: “The divide and rule policy of an Alien Govt. had created in the past a large measure of misunderstanding and distrust between our people and our Arakanese brethren. This policy culminated in the massacre of 1942 of our people residing in various parts of Akyab District” (Jamiat ul-Ulama, cited in Leider, 2018, pp. 204–05, *supra* note 21).

²⁵ Josef Federman, “West Bank settlers report surge in population growth”, in *The Times of Israel*, 6 February 2019. This number excludes East Jerusalem.

²⁶ ICC, OTP, Report on Preliminary Examination Activities 2017, 4 December 2017, para. 59 (see paras. 51–78) (<http://www.legal-tools.org/doc/e50459/>).

mainly-Muslim governments seek to have the ICC investigate and prosecute as a core international crime. Since the ICC Statute entered into force on 1 July 2002, its Article 8(2)(b)(viii) has prohibited the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies”. Israel – which, like Myanmar, is not an ICC State Party – does not consider its presence on the West Bank as occupation.²⁷

Could Myanmar argue that the transfer of civilians into Burma prior to World War II – a process that has contributed significantly to the demographic makeup of, for example, Rakhine State – was a violation of international law? Such population transfers were only expressly prohibited by international law with the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War,²⁸ whose Article 49(6) provides that the “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”.²⁹ In other words, the transfers into Burma happened several years prior to the first express treaty prohibition of such conduct.

Were that not the case, international lawyers would proceed to ask whether Burma was occupied³⁰ at the time of the transfers (a question of legal qualification on which the argument of this paper does not depend insofar as it concerns transfer of civilians into occupied *or similar territory*, including territory under forms of domination similar to occupation³¹ –

²⁷ Theodor Meron’s well-known dissenting advice when he served as the Legal Adviser of the Israel Ministry of Foreign Affairs is predicated on the assumption that there is a state of Israeli occupation, see his recent article “The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War”, in *American Journal of International Law*, vol. 111, no. 2, pp. 357–75.

²⁸ See <http://www.legal-tools.org/doc/d5e260/>.

²⁹ Article 85(4)(a) of the 1977 Additional Protocol I made population transfer – “the transfer by the occupying Power of parts of its own civilian population into the territory it occupies” – a grave breach (<http://www.legal-tools.org/doc/d9328a/>).

³⁰ Eyal Benvenisti defines occupation as “the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory” (see his monograph *The International Law of Occupation*, 2nd edition, Oxford University Press, 2012, p. 3).

³¹ Benvenisti observes that “foreign occupation has been likened by several UN General Assembly documents, including the Charter of Economic Rights and Duties of States, to colonialism” (making reference to UNGA resolutions 3281 (XXIX), 12 December 1974 (<http://www.legal-tools.org/doc/3bf094/>), and 3171 (XXVIII), 17 December 1973 (<http://www.legal-tools.org/doc/438f4c/>), *ibid.*, p. 17 (footnote omitted).

the value at stake is the same whether it was occupation or colonial rule). If the narrow answer is negative, what would be the effect of the British re-occupation of Burma at the end of World War II?³² And further: was Burma a sovereign nation at the time of the third Anglo-Burmese War?³³ We ask these questions as international lawyers because we have a particular kind of meeting between norm and fact in mind, namely evidence of

³² After Britain had defeated Japan in Burma at the end of World War II, London invoked the law of occupation as the legal basis for its authority in Burma, see Proclamation No. 1 of 1944: Military Administration issued by Louis Mountbatten as Supreme Allied Commander, South East Asia (“occupied by the Forces”, see para. 1); see also Donnison, 1956, for example, pp. 3, 33, 76, 113 and 263, *supra* note 16. Arakan had “a genuine and full military administration, the first in the Far East” (p. 15); cited by Benvenisti, 2012, p. 9, *supra* note 30. A “power struggle developed” between the Civil Affairs Service (Burma) under the South-East Asia Command and the Government of Burma in exile “under the direction of the former and still titular Governor”, see Philip Ziegler, *Mountbatten: The Official Biography*, Collins, London, 1985, pp. 317–23: “Damn it all, I’m governing Burma – not he, whatever his title”, wrote Mountbatten about the Governor (p. 318). The recognition that the United Kingdom re-occupied Burma affects our understanding of any earlier British claims of *debellatio* or subjugation through the three Anglo-Burmese Wars. Why would you re-occupy if your position is that the nation was subjugated decades earlier? Benvenisti argues that “the law of occupation proved very useful to the reoccupants, who invoked it in order to allow the military administrations wide discretionary powers unencumbered by constitutional constraints” (*idem*, 2012, p. 9, fn. 42, *supra* note 30).

Benvenisti finds the doctrine of *debellatio* to be “a remnant of an archaic conception that assimilated state into government”, and it “has no place in contemporary international law, which has come to recognize the principle that sovereignty lies in a people, not in a political elite. The fall of a government has no effect whatsoever on sovereign title over the occupied territory, which remains vested in the local population”, see *ibid.*, p. 163. But it is not so long ago that Georg Schwarzenberger condoned the doctrine, see his *International Law as Applied by International Courts and Tribunals: Volume II, The Law of Armed Conflict*, Stevens & Sons, London, 1968, pp. 167, 296, 63, 139, 467.

³³ As to whether Burma was a sovereign nation in 1885, see Thant Myint-U, 2007, chapters 6, 7 and 1 (in that order), *supra* note 18; see also Frank S.V. Donnison, *Public Administration in Burma: A Study of Development During the British Connexion*, Royal Institute of International Affairs, 1953, pp. 11–14. Thant Myint-U’s Chapter 1 details the British treatment of the last Burmese King Thibaw whose “archives [...] and almost all the other papers of the Court of Ava had gone up in flames as drunken British soldiers set fire to the king’s library soon after Thibaw’s surrender. It was not until Lord Curzon visited as viceroy in 1901 that the wanton destruction of the old buildings was ended and what was left of the Mandalay palace was preserved” (p. 30). Two years later, Lord Curzon wrote that the greatest threat to British rule in India (including Burma) was “the racial pride and the undisciplined passions of the inferior class of Englishmen in this country”, see Kenneth Rose, *Curzon: A Most Superior Person*, Macmillan, 1985, p. 343. Benvenisti describes how some colonial powers did “not distinguish between conquest and occupation”, enabling “the unilateral assumption of sovereignty over lands inhabited by what they deemed to be uncivilized peoples”, *idem*, 2012, p. 32, *supra* note 30.

alleged facts analysed in the light of the elements of the prohibition against transfer of civilian population into occupied territory. But this is not the only meeting between this norm and fact that is relevant in the Myanmar context.

The prohibition was intended to “prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race”.³⁴ Burma was subjected to colonial practices, and the Burmese suffered economic consequences with the massive transfer of civilians from British India. Does not her situation fall squarely within the generic legal good or value protected by the prohibition against population transfer into occupied territory? If the answer is in the affirmative, is this not important to recognise if we want to understand the recent situation in Rakhine and the excessive polarisation around accountability?

Not surprisingly, several delegates who spoke at the 1949 Diplomatic Conference were referring specifically to German and Japanese practices during World War II.³⁵ In the indictment in the case against major war criminals before the International Military Tribunal at Nuremberg, Count 3 – War Crimes, section ‘(J) Germanization of Occupied Territories’ referred to how the defendants “introduced thousands of German colonists”, in order “to assimilate [certain] territories politically, culturally, socially, and economically into the German Reich”.³⁶ The Judgment quotes Adolf Hitler stating on 5 November 1937 that it is “not a case of

³⁴ Jean S. Pictet (ed.), *Commentary on IV Geneva Convention*, International Committee of the Red Cross, Geneva, 1958, p. 283 (<http://www.legal-tools.org/doc/7d971f/>).

³⁵ See Final Record of the Diplomatic Conference of Geneva of 1949, vol. II-A, p. 664, cited by Pictet (representatives of the Soviet Union, the Netherlands and Italy) (<http://www.legal-tools.org/doc/fb1a60/>).

³⁶ International Military Tribunal, *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring et al.*, Indictment, 6 October 1945, as amended 7 June 1946 (<http://www.legal-tools.org/doc/23d531/>). Three “aims and purposes of the [...] defendants” were identified in the indictment’s Count 1 – The Common Plan or Conspiracy, section “IV. Particulars of the Nature and Development of the Common Plan or Conspiracy”, “(B) Common Objectives and Methods of Conspiracy”, the third of which was “to acquire still further territories in continental Europe and elsewhere claimed by the Nazi conspirators to be required by the ‘racial Germans’ as ‘Lebensraum’, or living space”.

conquering people but of conquering agriculturally useful space. [...] The history of all times – Roman Empire, British Empire – has proved that every space expansion can only be effected by breaking resistance and taking risks”.³⁷ The Tribunal found that, “[i]n Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans”.³⁸

Indications are, however, that underlying the acceptance of the international law prohibition against the transfer of civilians into occupied territory was a general concern for the harm it causes, and not only a reaction against the practices of defeated Germany. Notably, the International Law Commission has commented that it is “an exceptionally serious war crime [...] to establish settlers in an occupied territory and to change the demographic composition of an occupied territory”.³⁹ It expressed the view that this “constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide”.⁴⁰

The 2005 customary law study of the International Committee of the Red Cross held that the prohibition against transferring civilian population into occupied territory is a norm of customary international law.⁴¹

³⁷ Trial of the Major War Criminals before the International Criminal Tribunal Volume I – Judgment, p. 190 (<http://www.legal-tools.org/doc/f21343/>).

³⁸ *Ibid.*, p. 237. For findings on ‘Germanisation’, see pp. 238, 261, 295 and 335.

³⁹ International Law Commission (‘ILC’), Report of the Commission to the General Assembly on the work of its forty-third session, in *Yearbook of the International Law Commission*, 1991, vol. II, part 2, p. 105 (the offence appears as Article 22(2)(b) of the 1991 Draft Code) (<http://www.legal-tools.org/doc/251704/>). In the 1996 Draft Code (Article 20(c)(i)), the offence was formulated as the “transfer by the Occupying Power of parts of its own civilian population into the territory it occupies”, see *idem*, Report of the Commission to the General Assembly on the work of its forty-eighth session, in *Yearbook of the International Law Commission*, 1996, vol. II, part 2, pp. 53–56 (<http://www.legal-tools.org/doc/bb5adc/>).

⁴⁰ ILC, 1991, *supra* note 39. This strong statement is hard to reconcile with the definition of the crime of transfer of civilians which does not require any violation of civilian life or physical integrity. Rather, the crime primarily harms an interest of the pre-occupation collective of the occupied territory, in its demographic state. Genocide, on the other hand, requires a specific intent to bring about the physical-biological destruction of a group in whole or in part.

⁴¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules*, Cambridge University Press, 2005, pp. 462–63, on what they design-

The study relied on a considerable number of legal sources, including resolutions of the UN Security Council,⁴² the *Wall* Advisory Opinion of the International Court of Justice,⁴³ and the 2001 International Criminal Court Act of the United Kingdom.⁴⁴

The publicists Michael Cottier and Elisabeth Baumgartner explain that transfers of civilians into occupied territory have “severe humanitarian, economic, political and social long-term consequences, by changing the demographic composition of a territory, protracting conflicts and creating factual situations which are difficult to reverse”.⁴⁵ They stress that the prohibition “aims at protecting the status [...] of occupied territory against the long-lasting effects of settlements by the Occupying Power and its population”, continuing: “The transfer by an Occupying Power of its own civilian population into territory it occupies usually has substantial lasting consequences”, involving change of the “demographic compo-

nate as “Rule 130” (<http://www.legal-tools.org/doc/78a250/>). A detailed list of legal sources used in support of the position taken is found in *idem* (eds.), *Customary International Humanitarian Law, Volume II: Practice – Part 2*, Cambridge University Press, 2005, pp. 2956–70 (<http://www.legal-tools.org/doc/d8df48/>).

⁴² See three resolutions adopted during the Jimmy Carter Presidency: Resolution 446 (1979), 22 March 1979 (“to desist from taking any action which would result in [...] materially affecting the demographic composition”, and “not to transfer parts of its own civilian population into the occupied Arab territories” (para. 3) (<http://www.legal-tools.org/doc/70334f/>); Resolution 452 (1979), 20 July 1979 (<http://www.legal-tools.org/doc/946db2/>); and Resolution 476 (1980), 30 June 1980 (<http://www.legal-tools.org/doc/130fa8/>).

⁴³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (with distinct individual opinions by, *inter alios*, Judges Thomas Buergenthal and Rosalyn Higgins): Article 49(6) of Geneva Convention IV “prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory” (para. 120) (<http://www.legal-tools.org/doc/e5231b/>).

⁴⁴ Under the International Criminal Court Act (2001), ICC Statute Article 8(2)(b)(viii) is a domestic punishable offence (Sections 51(1) (England and Wales) and 58(1) (Northern Ireland), see Section 50(1) at the end, 50(6), and Schedule 8 (Article 8(2)(b)(viii)) (<http://www.legal-tools.org/doc/e32fd7/>). The United Kingdom’s *Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004, briefly states that “[m]embers of the occupying power’s own civilian population may not be transferred to occupied territory”, para. 11.55, p. 293 (<http://www.legal-tools.org/doc/9dfeb2/>).

⁴⁵ Michael Cottier and Elisabeth Baumgartner, “8. Paragraph 2(b)(viii): Prohibited deportations and transfers in occupied territories”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Munich, 2016, p. 405.

sition within the occupied territory”.⁴⁶ The aim of the Occupying Power may be to “factually weaken the position of the resident population of the occupied territory and solidify its territorial and political claim over the territory”.⁴⁷

A more careful review of these and other sources suggests that German practices during World War II influenced the decision to include Article 49(6) in Geneva Convention IV, and allegations linked to Israeli settlements on the West Bank have had a significant impact on the subsequent criminalisation of the norm in international law.⁴⁸ There seems to be a distinct element of targeted reaction in both norm-evolutions: the prohibition was made with the Germans in mind; the crime, with the Israelis. This perception puts sincerity and consistency to the test. The International Law Commission arguably failed the test when it suggested that the conduct of transfer of civilians “could echo the seriousness of genocide”, which is an exaggeration.⁴⁹ We face another test when Myanmar asks whether their concerns over the lingering harm caused by massive transfers of civilians into colonial Burma are not relevant to the international community.

3. In Search of a Response to the Sense of Double Standards

The ICC Prosecutor has requested authorisation to open an investigation into alleged crimes in Rakhine State in Myanmar at a time when, for a number of years, “[s]cepticism has [...] been mounting in the Global South where impunity for the massive human rights violations committed by Western colonial powers has been rife for more than half a century”.⁵⁰

⁴⁶ *Ibid.* (all three quotations in the sentence).

⁴⁷ *Ibid.*

⁴⁸ “It is undoubtedly true that some of the Arab delegations insisting on inclusion of the provision were seeking to highlight activities by Israel in the occupied territories”, see Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 259. Judge Eli Nathan, head of the Israeli delegation to the Diplomatic Conference, in an explanation of vote on 17 July 1998, said that had the provision not been included, “he would have been able to vote in favour of adopting the Statute”, see United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, vol. II, p. 123 (<http://www.legal-tools.org/doc/253396/>).

⁴⁹ See *supra* note 40 with explanation.

⁵⁰ See Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. i (<http://www.toaep.org/ps-pdf/26-kaleck/>).

As the founder of the European Center for Constitutional and Human Rights, Wolfgang Kaleck, has pointed out: “Repeatedly, international criminal law has been portrayed as a tool of Western domination whose claim to universality is nothing more than an empty ideological superstructure”.⁵¹

Myanmar has the potential to bring this sense of double standards to a head. Myanmar has suffered three colonial wars, systemic discrimination, demographic upheaval, and other violations for more than a century of colonial rule. By making deportation of Muslims from northern Rakhine State and the question of return the centrepiece of an ICC investigation – seemingly recognising a Rohingya identity⁵² – the Prosecutor is inexorably turning the spotlight on the demographic reality and background of Rakhine State. If the massive transfer of civilians into Burma during the late colonial period is seen as irrelevant to international law and justice, this may feed criticisms that “threaten to undermine the legitimacy of international criminal law and [that] thereby adversely affect its potential to contribute positively to the collective coming to terms with international crimes”.⁵³ Simply put, international law would be used against Burmese actors for current Rakhine violence, but it would be found to be silent on the past wrongs which make up part of the root causes of the violence. This can lead not only to estrangement from international law, but an anger which may negatively affect the necessary accountability processes.

⁵¹ *Ibid.*

⁵² Ambassador Derek Tonkin notes that the “United Nations and Western governments are under pressure to accept the Rohingya identity. That is a political decision which only they can take. It is important though that their unqualified recognition of the Rohingya identity in Myanmar and overseas should not provide moral and political support to a highly questionable and pretentious narrative. Such an uncritical acceptance damages the prospects for reconciliation by further polarizing the Buddhist and Muslim communities”: Tonkin, 2018, p. 239, see *supra* note 15. He refers to the encouragement “by a vociferous and well-coordinated international lobby” (p. 238), while recognising that “Rohingya might however also be seen to reflect an emerging, coalescing ethnic process among persons of Bengali racial origin designed as much as anything for self-protection in an increasingly hostile environment” (p. 230). Similarly, Jacques P. Leider refers to “a sense of shared destiny as victims of state harassment” (Leider, 2018, p. 206, see *supra* note 21). These quotations – which point in different directions – show how controversial the identity question is. This paper need not take a position on this question.

⁵³ Kaleck, 2015, p. i, *supra* note 50.

U Thant, the third UN Secretary-General who showed us that Myanmar is no stranger to the idea of wider ‘collective coming to terms’,⁵⁴ admired George Orwell and referred to his writings on colonialism to present the “strong resentment on the part of” the Burmese.⁵⁵ Orwell served with the Indian Imperial Police in Burma from 1922 to 1927, an experience which inspired his first novel *Burmese Days*: “In a job like that you see the dirty work of Empire at close quarters”.⁵⁶ Are there relevant insights that can be extrapolated from this well-known novel on colonial practices? One of its main characters, Dr. Veraswami, an Indian who came to Burma during the British rule, strives to become a member of the local club, “the spiritual citadel, the real seat of the British power, the Nirvana for which native officials and millionaires pine in vain”.⁵⁷ Orwell describes how prejudice and self-righteousness among British colonisers fed discrimination and corrupted local communities.⁵⁸ The Burmese riot against the British community is crushed, but their anger succeeds in bringing down the Anglophile Dr. Veraswami. That non-British Anglophile representatives of the international community may trigger Burmese indignation just as much as British officials – the pen-holders of the My-

⁵⁴ Three years before Emmanuel Macron was born, he called for government leaders to take “fresh, new approaches on a planetary basis”, informed by his “vision of a unified mankind”, see U Thant, *View from the UN*, David & Charles, London, 1977, p. xviii. Note also the conclusion of his book: “I even believe that the mark of the truly educated and imaginative person facing the twenty-first century is that he feels himself to be a planetary citizen” (p. 454). Aung San Suu Kyi has remarked that a certain “meanness of spirit” was shown by the authorities over U Thant’s funeral in Yangon, see her *Letters from Burma*, Penguin Books, London, 2010, p. 76 (first published in 1996). Whatever the circumstances at the time, this does not detract from the value of his book and legacy as Secretary-General.

⁵⁵ U Thant, 1977, p. 38, see *supra* note 54.

⁵⁶ George Orwell (né Eric Arthur Blair), *Shooting an Elephant and Other Essays*, Secker & Warburg, London, 1950, p. 79.

⁵⁷ George Orwell, *Burmese Days*, Penguin Books, London, 2009, p. 14 (first published in 1934).

⁵⁸ Says Dr. Veraswami to his English friend: “‘But, my dear friend, what lie are you living?’ ‘Why, of course, the lie that we’re here to uplift our poor black brothers instead of to rob them. I suppose it’s a natural enough lie. But it corrupts us, it corrupts us in ways you can’t imagine. There’s an everlasting sense of being a sneak and a liar that torments us and drives us to justify ourselves night and day. It’s at the bottom of half our beastliness to the natives. We Anglo-Indians could be almost bearable if we’d only admit that we’re thieves and go on thieving without any humbug.’”, *ibid.*, p. 37.

anamar situation in the UN Security Council⁵⁹ – is one of the more obvious assumptions that can be distilled from Orwell’s story. If such a representative happens to have worked intimately with the British Government during the negotiation and setting up of the ICC, Burmese sensitivity may be enhanced. But the anger could go further.

At first glance, it would primarily be a British problem if resentment for what Aung San Suu Kyi referred to as the “unchecked influx of foreigners”⁶⁰ grows as the ICC proceeds with its work and many Burmese come to feel that the language of international law has not been made for them, that there are in effect double standards. Europeans should not delight in the thought that this anger is not directed against Europe as such. Curiously, Orwell consistently refers to the “European Club”, not the British or English club, although that is what it essentially was throughout British India.⁶¹ As a strong supporter of the ICC, the European Union does indeed have an interest in avoiding extreme polarisation over the question of accountability for alleged core international crimes in Rakhine State. There is even talk in Yangon of how the accountability issue has become a factor in wider geopolitical considerations.⁶²

The purpose of this paper, however, is neither to predict how far the polarisation over the issue of accountability for Rakhine allegations may go, nor to speculate on how the issue may affect great-power interests in the region. Rather, it seeks to trigger and bring more minds to bear on the question of what can realistically be done to meaningfully respond to the sense of double standards and to reduce excessive polarisation.⁶³ This consultation needs to commence. While international criminal lawyers may not be the obvious leaders of such an inquiry – indeed, some will ask what the problem is – they have a role to play. It is important that new

⁵⁹ See, for example, “The UK Is ‘Taking a Stand’ to Bring Myanmar Leaders to Justice Over Rohingya Crisis”, in *Global Citizen*, 5 September 2018 (<http://www.legal-tools.org/doc/40cf22/>).

⁶⁰ See *supra* note 23.

⁶¹ See *supra* note 56.

⁶² In his book *Where China Meets India: Burma and the New Crossroads of Asia*, Faber and Faber, London, 2011, Thant Myint-U discusses various aspects of Myanmar’s relations with China, India and Western countries. Since his book was published, China has completed gas and oil pipelines from Yunnan Province across Myanmar to Ramree Island in Rakhine State, south of where the alleged crimes occurred in 2017.

⁶³ While recognising the inherently confrontational nature of criminal justice at the level of suspects and prosecution.

measures designed will not impede requisite accountability mechanisms, but supplement them.

There are recent examples of attempts to address historical wrongdoing also through the lens of current international law classifications. Initiatives in Canada,⁶⁴ Germany,⁶⁵ and Norway⁶⁶ come to mind. It may be useful to consider such processes more closely, with a view to designing a *sui generis* approach for Myanmar.

The German track, which concerns violations that occurred in Namibia, a former German colony, is particularly promising, as it is largely driven by a desire to find ways to deal with the problem of double standards in the context of former colonies. It is a multi-pronged track with several projects. It does not to date amount to a hard-nosed application of so-called ‘Third World Approaches to International Law’ (‘TWAIL’) which would not necessarily help to resolve the challenge before us in Myanmar.⁶⁷ A focused approach may suit the area of international criminal law well, insofar as core international crimes seek to protect interests such as groups of persons against physical-biological destruction and innocent civilians against being killed or tortured, which are common global values in a different manner than, for example, development or economic growth.⁶⁸ A well-designed process for Myanmar, with TWAIL participa-

⁶⁴ Canada’s National Inquiry into Missing and Murdered Indigenous Women and Girls produced various reports and activities between 1 September 2016 and 30 June 2019, including an advanced Internet presence (<https://www.mmiwg-ffada.ca/>).

⁶⁵ The European Center for Constitutional and Human Rights and partners have started a process to address the German genocide against the Ovaherero and Nama peoples in Namibia (1904-08), including a conference on “International Law in Postcolonial Contexts” (<https://www.ecchr.eu/en/case/namibia-a-week-of-justice/>) and an open letter to the German Government (<http://www.legal-tools.org/doc/24a52c/>).

⁶⁶ Norway has conducted a detailed public inquiry into the historical treatment of members of the Roma group in Norway, leading to the comprehensive report “Assimilering og motstand: Norsk politikk overfor taterne/romanifolket fra 1850 til i dag” (“Assimilation and resistance: Norwegian policy towards the Roma People from 1850 until today”), Norges offentlige utredninger 2015: 7 (<http://www.legal-tools.org/doc/ca4c52/>).

⁶⁷ Sergey Vasiliev, “The Crises and Critiques of International Criminal Justice”, in *SSRN Electronic Journal*, January 2019, pp. 8–10, 13–15, gives an overview of TWAIL critiques of international criminal law: “TWAICL seeks to decolonise the conceptual and normative apparatus of international criminal law, by interrogating assumptions of geopolitical neutrality, universality and moral immaculacy of its standards, practices, and impacts” (p. 15).

⁶⁸ Sundhya Pahuja argues that international law generally “refuses to engage with its imperial history and well-documented intimacy with the powerful”, see her monograph *Decolonising International Law*, Cambridge University Press, 2011, p. 1. The concepts of develop-

tion, could perhaps offer the established discourse useful specificity and future-orientation.

Such a mechanism should not be limited by truth and reconciliation processes as we know them from other countries around the world. Thorough research on some of the historical events referred to in Section 2. above could, if properly undertaken, shed further light on several questions and begin to bridge the gap between competing and fragmented narratives.⁶⁹ It may also be useful to include analysis of the lead-up to the adoption of Article 49(6) of Geneva Convention IV in 1949 in the mandate of a mechanism.

4. Myanmar as an Opportunity to Address the Problem of Double Standards

The tragic killings and the disruption of the lives of hundreds of thousands in northern Rakhine have rightly given rise to the question of accountability. But at the same time, Myanmar offers us an opportunity to recognise the seriousness of the problem of double standards for former colonies, and to consider more systematically what can be done about it. As we have seen, what many Burmese perceive to be a root cause of the conflict and violence in Rakhine – the transfer of civilians into colonial Burma – has since become a crime under international law. But the past transfers into Burma are widely considered irrelevant under international law. The default view seems to be that the language of international law does not extend to this wrong and its long-lasting consequences – that this grievance has no access to international law. Reminding the Burmese of the important and obvious fact that demographic history cannot justify international crimes against Muslims in northern Rakhine, does not address this grievance.

This paper invites a consultation on the features of a process that could meaningfully respond to this sense of double standards and reduce excessive polarisation over the issue of accountability for allegations in

ment and economic growth being her focus, she refers to “a pervasive rationality that successfully made a claim for the universality of a particular, or ‘provincial’ set of values originating in and congenial to the North” (p. 2, footnote omitted).

⁶⁹ Leider observes: “The interpretation that links the self-perception of the Arakanese/Rakhine as victims of both Burmese oppression and Muslim immigration – a kind of grand historical narrative from 1785 down to the present – rather calls for a deeper investigation of social conditions and inter-ethnic relations in Arakan during the 1920s and 1930s”, see *idem*, 2018, p. 217, *supra* note 21.

Rakhine. Section 3. of the paper sketches some desirable elements of such a process, without prejudicing the consultation which should take place with the participation of the Burmese and experts on double standards, colonialism, and international law. Section 2. prepares the context of the discussion by analysing the factual background of the transfer of civilians into colonial Burma, and the evolution of the international law prohibition against, and criminalisation of, such transfers.

It will not be easy to make such a process successful. For one, this is not about the existing national and international accountability mechanisms for Rakhine allegations, or how the practice of transfer of civilians into colonial Burma should (not) affect these mechanisms, which are immediate points of orientation for international criminal lawyers. Neither is it narrowly about the technical definition or applicability of the crime of transfer of civilians into occupied territory.

For the process to succeed, emphasis needs to be placed on the harm which the prohibition against transferring civilians into occupied territory seeks to avoid – referred to by the International Law Commission as “[c]hanges to the demographic composition”⁷⁰ – that is, on the purpose of the norm. Such undogmatic, material recognition of past harm and its lingering consequences may start to foster better understanding and contribute towards reduced polarisation over the issue of accountability in Rakhine.

Despite these challenges, this paper argues that it is worth trying to define and implement such a novel process. At least in situations where the transferred civilians remain a minority in the polity of the occupied territory, Myanmar shows that such transfers can cast shadows more than ten decades into the future. This risk of lingering long-term effect does not differ for the crime of deportation *out* of a territory, a fact which armed actors in Rakhine can ill afford to ignore.

⁷⁰ *Supra* note 39.

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Myanmar, Colonial Aftermath, and Access to International Law

Morten Bergsmo

The tragic killings and the disruption of the lives of hundreds of thousands of persons in northern Rakhine have rightly given rise to the question of accountability. But at the same time, Myanmar offers us an opportunity to recognise the seriousness of the problem of double standards for former colonies, and to consider more systematically what can be done about it. What many Burmese consider to be a root cause of the conflict and violence in Rakhine – the transfer of civilians into colonial Burma – has since become a crime under international law. But the past transfers into Burma are widely considered irrelevant under international law. The default view seems to be that the language of international law does not extend to this wrong and its long-lasting consequences.

This paper invites a consultation on the features of a process that could meaningfully respond to this sense of double standards and reduce excessive polarisation over the issue of accountability for allegations in Rakhine. It sketches some desirable elements of such a process, without prejudicing the consultation which should take place with the participation of the Burmese and experts on double standards, colonialism and international law. In preparing the context of the discussion, it analyses the factual background of the transfer of civilians into colonial Burma, and the evolution of the international law prohibition against, and criminalisation of, such transfers.

For the process to succeed, emphasis needs to be placed on the harm which the prohibition against transferring civilians into occupied territory seeks to avoid. Such undogmatic, material recognition of past harm and its lingering consequences may start to foster better understanding and contribute towards reduced polarisation over the issue of accountability in Rakhine.

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