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The Rohingya Refugee Crisis: Rethinking Solutions and Accountability

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Abstract

An estimated one million Rohingya refugees from Myanmar reside in a mega-camp outside Cox's Bazar, Bangladesh. Several hundred thousand internally displaced ethnic Rohingya remain in Myanmar. Durable solutions are not forthcoming. This paper reviews the situation in Myanmar and the regional, political and operational limitations including within the United Nations to assert voluntary repatriation of the Rohingya from Bangladesh will remain evasive. While the humanitarian situation on the ground is evolving, and justice and accountability measures are progressing at the same time political and diplomatic efforts continue to push for resolution of the crisis, there is a need to explore other solutions and mitigation measures available under international law and practice, and in doing so ensure the voices of the Rohingya are heard.

Introduction

The latest iteration of the protracted Rohingya refugee crisis which began 25 August 2017 with the influx of several hundred thousand refugees from Myanmar to Bangladesh, the day after the release of the Advisory Commission report chaired by late United Nations (UN) Secretary-General Kofi Annan¹, is an enormous challenge for the international community. Not only is Bangladesh put under the strain of hosting a large number of its neighbour's would-be citizens, but in the current political climate long-term solutions including voluntary repatriation appear remote. Despite ongoing diplomatic efforts by Bangladesh with support of the international community through the UN, and the development of human rights assessments and concrete actions for justice and accountability, there has been little progress in the creation of the conditions required to promote safe, dignified and sustainable return. As a result other solutions and mitigation measures for the Rohingya should be explored.

This paper reviews the current situation in Myanmar and the regional, political and operational limitations – including within the UN – to argue why voluntary repatriation of the Rohingya is not forthcoming. While the humanitarian situation on the ground is evolving and political and diplomatic efforts continue to push for resolution of the crisis, there is a risk of waning international interest which may result in reduced resources and donor contributions.

Justice and accountability measures, in whatever form, are a long-term effort and may take years. Whether the eventual success of these initiatives will facilitate or possibly frustrate voluntary repatriation is unclear. Whatever efforts are made on their behalf, Rohingya refugees must be consulted and heard in order to make any solutions credible, acceptable and durable.

A legacy of displacement and the emerging international response

The mass influx of several hundred thousand Rohingya refugees from Myanmar to Bangladesh which began in 2017 was shocking and dramatic, but not unprecedented. Smaller yet significant forced movements of ethnic Rohingya to Bangladesh occurred in 1942, 1978, 1991, 2012 and 2016.

¹ http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf

Over the years, thousands of individual Rohingya have travelled to Bangladesh for medical treatment and studies prior to the most recent influx. Some never returned home.

In the 1990s as a result of closed camp settings and the absence of long-term integration prospects, a repatriation exercise based on a memorandum of understanding (MOU) between the Bangladesh government and the Office of the UN High Commissioner for Refugees (UNHCR) took place between 1993–1997, with some 230,000 Rohingya returning to Myanmar. Sub-standard living conditions, the absence of legal and human rights protection, political exclusion, questionable voluntariness and returnees being poorly informed of what they would encounter once back in Myanmar resulted in this operation being soundly criticized.² The presence of a large number of armed officers engaged in the repatriation exercise in the 1970s has been also been acknowledged.³ Indeed earlier attempts at repatriation of Rohingya refugees in the 1970s and 1990s are regarded as regrettable low-points in UNHCR’s operational history in the Asia region.⁴

History risks repeating itself.⁵ Although the UN and international community place much emphasis on ‘lessons learned’, the current scenario of the Rohingya crisis with its strong emphasis on repatriation requires critical examination. The systematic disenfranchisement, discrimination and absence of human rights protection and discrimination against the Rohingya, one of over a hundred ethnic groups of diverse religions residing in the territory of Myanmar since the 12th century⁶, has been extensively documented.⁷ While it has been argued the historical presence of the Rohingya in present day Myanmar is a result of colonial nation state design under questionable principles and

² See for example David Petrasek, ‘Through Rose-Coloured Glasses: UNHCR’s Role in Monitoring the Safety of the Rohingya Refugees Returning to Burma’, in *Human Rights and Forced Displacement*, AF Bayefski and J Fitzpatrick (editors), Kluwer Law International, 2000, at pp 114-136.

³ The former deputy commissioner for Chittagong noted in a 4 September 2019 article in *The Dhaka Tribune* that during the 1978 repatriation exercise the government of Bangladesh “... deployed one full battalion of armed police around the camp [of Rohingya refugees], which we revealed after we took back control of the camp. It was easy later to transport the selected repatriates to another camp and take them from there to the designated repatriation outpost. I myself took them across the border and handed them to the Myanmar authorities.” See: <https://www.dhakatribune.com/opinion/op-ed/2019/09/04/the-intractable-rohingya-repatriation>

⁴ For an overview of Rohingya influx to Bangladesh see: <https://reliefweb.int/report/bangladesh/historical-review-rohingya-influx-1978>; and *Repatriation of Rohingya Refugees* by Professor CR Abrar of Dhaka University at: <http://www.burmalibrary.org/docs/Abrar-repatriation.htm>. Another helpful reference is *The Rohingya Genocide: Compilation and Analysis of Survivors’ Testimonies*, edited by Mohfidul Hoque and published by the Centre for the Study of Genocide and Justice, Liberation War Museum (www.liberationwarmuseumbd.org), September 2018. Also see: <https://odihpn.org/magazine/primitive-people-the-untold-story-of-unhcrs-historical-engagement-with-rohingya-refugees/>; and ‘Burmese refugees in South and Southeast Asia: A comparative regional analysis’ by Gil Loescher and James Milner, at pp 310-315, in *Protracted Refugee Situations: Political, Human Rights and Security Implications*, Loescher, Milner, Newman, Troeller (editors), United Nations University, Tokyo, 2008.

⁵ <https://www.newsdeeply.com/refugees/community/2018/01/17/we-must-not-repeat-the-shameful-history-of-returning-rohingya-refugees>

⁶ See Melissa Crouch, ‘Myanmar’s Muslim Mosaic and the Politics of Belonging’, Chapter 1, in *Islam and the State in Myanmar*, M Crouch (editor), Oxford University Press, 2016.

⁷ *The Plight of the Stateless Rohingyas: Responses of the State, Society and the International Community*, Imtiaz Ahmed (editor), The University Press Limited, Dhaka (2014); and *Myanmar’s Enemy Within: Buddhist Violence and the Making of the Muslim ‘Other’*, Francis Wade, Zed Books, London 2017. International human rights organizations, notably Human Rights Watch, Amnesty International and Fortify Rights, have for decades documented and published reports on the plight and human rights situation of the Rohingya.

practices of international law⁸, the fact remains they have resided in Myanmar for generations. As much as any territory, the Republic of the Union of Myanmar can be considered the Rohingya's country of origin and homeland.

What is different this time in the quest for repatriation is a vigorous response on human rights and accountability issues initiated largely through the UN. There is also enormous media attention to the crisis⁹, and credible claims of crimes against humanity and possibly genocide having taken place.

Within the UN, the Human Rights Council (HRC) established an Independent International Fact-Finding Mission (FFM) on Myanmar comprised of eminent jurists and human rights experts Marzuki Darusman from Indonesia, Radhika Coomaraswamy from Sri Lanka, and Christopher Sidoti from Australia.¹⁰ The FFM investigated and prepared comprehensive reports on the events which gave rise to the 2017 exodus. The FFM's findings are based on detailed interviews with hundreds of survivors and government officials, UN and NGO staff, in addition to field visits and forensic and other evidence collected and vetted by a team of experts on sexual violence in conflict, international criminal law, and military operations.

The FFM's 444-page report released in September 2018¹¹, and its subsequent reports¹², provide an unprecedented amount of information including names of individuals alleged to have committed the most serious crimes and human rights violations against Rohingya men, women, and children.¹³ The FFM's work continued through the presentation of its final report to the UN Human Rights Council (HRC)¹⁴, while in March 2019 FFM Chair Darusman noted:

[...] there has been little progress in the human rights situation in Myanmar since we presented [our Report] to the [UN] Human Rights Council, General Assembly and Security Council at the end of [2018] ... To the contrary, the fighting continues in Rakhine and in the Northern States of Kachin and Shan and tensions are escalating in other regions. Human rights violations have not stopped, nor are victims seeing

⁸ See Mohammad Shahabuddin, 'Post-colonial boundaries, international law and the making of the Rohingya crisis', *Asian Journal of International Law*, 9 (2), July 2019, available at: <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/postcolonial-boundaries-international-law-and-the-making-of-the-rohingya-crisis-in-myanmar/91F3B2AF9E7679F12BE5FA38BEBED602>

⁹ A Google search of the key words 'Rohingya refugee crisis' conducted 10 December 2019 indicates some 2.4 million news articles and other reports in the English language have been published since August 2017.

¹⁰ <https://www.right-docs.org/doc/a-hrc-res-34-22/>

¹¹ UN doc ref: A/HRC/39/64, 18 September 2019, accessible via:

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>

¹² See *Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts* (UN doc ref: A/HRC/42/CRP.4, 22 August 2019) available at:

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/sexualviolence.aspx>; and *Economic interests of the Myanmar military* (A/HRC/42/CRP.3, 5 August 2019) at:

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

¹³ See Joint Legal Opinion on the Government of Myanmar's Compliance with the Convention on the Rights of the Child in the Context of the Treatment of Rohingya Children Following the Events of 25 August 2017, prepared by Professor Guy Goodwin-Gill and Dr Jason Pobjoy, available at:

<https://resourcecentre.savethechildren.net/library/joint-legal-opinion-government-myanmars-compliance-convention-rights-child-context-treatment>

¹⁴ UN doc ref: A/HRC/42/50, 8 August 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/236/74/PDF/G1923674.pdf?OpenElement>

justice. There is an acute need to continue to thoroughly document the patterns of violations being committed, as we speak.¹⁵

The final report of the FFM drew the following conclusion:

Some 600,000 Rohingya are estimated to remain in Rakhine State. They continue to be subjected to discriminatory policies and practices, including segregation and severe restrictions on their movements; deprivation of citizenship; denial of economic, social and cultural rights; physical assaults constituting torture or other cruel, inhuman or degrading treatment or punishment; arbitrary arrest; and, in some areas, hostility from members of ethnic Rakhine communities that the mission found also to constitute persecution and other prohibited crimes against humanity. The Government of Myanmar claims that it would welcome back Rohingya returnees from Bangladesh. In the light of the continuing persecution of remaining Rohingya, the legal conditionalities placed on return and the unacceptable living conditions that await returnees, the mission regards these statements and associated measures as lacking sincerity.

In May 2019, the tripartite memorandum of understanding between [UNHCR], the United Nations Development Programme and the Government of Myanmar aimed at creating conducive conditions for the voluntary, safe, dignified and sustainable repatriation of refugees from Bangladesh was extended for one year. The mission concludes, however, that the Government [of Myanmar] has not taken the steps necessary to put the requisite conditions for the return of the refugees in place.¹⁶ (emphasis added)

The FFM's findings fed into another mechanism established by the HRC, the Independent Investigative Mechanism for Myanmar (IIM) which is tasked with "collecting, consolidating,

¹⁵ 'UN Independent International Fact-Finding Mission on Myanmar advances accountability and initiates new investigations', available at:

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24334&LangID=E>

The FFM Report with key UN resolutions and other authority, official statements, advocacy updates and news is available the Mission's website at: www.ffmmyanmar.org

¹⁶ A/HRC/42/50, *op cit*, at paras 76 & 85. In presenting its final report to the 42nd session of the Human Rights Council on 17 September 2019, FFM Chairman Darusman employed even stronger language in noting:

We conclude that there is a strong inference of continued genocidal intent on the part of the State in relation to the Rohingya, that there is a serious risk of genocide recurring and that Myanmar is failing in its obligations under the Genocide Convention to prevent genocide, to investigate genocide and to enact effective legislation criminalizing and punishing genocide. Let me be clear. The policies, laws, individuals and institutions that laid the groundwork for the brutal "clearance operations" in 2016 and 2017 remain in place and strong.

Impunity continues. Discrimination continues. Hate speech continues. Persecution continues.

The return of close to one million Rohingya refugees to Rakhine State is simply impossible under the current circumstances. There is nowhere safe and viable for them to return to. Rohingya lands and villages have been destroyed, cleared, confiscated and built on, including new structures that resemble camps, with Rohingya forced labour. The Government's repatriation plans are inadequate. (emphasis added)

See <https://reliefweb.int/report/myanmar/statement-42nd-session-human-rights-council-marzuki-darusman-chair-independent>; also see the August 2019 report of the UN Secretary General at paras 29-32: <https://undocs.org/A/74/311>

preserving and analysing evidence of the most serious crimes and violations of international law committed in Myanmar since 2011.”¹⁷ Recently established, the IIM is headed by an experienced international prosecutor. The tasks before the IIM are enormous and like any new UN entity or mechanism, key ingredients to ensure it can achieve its objectives are sustained donor interest in addition to cooperation and support of UN member states including Myanmar.¹⁸ The IIM is required to prepare evidence and files leading to eventual criminal prosecutions, which by definition requires employing a criminal law standard of proof. Getting to the point where actual prosecutions could be brought is however a long-term process which previous experience suggests may take years.

At another level, the UN General Assembly in its 22 December 2018 resolution on the ‘Situation of human rights in Myanmar’ *inter alia* calls for a wide range of operational and related accountability measures including:

“... a full and independent investigation of the human rights violations and abuses committed ... against the Rohingya Muslims and persons belonging to other minorities ... to ensure that those responsible for such crimes are held accountable; [and encouraging] the international community to (a) assist Bangladesh in providing humanitarian assistance to Rohingya refugees and forcibly displaced persons until such time as they are voluntarily repatriated to Myanmar in safety and dignity; and (b) assist Myanmar in the provision of humanitarian assistance to affected persons of all communities who have been forcibly displaced, including in camps for internally displaced persons within Rakhine State; ... and requests the Secretary General to call the continued attention of the Security Council to the situation in Myanmar with concrete recommendations for actions towards resolving the humanitarian crisis, promoting the safe, dignified, voluntary and sustainable return ... and ensuring accountability for those responsible for human rights violations”¹⁹

In addition to sustained multilateral attention to the Rohingya crisis in the UN, the situation is helpfully a humanitarian and foreign policy priority of several countries.²⁰ More than two years on, it remains crucial to identify and implement solutions before the camp situation in Bangladesh, or

¹⁷ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24334&LangID=E>

¹⁸ See the presentation of the report by Nicholas Koumjian, Head of International Investigative Mechanism for Myanmar: <http://webtv.un.org/watch...-2014-unfpa/3799819085001/watch/nicholas-koumjian-iimm-1st-meeting-42nd-regular-session-human-rights-council/6084603514001/?term=&page=5>; the IIM report to the Human Rights Council dated 7 September 2019 (UN doc ref: A/HRC/42/66) is available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/235/11/PDF/G1923511.pdf?OpenElement>

¹⁹ <https://undocs.org/en/A/RES/73/264>

²⁰ Examples include Canada: https://international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/myanmar.aspx?lang=eng; Sweden: <https://www.swedenabroad.se/en/embassies/un-geneva/current/news/rohingya-humanitarian-crisis/>; USA: <https://www.state.gov/united-states-announces-new-humanitarian-assistance-at-the-launch-of-the-joint-response-plan-for-bangladesh/>; Japan: <https://www.aa.com.tr/en/asia-pacific/japan-pledges-325m-for-rohingya-in-bangladesh/1403180>; Norway: <https://www.regjeringen.no/en/aktuelt/hum-support-myanmar/id2571108/>; and the European Union: https://eeas.europa.eu/delegations/bangladesh_en/58610/Rohingya%20Crisis:%20EU%20releases%20%E2%82%AC24%20million%20for%20Bangladesh;

possibly isolation on an ‘island’ site²¹, becomes further entrenched with the risk of diminished political interest and humanitarian funding and support.

On the ground and of genuine concern to the Bangladesh authorities and public is what impact a longstanding mega-camp can have on public health, community relations and development in addition to heightened security risks and criminality in Bangladesh. An overcrowded refugee camp established in a hilly topography and cyclone-prone region which fails to end and lacks adequate resources and support is in no one’s interest – above all, the Rohingyas’. In this context the role and responsibilities of the UN in Myanmar was also the subject of an enquiry following an FFM recommendation.²²

The pressure on Bangladesh

Notwithstanding the sacrifice and commitment demonstrated by Bangladesh, there remains a lack of developments in Myanmar to establish conditions permitting safe and voluntary repatriation.²³ While repatriation remains a priority solution promoted by Bangladesh and concerned governments and the UN²⁴, improving conditions to permit safe and sustainable returns and ensure the human rights of the displaced Rohingya is moving very slowly, if at all.²⁵

²¹ An interesting trilogy of articles in the Bangladesh media addresses the controversy surrounding the Bhasan Char island proposal: <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/03/03/rohingya-relocation-to-bhasan-char-to-start-by-mid-april>; <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/03/25/un-conditionally-welcomes-rohingya-relocation-to-bhashan-char>; <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/04/05/rohingyas-reluctant-to-move-to-bhashan-char>; also the reaction and concerns from Human Rights Watch: <https://www.hrw.org/news/2019/03/15/rohingya-bangladesh-bhasan-char-will-be-prison>; and other members of the NGO community: <https://www.hrw.org/news/2019/11/12/joint-letter-prime-minister-hasina-bhasan-char>

²² The wording of the FFM recommendation concerning the UN in the final report (A/HRC/39/CRP.2, at para 1706) is:

As a matter of urgency, there must be a comprehensive, independent inquiry into the United Nation’s involvement in Myanmar since 2011, with a view to establishing whether everything possible to prevent or mitigate the unfolding crises was done; identifying lessons learned and good practice; making recommendations as appropriate, including on accountability; and enabling more effective work in future.

The significance in this recommendation is it identifies “the UN” and does not single out a specific role or agency. Concern about how such an “independent inquiry” will take place and eventually be made public was raised in a joint letter to the UN Secretary General signed by several leading human rights NGOs: https://www.fortifyrights.org/downloads/190325_Open_letter_UNSG_re_Myanmar_review.pdf; and <https://www.theguardian.com/world/2019/feb/27/un-investigates-conduct-myanmar-rohingya>

²³ There is an impressive range of predominantly state-driven measures which should be undertaken and in place *before* voluntary repatriation can be recommended and supported by the UN. A comprehensive overview is provided in the *UNHCR Handbook for Repatriation and Reintegration Activities*, Geneva, May 2004, available at: <https://www.refworld.org/docid/416bd1194.html>

²⁴ See the interview with the UN High Commissioner for Refugees during his mission to Myanmar in May 2019: <https://www.unhcr.org/news/latest/2019/5/5ce7b1c94/un-high-commissioner-refugees-concludes-visit-myanmar.html>. While repatriation was scheduled to begin in November 2018, the Rohingyas did not agree, saying the conditions in Myanmar were unsafe.

²⁵ See for example ‘Rohingya Repatriation: Many twists and turns but no solution in sight yet’, *The Daily Star*, 21 May 2019 (www.thedailystar.net) at: <https://www.thedailystar.net/opinion/perspective/news/rohingya-repatriation-many-twists-and-turns-no-solution-sight-yet-1746319>

This point amongst others was highlighted by the Bangladesh Foreign Secretary to the UN Security Council (SC or Council). The Foreign Secretary advised Council members the prospects of return are negligible and the Bangladesh government is reaching a breaking point in receiving Rohingya refugees. Key remarks are summarized in a public statement:

... [the] Rohingya and those in their host communities are suffering, with their prolonged presence posing formidable challenges and adversely affecting the country's economy, environment, social fabric and security. The idea of long-term hosting by Bangladesh is not at all a viable proposition. Even if repatriation began today, it would take another 12 years based on an estimated 300 Rohingyas returning every day. Despite [the Bangladesh] government's efforts, not a single Rohingya has volunteered to return to Rakhine due to the absence of a conducive environment there", [the Foreign Secretary] said, adding that as far as repatriation is concerned, the situation has gone from bad to worse, with the Myanmar military having engaged in heavy fighting since November 2018. [The Foreign Secretary] regretted to inform the Council that Bangladesh will no longer be in a position to accommodate more people from Myanmar. Going forward [...] the priority is to ensure the safe, voluntary, sustainable and dignified return of the Rohingyas, which requires building confidence among them.²⁶ (emphasis added)

The government of Bangladesh must be commended for the generosity the country continues to show towards the Rohingya who were granted asylum.²⁷ At the time of the exodus in August 2017 there was worldwide attention and outrage concerning events in Myanmar. There was pressure from Bangladesh civil society and externally to permit the Rohingya to cross the border. Calls to save the Rohingya grew in intensity as did daily arrivals of asylum seekers. Over a period of two years some 743,000 Rohingyas sought refuge in Bangladesh, making Kutupalong camp outside Cox's Bazar the largest refugee settlement in the world. Added to the existing Rohingya population Bangladesh has hosted for three decades, the total is close to one million individuals. Of this number, 52% of the refugees in the camps are women and girls and 16% are single mothers.²⁸

Senior Bangladeshi officials have explained the sense of moral imperative to permit the Rohingya to enter the country despite the challenges in receiving and hosting such large numbers. In this regard the Bangladesh Prime Minister has shown true leadership and remains one of the strongest advocates seeking a solution to the crisis.²⁹ It has been suggested there may be something in the national psyche especially with Bangladeshis who experienced the fight for independence and lived their own experience of refugeehood, war and famine. At the time of the formation of the Bangladesh state in 1971, the country experienced one the largest exoduses of displaced humanity in modern history with an estimated 10 million refugees entering India. Bangladesh was essentially created on the back of a refugee crisis and many baby boomers vividly remember that difficult time. One official I spoke to described how he recalls seeing "trucks with UNHCR emblazoned on the side" when he was in India as a refugee with his family, only eight years old.

²⁶ <https://www.un.org/press/en/2019/sc13727.doc.htm>

²⁷ Neither Bangladesh nor Myanmar are parties to the *1951 UN Refugee Convention* or the *1967 Protocol*, and there is an absence of a domestic law addressing refugee protection issues in both countries. Globally, as a sub-region, South and Southeast Asia have the fewest countries that have ratified the international refugee law treaties and/or adopted domestic refugee laws. See <http://xchange.org/asia-refugee-policy-analysis/>

²⁸ https://data2.unhcr.org/en/situations/myanmar_refugees

²⁹ <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/09/28/pm-places-four-point-proposal-to-end-rohingya-crisis>

Visiting Cox's Bazar and Kutupalong in Fall 2017 and walking through (more accurately hiking up and down) the massive camp accompanied by a medical specialist was strangely heartening as the Rohingya were incredibly engaged and busy. Groups of men were building bamboo frame shelters, digging bore wells and constructing walkways and embankment supports across the hilly terrain. Long lines of newly arrived Rohingya carrying whatever they could were waiting to receive humanitarian assistance including emergency shelter kits, vaccinations, food ration documentation and registration. The then new camp already had pockets of informal economic activity including food stalls, tailor shops and people selling dry goods. The settlement resembled a giant shanty town taking shape. Emblems, insignia and banners of numerous humanitarian agencies and literally thousands of humanitarian workers in organizational caps and vests were present throughout the area.

New arrivals in the UNHCR-run transit centres, fatigued following several days journey on foot and periods of uncertainty and insecurity at the Myanmar-Bangladesh border, were clearly relieved to have made it to safety. Bangladesh was the destination where they knew they could find protection. What the People's Republic of Bangladesh has done by permitting the Rohingya to cross the international border and enter the country saved and continues to save many lives. It is also taking a toll on the country, in particular the nearby host community in Cox's Bazar.³⁰ Given the large-scale refugee settlement in Kutupalong in a limited physical space, it is understandable protection and humanitarian assistance concerns are rampant with regular reports of criminality, inadequate services and serious protection challenges facing particularly women and girls.

UN system-wide presence in Myanmar and the need for stocktaking

In Myanmar, UN entities have for decades been between a rock and hard place operating in a country which imposes firm controls. UN officials have limited freedom of movement and access. This limits the ability to conduct needs assessments and plan, deliver and monitor humanitarian assistance and other interventions. In addition to development and humanitarian work which for UNHCR since 1994 includes managing humanitarian assistance programmes in northern Rakhine State (NRS), engaging in protection work with the internally displaced in Kachin and northern Shan states, contingency planning for refugee returns from Thailand, and along with other UN actors supporting Myanmar in times of crises during Cyclone Nargis³¹, the UN's presence, as best it can, serves as the "eyes and ears" of the international community.

Despite these limitations, being able to monitor and report on the human rights situation and conditions in particularly NRS including the malnutrition of children and human rights violations

³⁰ A socio-economic study commissioned by UNDP and prepared by the Policy Research Institute of Bangladesh entitled *Impacts of the Rohingya Refugee Influx on Host Communities* concluded that several thousand acres of land have been rendered unusable due to deforestation, groundwater levels near Kutupalong refugee camp have fallen between five and nine metres, and latrine construction close to potable water sources have significantly increased the risk of faecal contamination. Further, an estimated 750,000 kgs of timber, vegetation and roots are collected as cooking fuel by the refugees on a daily basis. The impact on the local economy as a result of fishing and agricultural restrictions has also had a significant impact on the local community. The report is available at:

https://issuu.com/bdundp/docs/impacts_of_the_rohingya_refugee_inf

³¹ https://en.wikipedia.org/wiki/Cyclone_Nargis

(in ‘peace time’ before the 2017 events started) is routine work for UN and NGO actors. Raising the alarm diplomatically and publicly when violations or concerns are discovered is an integral part of what the UN should stand for and a key component of the organization’s protection mandate. However as in all countries where the UN operates, it does so at the pleasure of and with the permission of host governments.

Concerns that perceived overstepping may lead to admonishment or being asked to leave by the authorities can result in limited engagement, extreme secrecy and self-censorship. Lack of sharing information even between offices of the same organization is the way some UN actors and agencies have operated for years. Even at the senior level, it is a rare official who risks speaking out on human rights issues while posted and residing in a country like Myanmar. Personal risks are high and the track record of the UN supporting its own when an official takes a courageous stand resulting in being made *persona non grata* does not instill confidence in staff.

Leadership also sets the tone³², and as suggested by the ‘Rosenthal report’³³, UN operations in Myanmar predominantly engaged in ‘quiet diplomacy’. While often pragmatic and effective, this approach can also have serious limitations. Against the background of the latest crisis and subsequent developments including calls for justice and accountability, the UN continuing in the

³² For a fascinating and rather sobering discussion on the politics of the UN and the real limits of executive organs including the Security Council to take responsibility in times of crises and *inter alia* how this impacts on the ‘question of courage in UN leadership at the highest level’ see *Our Shared Humanity: The Arc of Intervention* organized by Chatham House on 3 June 2019 featuring Lakhdar Brahimi (The Elders; Chair, Panel on United Nations Peace Operations (2000)), Comfort Ero (Africa Program Director, International Crisis Group), and Ian Martin (Special Representative of the UN Secretary-General in East Timor (1999), Nepal (2007-9) and Libya (2011-2)). An archived video-recording of the discussion with Q & A is available on the Chatham House website at: <https://www.chathamhouse.org/file/our-shared-humanity-arc-intervention#>

³³ The following passage from *A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018*, prepared by Ambassador Gert Rosenthal and dated 29 May 2019 suggests the following different approaches at the highest level of the UN:

Even at the very highest levels of management of the Organization – commonly referred to in UN circles as the 38th floor – the oft-mentioned competing strategies were both represented until the end of 2016 in the persons of the Deputy Secretary-General and the Special Adviser on Myanmar; the latter concurrently also the Chef de Cabinet of the Secretary-General until March 2012. No one can fault either personality for their credentials and unquestionable integrity and respect for the United Nations. The Deputy Secretary-General had an impressive background in his country (Sweden) and in international circles, and was, among other aspects, a known human rights advocate. The Special Adviser also had a notable background in the foreign service of his country (India), and had two important additional assets: his proximity to the Secretary-General (at least when he exercised the post of Chef de Cabinet) and his deep knowledge and wide understanding of Myanmar and its neighboring countries (including China, where he had served as Ambassador of India). As can be surmised, the Deputy Secretary-General favored a more robust posture of the United Nations to address the events in Rakhine State, while the Special Adviser argued for quiet diplomacy to exert increasing influence on the host Government. (emphasis added, pp 19-20)

The report entitled *A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018* is available at:

<https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf>

same tracks may be untenable. As one important element, a more consistent and system-wide human rights focus is strongly encouraged.³⁴

Limited humanitarian access and being unable to move and operate with autonomy in addition to leadership concerns and reports of lack of inter-agency cooperation and unnecessary secrecy and mistrust³⁵ exposed the UN in Myanmar to criticism. Claims of some UN entities being unable or unwilling to raise human rights issues despite the aspirations of the Human Rights Up Front initiative³⁶, in addition to robustly engaging in early warning activities, appear to have motivated the FFM's recommendation to conduct an inquiry into the UN's work in Myanmar. While no one suggests the operational environment was without challenges, there are limits in terms of what the UN can and should accept without undermining its role, legitimacy and mandate.

Regrettably, engaging in 'negative coping strategies' appears to be the way the UN has chosen to operate over many years.³⁷ As with other demanding operations, the UN (and donors) may be

³⁴ General Assembly Resolution on the 'Situation of Human Rights in Myanmar' highlights this point: "[...] encourages the United Nations system [...] to ensure that all engagement with Myanmar takes into account, and addresses, human rights concerns [...]", fn 18 *supra*, at p 5 (emphasis added).

³⁵ In the report *Time to Break Old Habits: Shifting from Complicity to Protection of the Rohingyas in Myanmar*, Liam Mahony, Director of Fieldview Solutions, notes:

The organization with the most information about protection realities in Rakhine was UNHCR, resulting from the protection monitoring of various partners that it coordinated, its substantial deployment, its long-term presence and its network of contacts. But few other organizations were benefitting from this information. In many other conflict settings, UNHCR as protection lead manages a protection monitoring process which produces regular public summaries of data on protection incidents and trends to assist all protection cluster members with their planning and advocacy. This was not happening for Rakhine State, and especially not for the north. On the contrary, there was a high-level (UN Resident Coordinator and UNHCR) policy of hiding information, which is part of the reason OCHA was constrained from having a presence in the north. Scores of NGO staff gather data on incidents of abuse or other humanitarian protection gaps, and feed this into UNHCR's highly secret data system – a system with many inputs but few outputs. This has been the quietest, most invisible Protection Monitoring System this author has ever encountered. (p 26)

The report is available at: http://www.fieldviewsolutions.org/fv-publications/Time_to_break_old_habits.pdf

³⁶ See 'The UN Secretary-General's Human Rights Up Front (HRUF) Initiative and the Prevention of Genocide: Impact, Potential, Limitations', Ekkehard Strauss, *Genocide Studies and Prevention: An International Journal*, 11 (3), Article 8 available at: <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1504&context=gsp>

³⁷ Mahony, *op cit*, at p 6 sums up the dilemma:

The international organizations on the ground and the diplomats in the [Myanmar] capital keep silent as a general rule because they believe this silence to be a necessary condition of operating smoothly in the country. Humanitarians often apply the phrase "negative coping strategies" to certain self-destructive approaches chosen by populations and individuals under duress. A "negative coping strategy" is an equally apt description of how these organizations and bilateral donors chose to quietly sustain Myanmar's internment camps for the Rohingya for over 5 years. The government also allowed humanitarians to provide a fraction of the food needs of a starved Rohingya population of northern Rakhine state for two decades, on condition that they stay mostly silent about one of the worst ongoing child malnutrition situations in the world, and they obeyed. Adding insult to injury, Myanmar in recent years has demanded that the internationals inside Myanmar refrain from using the word "Rohingya" at all when speaking of this persecuted minority, and nearly all have consistently complied, thus assisting the state in erasing this minority's identity. Such compliance and silence made ethnic cleansing easier.

A decade ago the UN and other humanitarian organizations exhibited similar obedience to the Sri Lankan government. First they kept quiet about mass killings and war crimes, and after the war they funded and managed state-run internment camps for ethnic Tamils. The subsequent

satisfied to remain and do what it can against the odds, including mitigating the worst of a protracted humanitarian crisis rather than draw down or pull out.

The report prepared by former Guatemalan Ambassador Gert Rosenthal, a self-described “novice on Myanmar”, rightly concludes “the brunt of the responsibility rests squarely on Myanmar ... regarding the nature and scope of violations of international humanitarian and human rights law that occurred (and continues to occur)”. Notably there is an absence of any evaluation of institutional or professional accountability. Rosenthal’s conclusion there was an absence of a unifying strategy at the highest levels of the UN Secretariat is also nothing new. While a degree of institutional discipline and coordination in a country operation may be expected, individual agencies such as UNHCR and the Office of the High Commissioner for Human Rights (OHCHR) have distinct mandates and operational roles which should be a considerable strength to the UN system as a whole. What appears to have taken place is an attempt by UN country team leadership to emphasize development work at the expense of human rights. Individual UN agencies who may have seen things differently would then move to their own agenda, leading to problems of coordination.

In the end Rosenthal’s report reads like something we have seen in other UN operations, which boils down to some serious mistakes and bad decision-making by the country team and lack of coordination. Rosenthal suggests a United Nations “observatory” in Rakhine State would have offered a measure of confidence to “oppressed minorities that their basic human rights would be respected, and that the root causes that led to their forced emigration would be addressed by the national authorities”.³⁸ Whether such a mission could have such a strong effect is unknown. What is clear is it would require SC engagement and adoption of a formal resolution which at the time (and presently) is lacking.

Rosenthal concedes that he did not have time to “examine all the communications and detailed data”. Questions which could have been helpfully addressed are: was the UN aware of reports pushing out the Rohingyas was being planned as a possible ‘final solution’; what did UN entities specifically do to engage in early warning as envisioned by the Human Rights Up Front initiative; and what did or could agencies do to protect victims of human rights abuses including the Rohingya in NRS and internally displaced in the camps? Apart from UN presence in Myanmar what did other actors such as the UN High Commissioner for Human Rights and Special Advisors on the Prevention of

scathing internal UN investigation prompted a new UN-wide doctrine called “Human Rights Up Front”, imploring UN leaders and other international organizations to behave more courageously. In the ensuing years, many meetings were held, papers and manuals were published and countless Powerpoint-based trainings were delivered to thousands of UN and NGO staff all over the world – including in Myanmar. But for Myanmar’s Rohingya, this doctrine can only be characterized as a complete failure. At their expense, the mistakes of Sri Lanka are still being repeated, and their suffering continues.

³⁸ Rosenthal, *op cit*, p 24.

Genocide and Responsibility to Protect³⁹ do to alert the international community including the SC and Secretary General? Most importantly how did these high offices engage in preventive diplomacy and advocacy to try to prevent a looming crisis?

Beyond what Rosenthal accomplished in his 36-page report, a full enquiry of UN system-wide efforts including inputs from all relevant actors⁴⁰ would have been extremely helpful; as would a more fulsome reflection on what institutionally could or should have been done given perceived limitations and operational concerns. The bottom line is the UN continues to have a limited operational presence, political leverage and opportunities to expand its role with a human rights focus in Myanmar. How the UN can engage in a repatriation scheme with a credible monitoring role and the ability to engage in robust advocacy for the Rohingya remains unclear at best, and is unlikely given the current politic.

Contradictory pressures, renewed conflict and demonization of the Rohingya

As an ethnic group the Rohingya have suffered in the extreme and have been described as ‘the world’s most persecuted minority’. It should be acknowledged the Rohingya have been historically demonised.⁴¹ Not dissimilar to propaganda campaigns against Jews and other religious, ethnic and sexual minorities in Nazi and fascist occupied Europe, the ‘fear of outgroups’ appears to be actively tolerated in Myanmar making it unlikely the Rohingyas will ever be accepted as equals.

While there is considerable support and growing calls for justice and accountability of both institutions and individuals before the International Criminal Court⁴² and the International Court of Justice⁴³, with notably the Gambia taking the lead to file a case under the 1948 *Genocide Convention*

³⁹ In February and October 2017, the UN Special Advisors on Prevention of Genocide and Responsibility to Protect issued strong statements which *inter alia* refer to ‘atrocious crimes’ (i.e. genocide, crimes against humanity and war crimes) taking place against the Rohingya in Myanmar:

https://www.un.org/en/genocideprevention/documents/20170206%20Statement_Myanmar_reaction%20to%20OCHR%20report_Final.pdf;

https://www.un.org/en/genocideprevention/documents/20171019%20Statement_Myanmar_Final.pdf; and in November 2018 the UN High Commissioner for Human Rights, Michelle Bachelet, urged the government of Bangladesh to halt plans for the repatriation of Rohingya refugees to Myanmar, warning that the returns would be a violation of international law and put their lives and freedom at serious risk:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865>

⁴⁰ Curiously UNHCR senior management is not mentioned in the annexed list of interlocutors. See Rosenthal, *op cit*, p 34.

⁴¹ See the *International State Crime Initiative Report* (University of Queen Mary, University of London, 2018) available at: <http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf>.

⁴² See for example: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1465>;

<https://www.icc-cpi.int/rohingya-myanmar>; <http://www.legalactionworldwide.org/rohingya-crisis/>

⁴³ <https://www.dhakatribune.com/bangladesh/2019/05/17/gambia-s-foreign-minister-says-rohingya-issue-to-be-taken-to-icj>; and see the commentary by Dr Priya Pillai: <http://opiniojuris.org/2019/11/06/the-international-court-of-justice-and-the-rohingya-the-long-road-ahead-for-accountability/>, and John Packer: <https://www.openglobalrights.org/genocide-is-an-act-of-state-and-demands-a-response-by-other-states/>; also the Q & A on the ICJ and genocide in Myanmar prepared by the Global Justice Center, available at: <http://www.globaljusticecenter.net/blog/19-publications/1147-q-a-the-international-court-of-justice-the-genocide-of-the-rohingya>

against Myanmar⁴⁴, these developments and legal actions⁴⁵ may paradoxically make finding a return solution more challenging by creating contradictory pressures on the Myanmar authorities.⁴⁶

The Myanmar military (Tatmadaw) holds the reins of power with respect to creating conditions to permit the Rohingya to safely return home. As noted by the FFM, the Tatmadaw's domination in politics remains absolute and secure:

Despite the elections and the National League for Democracy (NLD) being in power, the Government remains a quasi-civilian one at best. The 2008 Constitution was designed by the military to retain its dominant role in politics and governance. It instituted a system of government with military and civilian components. Under the Constitution, 25% of the seats in each house of parliament and in the state and regional assemblies belong to unelected members of the military, who are appointed by the Tatmadaw. This is significant because the Constitution requires 75% of votes in both houses of parliament for a constitutional amendment to be adopted, giving the Tatmadaw, through its appointed members of parliament, effective veto power. Furthermore, Parliament elects the President from among three proposed candidates, one nominated by each legislative body and the third by the military appointed members of parliament. This effectively guarantees the Tatmadaw at least one vice-presidential position. Additionally, the Tatmadaw selects candidates for (and effectively controls) three key ministerial posts: Defence, Border Affairs and Home

⁴⁴ On 18 October 2019 at an *International Conclave on Justice and Accountability for Rohingya* in The Hague, the Minister of Justice of Gambia, HE Abubacarr Marie Tambaou, announced that on 4 October 2019 his government had instructed its law firm to file proceedings before the International Court of Justice concerning Myanmar's obligations under the 1948 *UN Genocide Convention*. On 11 November 2019, Gambia filed its application. See: https://twitter.com/Gambia_MOJ;

<https://www.dutchnews.nl/news/businesswire/foley-hoag-leads-the-gambias-legal-team-in-historic-case-to-stop-myanmars-genocide-against-the-rohingya/>; <https://aawsat.com/english/home/article/1986496/gambia-files-rohingya-genocide-case-against-myanmar-world-court>;

<https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court>

The Gambia's 47 page submission to the ICJ provides a detailed summary of key facts with supporting reference documentation making out the claim of acts of genocide having been committed by Myanmar. The full text is available at: <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf>

⁴⁵ See 'Three Complementary Legal Strategies for Accountability: A Momentous Week for the Rohingya' by Priya Pillai in *Opinio Juris* at: <http://opiniojuris.org/2019/11/19/three-complimentary-legal-strategies-for-accountability-a-momentous-week-for-the-rohingya>

⁴⁶ An interesting perspective on the quest for retributive justice in Myanmar is offered by Morten Pedersen who notes:

... herein lies the ultimate paradox in the push for criminal prosecution. By putting not only the Commander-in-Chief but any military officer who served in Rakhine State during the violence on notice that they could someday be held accountable for their crimes, we have essentially ensured that the military-as-an-institution cannot risk letting go of control of the state. They will be well aware of what happened, for example, to General Pinochet of Chile and that the only way for them to remain safe is to be in power. (emphasis added)

Morten B Pedersen, 'The ICC, the Rohingya and the limitations of retributive justice', *Australian Journal of International Affairs*, 2019, 73 (1), at p 12; also see 'Analysis: History Suggests Int'l Targeting of Tatmadaw over Rohingya is Misguided': <https://www.irrawaddy.com/news/burma/history-suggests-intl-targeting-tatmadaw-rohingya-misguided.html>

Affairs. This is sufficient to control the National Defence and Security Council and the entire security apparatus.⁴⁷ (emphasis added)

Of note, international accountability measures against the state of Myanmar including towards senior Tatmadaw officers are not recognized by the Myanmar authorities⁴⁸. It is possible a return solution for the Rohingya may be used as a bargaining chip in an attempt to diminish or by-pass accountability efforts. Thinking ahead, while there may be a regime change in Myanmar during the national election expected in 2020, the particularities of constitutional power sharing and vested interests of the Tatmadaw makes the possibility of true political reform or regime change remote.⁴⁹ Meanwhile modest numbers of asylum-seekers from Myanmar continue to arrive in Bangladesh as diverse ethnic and religious groups flee due to renewed conflict in Kachin, Shan and Rakhine states.⁵⁰

Once again, the fundamental changes and human rights protections and political will by the Myanmar government especially Tatmadaw required to instill confidence in safe, dignified and sustainable returns are simply not in place. Whether they will be in the medium to long term is an open question, but the level of protection guarantees required for the Rohingya is arguably heightened given their history of serious human rights violations, earlier flawed repatriation attempts, and other deprivations. That said, the Rohingya are not unique in terms of protection needs as several other ethnic groups previously fled Myanmar seeking asylum, with UNHCR recently calling for continued protection for one such group which was being considered for cessation of refugee status.⁵¹

⁴⁷ FFM Report, *op cit.* (A/HRC/39/CRP.2, 17 September 2018), para 81, p 24. Also see Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis*, Hart Publishing, 2019:

<https://www.bloomsburyprofessional.com/uk/the-constitution-of-myanmar-9781509927364/>

⁴⁸ <https://www.reuters.com/article/us-myanmar-rohingya-icc/myanmar-says-international-criminal-court-has-no-jurisdiction-in-rohingya-crisis-idUSKCN1LN22X>; also see

<https://www.nytimes.com/2018/09/06/world/asia/rohingya-myanmar-international-criminal-court.html>

⁴⁹ See <https://theaseanpost.com/article/myanmar-army-warns-against-changing-constitution-0>

In its September 2019 report to the Human Rights Council, the FFM concluded that:

The mission found a near complete absence of accountability at the domestic level for gross violations of international human rights law and serious violations of international humanitarian law. The Prosecutor of the International Criminal Court, in her request for authorization of an investigation [...] concluded much the same. The government of Myanmar is simply unwilling to end impunity for these violations, especially those committed by security forces. Impunity is also structural; it is built into the legal framework and the system of governance, including the *Constitution*, article 343 (b) of which stipulates that decisions of the Commander in Chief concerning military justice matters are “final and conclusive”, with no right of appeal. The government’s outright rejection of the mission’s findings is also indicative of its unwillingness to pursue accountability at the domestic level.

A/HRC/42/50, para 95.

⁵⁰ See for example: <https://www.amnesty.org/en/latest/news/2019/05/myanmar-military-commits-war-crimes-latest-operation-rakhine-state/>; and

<https://www.amnesty.org/download/Documents/ASA1604172019ENGLISH.PDF>

⁵¹ <https://www.unhcr.org/news/press/2019/3/5c8a31984/unhcr-says-ethnic-chin-refugees-require-continued-international-protection.html>

Power politics, geo-politics and inaction by the Security Council

Why the events of August 2017 did not prompt decisive Council action in what may be considered a textbook case envisioned by the Responsibility to Protect⁵² regime can be summed up in a few words: *lack of collective political will*. Permanent members China and Russia in particular have not to date agreed to any SC action against Myanmar.⁵³ Despite the current political impasse, as an executive organ with authority to take action under Chapter VII of the *UN Charter*, the Council should have a clear obligation to act when credible allegations of genocide or crimes against humanity are brought before it.⁵⁴ While some commentators and political leaders have suggested UN peacekeepers or international observers or monitors be deployed to ensure the safety and security of the Rohingya upon return, that too is a far reach without the full agreement of all SC permanent members.

Questions of state sovereignty and non-interference aside, hallowed principles in the ASEAN context⁵⁵, perceived international interference in the treatment of religious and ethnic minorities in the territory of Council member states is also acutely at play. Moreover the importance of maintaining positive bilateral and economic relations and trade may trump the importance of ensuring the human rights of the Rohingya.⁵⁶ As noted by Simon Adams of the Global Centre for the Responsibility to Protect (R2P):

Eight months after so-called “clearance operations” began in Rakhine State, the UN Security Council did, however, undertake an official visit to the region. During April 2018 Council members visited Rohingya refugee camps in Bangladesh, while in

⁵² <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>

⁵³ On 21 August 2019 the Security Council engaged in consultations on Myanmar and was briefed by the UN High Commissioner for Refugees and UNDP. While the general position remains to support voluntary repatriation in principle, there remains a lack of consensus and specific action by the Council to move forward the required elements in Myanmar to instill confidence for returns including granting the Rohingyas’ demands for human rights enfranchisement including the grant of citizenship. An Arria-Formula meeting was held on 23 August on ‘*Mass Atrocity Crimes in Myanmar: Where do we stand on accountability*’. The Council was briefed by FFM member Radhika Coomaraswamy, journalist Esther Htusan, and Wakar Uddin of the North American Burmese Rohingya Association. The meeting reportedly did not result in any Council decisions.

Ms Coomaraswamy gave a briefing to the UN press corps on 22 August 2019 upon the release of the FFM report on ‘Sexual and gender based violence’. Of particular interest she described that apart from ongoing (albeit limited) engagement of the ICC and potentially ICJ, the FFM recommends establishing an international mechanism as the best way forward to deal with accountability issues. In the alternative a hybrid court will require finding individuals from Myanmar who are “able to withstand any kind of political pressure”. A further recommendation is to establish a trust fund for survivors in line with Human Rights Council resolution 39/2. A video of the briefing can be accessed at: <http://webtv.un.org/search/report-on-myanmar-press-conference-22-august-2019-/6075780154001/?term=myanmar&sort=date>

⁵⁴ See December 2018 report of the Global Justice Centre, *Beyond Killing: Gender, Genocide and Obligations under International Law*, in particular chapter VI on Genocide and International Organisations. The report is available at: <http://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf>

⁵⁵ See <https://theaseanpost.com/article/non-interference-and-rohingya-crisis; and https://www.eurasiareview.com/01032019-the-rakhine-crisis-role-of-asean-analysis/>

⁵⁶ Myanmar enjoys a trade surplus with China, and in December 2018 it was reported largely border-area exports from Myanmar to China totalled US\$2.4 billion while imports from China totalled \$900 million; <https://www.mmtimes.com/news/myanmar-china-border-trade-focus.html>

Myanmar they met with political and military leaders, including *de-facto* head of state Aung San Suu Kyi and Senior General Min Aung Hlaing [...] On the flight to Rakhine State the ambassadors flew over scorched villages and several of them photographed the charred landscape below, noting that you could still see the outline where the huts and homes of the Rohingya had once been. Entire communities had clearly been purged. The visit had a profound impact on several of the ambassadors and although a group of states on the [Council] have worked to keep the issue of the Rohingya in the Council's focus, as of [October 2019] there had still not been a single formal resolution adopted to name the nature of the crime committed against them, nor to hold the perpetrators accountable.⁵⁷

Being able to seek 'asylum' in Bangladesh arguably satisfies one of the requirements of the R2P regime.⁵⁸ Aside from R2P and SC inactivity though, another element which has thus far failed to take root is the principle of responsibility sharing in refugee law. While celebrated by major states in the *UN Global Compact on Refugees* and the earlier *NY Declaration*⁵⁹, 'responsibility sharing' has failed to materialize in practice in the Rohingya context with no major offers to date to resettle or provide temporary protection to ease the pressure on Bangladesh.

Even a neighbouring country like Japan, while showing strong support for Bangladesh and the humanitarian plight of the Rohingya and remaining a generous donor country, was among a handful of states, including India, who abstained during voting on General Assembly and HRC resolutions on human rights in Myanmar.⁶⁰ While in principle abstaining is neither voting for or against a resolution, the perception appears to be that not voting for a resolution critical of Myanmar may permit privileged diplomatic access. At the time however this may not have been appreciated by the country hosting close to a million refugees, and Japan's perceived indifference and interest "to promote foreign business opportunities in war-torn Rakhine state" has been criticized.⁶¹

⁵⁷ The Global Centre for the Responsibility to Protect Occasional Paper *If Not Now, When? The Responsibility to Protect, the Fate of the Rohingya and the Future of Human Rights*, Dr Simon Adams, January 2019, at p 10. The report is available at: http://www.globalr2p.org/media/files/occasionalpaper_rohingyafinal.pdf

Being able to seek 'asylum' in Bangladesh arguably satisfies one of the requirements of the R2P regime, as there may be no easier way for the international community to meet its responsibility to protect than providing asylum and other international protection on adequate terms. See 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims', Brian Barbour & Brian Gorlick, *International Journal of Refugee Law (IJRL)*, 20 (4), December 2008, Oxford University Press; *UNHCR New Issues in Refugee Research* paper no 159 (July 2008), available at: <https://www.unhcr.org/research/working/487b619b0/embracing-responsibility-protect-repertoire-measures-including-asylum-potential.html>

⁵⁸ 'Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims', Brian Barbour & Brian Gorlick, *International Journal of Refugee Law (IJRL)*, 20 (4), December 2008, Oxford University Press; *UNHCR New Issues in Refugee Research* paper no 159 (July 2008), available at: <https://www.unhcr.org/research/working/487b619b0/embracing-responsibility-protect-repertoire-measures-including-asylum-potential.html>

⁵⁹ <https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>

⁶⁰ Human Rights Council resolution: <https://reliefweb.int/report/myanmar/situation-human-rights-myanmar-ahrc40119>

⁶¹ <https://bdnews24.com/bangladesh/2017/11/19/un-resolution-on-myanmar-abstention-from-voting-doesnt-mean-opposing-bangladesh-japan-says>; <https://www.amnesty.org/en/latest/news/2017/12/un-china-fails-to-scupper-resolution-on-myanmars-persecution-of-rohingya/>; <https://www.hrw.org/news/2019/06/20/japans-cold-blooded-approach-rohingya-crisis>

Similarly, India has a keen economic interest in Myanmar as a part of its Act East policy and a potential land bridge into Southeast Asia. Notwithstanding head of state level diplomacy which resulted in agreement for the “safe, speedy, and sustainable” repatriation of the Rohingya⁶², the Hindutva-movement and perceived view by the Indian authorities concerning the national security implications of Rohingya residing in their territory has resulted in deportations to Myanmar.⁶³ Although UNHCR has registered some 40,000 Rohingya refugees under its mandate in India, a pending Indian Supreme Court challenge may determine the fate of those remaining in the country.⁶⁴

For both Japan and India, Myanmar is a key bridge country for their economic ambitions. The geo-political interests and economy of these countries and how it may play out to counter China’s presence and domination may explain why regional responses and powers have been unwilling or ineffective to pressure Myanmar. Furthermore, China, as a permanent member of the SC, has not taken a lead to move things forward in the Council. Beyond geo-political considerations there can be a reluctance to set a precedent through the Council acting to resolve a major refugee crisis which fails to serve the economic interests of key powerful states.

The economic ambitions of China in Myanmar are clearly apparent. China wants access to the Bay of Bengal as part of its Belt and Road Initiative (BRI), and a direct line from China to this strategic maritime route is through NRS state. An empty and unhindered geography could facilitate infrastructure development and security while serving any interest to repopulate NRS with Bamar Buddhists. With China’s economic and military might and regional leadership, it can be expected any future development of NRS will see their continued involvement and influence.⁶⁵ While the BRI may eventually benefit Bangladesh, initial studies indicate the regional interest and economic net gain to Myanmar as significantly more prominent.⁶⁶

⁶² <https://www.dhakatribune.com/bangladesh/foreign-affairs/2019/10/05/hasina-modi-for-expediting-efforts-for-sustainable-rohingya-repatriation>

⁶³ See ‘Rohingyas: Pawns on the Geopolitical Chessboard’, by Tapan Bose, Chapter 11, in *The Rohingya Refugee Crisis: Towards Sustainable Solutions*, Imtiaz Ahmed (editor), Centre for Genocide Studies, University of Dhaka, Bangladesh 2019.

⁶⁴ https://www.business-standard.com/article/current-affairs/refugee-status-or-deportation-for-rohingyas-sc-may-rule-before-cji-retires-119081600125_1.html; <https://www.scobserver.in/court-case/rohingya-deportation-case>

⁶⁵ https://csis-prod.s3.amazonaws.com/s3fs-public/publication/180717_Poling_Kyaukpyu.pdf?YxLRoMB9yRKoZpxqV5DAO13j4G3QtQo9

⁶⁶ *The Belt and Road Initiative in Southeast Asia*, Jinny Yan, on China’s BRI and Southeast Asia, LSE Ideas (www.lse.ac.uk/ideas)/CIMB ASEAN Research Institute (www.cariasean.org), October 2018.

The challenges and potential benefits facing Bangladesh with respect to the BRI are described as follows:

Bangladesh is [...] enclosed by India on all four sides including the Bay of Bengal, except for a relatively small stretch of border with Myanmar in the southeast. Therefore, proactive participation in BRI by both India and Myanmar is a precondition for Bangladesh to be able to reap maximum benefit out of the BRI; besides, serious lack of infrastructures, shortage of electricity and energy, lack of diversity of exportable items, need for modern and appropriate technology, shortage of investible capital, need for development of skilled manpower and human resources, challenges of environmental degradation and climate change; influx of more than a million Rohingya refugees and strained relations with Myanmar are some tough challenges that need to be addressed if Bangladesh has to reap maximum benefit from participation in BRI [...] In spite of all challenges, any initiative or endeavor that seeks to promote broader connectivity and cooperation between and amongst peoples, is [...] something that will invariably bring benefits to all, if pursued with due diligence based on the principles of equality, mutual understanding, mutual respect and mutual benefit. The same is also true for BRI. Given the huge and almost unfathomable size of the related concept, vision and initiative, the benefits to all associated with BRI are also expected to be huge and unfathomable.

Another factor which can impact finding a repatriation solution for the Rohingya is a chauvinistic attitude towards Bangladesh. Economic exchange between Myanmar and Bangladesh is not particularly high compared to other regional trading partners and the Rohingya crisis has made the trade picture increasingly less favourable.⁶⁷ Bangladesh may also be viewed as a predominantly Islamic country which threatens Buddhist dominant Myanmar. The Rohingya crisis repeating itself since before the formation of the Bangladesh state naturally aggravates bilateral relations. Security concerns are also being raised by both the Bangladesh and Myanmar authorities concerning the Rohingya.⁶⁸

Finally, the long history of conflict in Myanmar which relies on contraband trade to finance both state and non-state actors strategies and political aspirations is yet another factor working against refugee return.⁶⁹ Widespread corruption and militant and criminal enterprises operating on various borders throughout South and Southeast Asia and China contributes to trade in illegal arms and human trafficking.⁷⁰ There are regular reports from national human rights bodies and NGOs and the media concerning allegations and in some cases criminal convictions of government officials having committed heinous crimes including human trafficking.⁷¹ A more detailed discussion of this issue is beyond the scope of this paper, but it remains a relevant consideration at a time many voices are calling for repatriation of the Rohingya to Myanmar.

Commentary by Ambassador Munshi Faiz Ahmad, Chairman, Bangladesh Institute of International Strategic Studies (BISS), in *The Belt and Road, A Quarterly Magazine*, Centre for East Asia Foundation (www.ceafasia.org), Bangladesh, Issue 1, April-June 2019, p 7.

⁶⁷ <https://www.dhakatribune.com/business/commerce/2018/07/12/rohingya-crisis-hits-bangladesh-s-exports-to-myanmar>

⁶⁸ Christine Fair, an American political scientist and terrorism expert has written that:

In spite of the grotesque brutalities the Rohingyas have endured, they have not articulated an Islamist or separatist demand. Their demand is simply to return to Myanmar with citizenship and, problematically, with government recognition as a distinct ethnic group. The Rohingya have not given rise to many violent non-state actors claiming to represent them. One of the few violent groups that has emerged in recent years is the Arakan Rohingya Salvation Army (ARSA). [While many in the “Islamist terrorism” industry have been quick to paint ARSA with the jihadi brush](#), I am skeptical of ARSA’s Islamist *bona fides*. ARSA has assiduously rejected Islamist appeals. However, other Islamist groups in the region have identified the Rohingya as a *cause celebre*, including the Pakistan-based Lashkar-e-Taiba (LeT), the Islamic State, and al-Qaeda Indian Subcontinent. The longer the Rohingya remain cramped in inadequately-appointed camps in Bangladesh or countenance ongoing ethnic cleansing in Myanmar, the more probable it becomes that either the nature of ARSA will bend towards Islamism and/or Islamist militant groups will conduct violence on their behalf.

Article available at: <https://www.lawfareblog.com/arakan-rohingya-salvation-army-not-jihadis-you-might-expect>; also see: <https://www.irrawaddy.com/in-person/interview/no-evidence-arsa-links-isis-terrorism-expert.html>

⁶⁹ See, for example: *Burma in Revolt: Opium and Insurgency Since 1948*, Bertil Lintner, Silkworm Books, 1999; and *Blood and Silk: Power and Conflict in Modern Southeast Asia*, Michael RJ Vatikiotis, Weidenfeld & Nicolson, 2018. Also <https://www.bangkokpost.com/thailand/general/1695792/shan-state-drug-blitz-nets-big-haul>

⁷⁰ See: <https://reliefweb.int/report/myanmar/analysis-arakan-army-powerful-new-threat-tatmadaw>

⁷¹ <https://www.fortifyrights.org/downloads/Fortify%20Rights-SUHAKAM%20-%20Sold%20Like%20Fish.pdf>

Solutions and options for a way forward

Short of decisive action by UN and regional institutions or bodies including the SC, ASEAN or the Organisation of Islamic Cooperation (OIC), or significant political developments in Myanmar which would permit safe and sustainable repatriation as a preferred solution⁷², there are other interim solutions and mitigating actions which deserve attention. While many Rohingya refugees have themselves expressed the desire to return “home”, many have not. What they all largely agree upon is ensuring several reasonable demands are in place before returning to Myanmar. These include justice for the wrongs committed and reparations for losses suffered; recognition of and ensuring their protection and human rights including physical protection in Myanmar; the grant of civil status including full Myanmar citizenship⁷³; in addition to being able to return in safety and dignity and to their home villages and regions in Myanmar.⁷⁴

Delivering on such demands requires clear political commitment from the Myanmar authorities. From the perspective of the Rohingya, fulfilling their demands may be required *before* there is any move to return. Another possible scenario is some Rohingya may agree to return on the basis of minimum guarantees along with the promise of eventual longer-term gains such as the grant of citizenship. In the end voluntary repatriation, properly executed, is a personal choice. Monitoring compliance with any such arrangement is an important practical undertaking which begs the question of who could take on that role, especially given UNHCR’s limited access and freedom of movement in Myanmar, particularly in NRS.

The following section identifies some options which could be taken by the government of Bangladesh and the international community to alleviate the suffering of the Rohingya and overall pressure on Bangladesh. While these proposals are neither novel nor unprecedented, they have received limited attention given the dominant discourse on repatriation. While the emphasis on repatriation should not be diminished or abandoned, other solutions should be given serious consideration by concerned state actors, international organizations and other interested parties in the interest of making them operational.⁷⁵

Access to education, work rights and other services with government support

In Kutupalong camp in late 2017, an elderly Rohingya woman I met had been forcibly displaced from Myanmar on four separate occasions, and three times she returned “home”. Communicating

⁷² For a thoughtful discussion on the political considerations of repatriation see Megan Bradley, ‘Is Return the Preferred Solution to Refugee Crises? Exploring the Moral Value of the Right of Return’, Chapter 8 in *The Political Philosophy of Refuge*, David Miller and Christine Straehle (editors), Cambridge University Press (forthcoming)

⁷³ See Archana Parashar, Jobair Alam, ‘The National Laws of Myanmar: Making of Statelessness for the Rohingya’, *International Migration*, 8 November 2018, available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12532>; and *Tools of Genocide: National Verification Cards and Denial of Citizenship of Rohingya Muslims* published by Fortify Rights on 3 September 2019, in particular pp 46-48. The report is available at: <https://www.fortifyrights.org/publications.html>

⁷⁴ See the March 2019 survey produced by Xchange – *Research on Migration* at: <http://xchange.org/reports/TheRohingyaSurvey2019.html>

⁷⁵ See 29 August 2019 guest column by Dr Tony Waters in *The Irrawaddy* at: <https://www.irrawaddy.com/opinion/guest-column/insistence-on-voluntary-rohingya-repatriation-to-myanmar-lacks-moral-imagination.html>

through a Rohingya refugee teacher who spoke English, she said she did not think she would be able to return again given the horrors she experienced. “Everything is lost”, she said.

On the pathways in the camp barefoot children played with makeshift toys: a ball made of string and tape; a wooden-spool rolled on the end of a stick; and a push-kart made out of scrap wood and cardboard box with roughly hewn wooden wheels. On a shallow landing some refugees were playing badminton with a net and rackets hand carried from Myanmar. This was clearly a group of humanity who were just glad to be alive and safe and it showed on their faces and how they acted and engaged with one another.

While clearly a domestic policy choice, Bangladesh (as well as other countries hosting Rohingya refugees) should consider granting access to public schools and work rights to the Rohingya in addition to ensuring health care for the population, including psycho-social support and family planning and reproductive health⁷⁶, through access to public facilities and services. Bangladesh is *de facto* permitting some of this assistance as the UN and dozens of domestic and international NGOs⁷⁷ are present in the camps and working on a broad range of protection and assistance programmes around health, education, protection and community outreach. Of particular importance is accessing education, as this could prevent another lost generation given the current figures of 70-plus percent of Rohingya being illiterate and innumerate.

Increased access to public services with government support would permit more individuals to benefit, and the quality of services in education and health care in particular could significantly improve. Commitments from the World Bank⁷⁸ and UN development actors and crucially donors⁷⁹ to support and upscale the welfare and economic absorption and co-existence of the Rohingya with local communities are timely, and with government support at all levels can help develop and finance medium term plans to help refugees and host communities alike.⁸⁰

Establishing and sustaining programmes requires continued commitment from the Bangladesh government in addition to local authorities and institutions. Sustained engagement in a broad range of humanitarian programmes including training, capacity building, community development and

⁷⁶ <https://www.thedailystar.net/frontpage/family-planning-too-important-yet-ignored-1485694>;
<https://reliefweb.int/report/bangladesh/finding-reproductive-healthcare-world-s-biggest-refugee-camp>;
<https://www.cgdev.org/publication/removing-barriers-and-closing-gaps-improving-sexual-and-reproductive-health-and-rights>

⁷⁷ Bangladesh with support from the international community has many skilled individuals and long experience contributing to humanitarian work for displaced persons from Myanmar even well before the most recent crisis, and there also many examples of Bangladesh NGOs and humanitarian actors taking the lead on these initiatives. See for example: <http://response.brac.net/>

⁷⁸ See the October 2019 Centre for Global Development/International Rescue Committee Report *Moving Beyond the Emergency: A Whole of Society Approach to the Refugee Response in Bangladesh*, available at: <http://www.worldbank.org/en/news/loans-credits/2019/03/07/bangladesh-emergency-multi-sector-rohingya-crisis-response-project>

⁷⁹ Under an agreement between the government of Norway and the UN Development Programme (UNDP), Norway will support work aimed at “fostering peace and harmony in Rohingya camps and host communities in Cox’s Bazar”. The agreement will support UNDP’s research into understanding the origin and drivers of social tensions in the Rohingya camps and host communities since the August 2017 influx. Research findings will strengthen development work in Cox’s Bazar with a view to promoting peace and tolerance in the camps and host Bangladesh communities. See: <https://www.thedailystar.net/city/news/undp-norway-sign-747306-agreement-1744648>

⁸⁰ <https://www.cgdev.org/publication/moving-beyond-emergency-whole-society-approach-refugee-response-bangladesh>

outreach delivered by staff on the ground also requires a huge input of resources.⁸¹ Critically the required billions of dollars could be utilized to improve public services for the refugees *and* host communities and raise living standards for all in a sustainable way.

In order to deliver these and other services requires considering an end to encampment and permitting refugees to be hosted in various communities outside of Cox's Bazar. Proper registration of the refugee population with a national authority and international organization would meet the needs of identifying the refugee population as a law and order concern. At the same time this would facilitate organizing eventual repatriation when feasible.

Apart from providing services it must be acknowledged refugees want to work and help themselves. Refugees also have skills. While the refugee community in Bangladesh may be able to find limited work in the informal economy, the absence of legal protection makes them vulnerable to exploitation and abuse. Refugees are often willing to do work in sectors considered undesirable by locals, and permitting the Rohingya to work in areas with labour needs including seasonal engagement contingent on them being registered with the government and UNHCR would be a significant step forward. Such arrangements could help manage the refugee population who could become more self-reliant, a positive approach for both refugee and local communities.⁸² Engagement of the International Labour Office (ILO) in supporting job skills training and creating job opportunities for the Rohingya, similar to initiatives for Syrian refugees in Jordan, could also be explored and promoted in Bangladesh.⁸³

⁸¹ The Dhaka-based Centre for Policy Dialogue (CPD) estimates that if the Rohingya stay in Bangladesh for 5 years from the fiscal year 2018-19 onwards, the cost to maintain them will be US \$7.046 billion till 2023. With population growth and inflation adjustments, this cost will continue to increase and over 10 years will rise to US \$17.204 billion. See: <https://www.thedailystar.net/opinion/macro-mirror/news/addressing-the-rohingya-crisis-whose-responsibility-it-1742485>

⁸² There are an estimated 150,000 ethnic Rohingya from Myanmar residing in Malaysia, 80,000 of whom are currently registered with UNHCR as mandate refugees. Being registered with UNHCR permits access to a UNHCR ID card which can assist in avoiding being processed under the Malaysian *Immigration Act* 1959/63 as amended, for illegal entry and stay. While being registered with UNHCR does not permit refugees to legally work, it does offer a significant degree of protection as the police, prosecution service and the courts generally appreciate the role of UNHCR and what it means to be a refugee (largely as a result of extensive outreach and training undertaken by UNHCR in cooperation with several actors including The Malaysian Bar Association). As a result, many Malaysian employers are willing to hire refugees although formally it is unlawful to do so. The ultimate goal which UNHCR has been consistently advocating for is transition to legal work rights for refugees in Malaysia. For further information, an interesting study on the issue was recently conducted by two Malaysia-based economists, see: <http://www.melatinungsari.com/uploads/2/3/6/3/23631450/finalreport-mnsf.pdf>

⁸³ https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/briefingnote/wcms_670182.pdf; <https://reliefweb.int/report/jordan/jordan-compact-three-years-where-do-we-stand>

By analogy, the experience of working abroad is well known in Bangladesh. More than 10 million Bangladeshi citizens work outside their country and contribute an estimated US \$1.2 billion in monthly remittances, making it one of the largest and most important contributions of direct capital.⁸³ Capital gain is only part of the story as migrant workers may eventually return home with new skills, languages, networks and the ability to manage their own businesses and contribute to Bangladesh society. Remittances are an invaluable source of income for many Bangladeshi families that permits girls and boys to pursue a better standard of education, which directly impacts future choices and opportunities. Permitting refugees to legally work would similarly provide these opportunities for their children and families.

Promoting third country resettlement and regional responsibility sharing

Another solution is third country resettlement. While some limited movement of Rohingya refugees directly from Myanmar and Bangladesh to third countries is taking place, this is often done through irregular channels and at great cost and personal risk.⁸⁴ Managed migration via third country resettlement supported by UNHCR and IOM with government engagement is routine refugee protection work around the globe. Malaysia, for example, while generously permitting an estimated 150,000 Rohingya from Myanmar to reside in the country, the majority of whom are registered with UNHCR as mandate refugees, facilitates UNHCR and IOM to arrange third country resettlement by granting exit permission for refugees with particular protection needs. Over the last decade several thousand Rohingya refugees have benefitted from being resettled from Malaysia to several countries including Canada, the United States, Japan and New Zealand.

One proposal is to capitalize on opportunities from those countries who have offered to resettle Rohingya from Bangladesh. Canada is one such country and has communicated its interest at the highest level of government.⁸⁵ A properly managed resettlement programme can avoid or mitigate any risks of pull factor or fraud and is routine work for UNHCR and IOM. It can be expected any initial resettlement from Bangladesh would be modest in numbers and prioritize individuals with urgent protection needs such as women victims of violence, the medically at risk and separated family members. Permitting third country resettlement is a policy decision the Bangladesh government may wish to reconsider.

Resettlement opportunities are not just to the advantage of the lucky few who have a chance to start a new life abroad. It can also benefit resettlement and asylum countries⁸⁶ and result in accumulation of job and leadership skills, as well as human capital and remittances sent to family and friends who remain abroad as refugees or internally displaced. Support from the Rohingya diaspora is already taking place, and privately generated and delivered remittances and funds are reaching refugees in Bangladesh which helps them manage their lives.

Resettlement and other stay arrangements can also be explored in the Asia region. There are several advantages and political opportunities for successful regional resettlement or temporary stay arrangements. There is genuine public sympathy and understanding for the plight of the Rohingya in Malaysia and Indonesia for example and the ASEAN region generally, as well as within the fifty-seven state membership of the OIC. Thailand, Malaysia, Indonesia and other Southeast Asian states all have vibrant formal and informal sector economies which can provide work opportunities for refugees who are fortunate enough to enter their territories. They already host important numbers of Rohingya. Some Gulf states also host several hundred thousand Rohingya as migrant workers so additional arrivals would have an immediate support network as they do in other countries.

Regional support and solidarity for Bangladesh through a managed programme of moving Rohingya to neighbouring countries in Asia would be a positive example of global responsibility sharing. Various options can be considered. Similar to the Comprehensive Plan of Action (or CPA)

⁸⁴ See, for example: <https://www.thestar.com.my/news/regional/2019/05/19/84-rohingya-stopped-from-boat-journey-to-malaysia/>; and <https://www.thedailystar.net/backpage/news/police-rescue-dozens-malaysia-bound-rohingyas-boat-1743880>

⁸⁵ <https://www.reuters.com/article/us-bangladesh-rohingya-refugees/exclusive-bangladesh-silent-on-canadian-offer-to-take-rohingya-refugees-officials-idUSKCN1NE009>

⁸⁶ <https://www.theguardian.com/world/2019/jun/18/tampa-refugee-taken-in-by-new-zealand-wins-fulbright-scholarship>

previously adopted for Indo-Chinese refugees, different approaches could be adopted for the Rohingya including temporary protection and stay arrangements; temporary protection and stay with an eventual resettlement scheme; or repatriation under international supervision with an option of applying for asylum if conditions so require.

There is no hard and fast model, and no doubt negotiating such arrangements for the Rohingya in the current global and regional politic would be a challenge.⁸⁷ However, this is worth pursuing and would be a test of the leadership and good will of key governments and institutions including ASEAN, the OIC, the Asian-African Legal Consultative Organisation (AALCO), and the UN among others. Of note, amongst the ways to promote international solidarity highlighted in the *Global Compact on Refugees* (GCR) was to pursue resettlement, complementary pathways for admission to third countries, and local integration and other local solutions.⁸⁸

The importance of diplomacy and Rohingya participation

While continuing to engage in negotiations and programme and protection activities geared towards voluntary repatriation, signing another MOU with a focus on repatriation without including and consulting the Rohingya, especially women, or otherwise direct participation from affected communities, undermines the credibility of the process. Similar concerns have been voiced in respect of accountability processes for human rights violations.⁸⁹ In response to the renewal of an MOU on repatriation between the government of Myanmar and UNHCR, the coordinator of the Free Rohingya Coalition expressed his regret “the UN agencies have not even consulted the Rohingyas, the survivors of genocide”.⁹⁰ While such views may be overstated, a leaked report prepared by the ASEAN Emergency Response and Assessment Team (ERAT) was similarly criticized.⁹¹

A basic element in preparing for repatriation is to ensure each individual refugee can make an informed choice concerning his or her decision to return, including any benefits or restrictions they may experience in their country of origin. Administering a transparent, well-informed, safe and sustainable voluntary repatriation exercise is not something the UN can achieve on its own. The responsibility lies first and foremost with the country of origin, Myanmar.

⁸⁷ See ‘Refugee Burden Sharing: A Modest Proposal’, Peter H Schuck, Yale Law School Legal Scholarship Repository (1997), available at:

https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2691&context=fss_papers; and ‘The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?’, Meltem Ineli-Ciger, *Refugee Survey Quarterly*, 38 (2), June 2019, available at: <https://academic.oup.com/rsq/article/38/2/115/5474959>

⁸⁸ <https://www.unhcr.org/the-global-compact-on-refugees.html>;

https://www.unhcr.org/gcr/GCR_English.pdf (at paras 90-100); also see the policy brief by former Deputy High Commissioner for Refugees, T Alex Aleinikoff, *From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations*, Migration Policy Institute, May 2015, available at: <https://www.migrationpolicy.org/research/dependence-self-reliance-changing-paradigm-protracted-refugee-situations>

⁸⁹ See 14 February 2019 op-ed in *TIME* magazine by John Quinley III, Human Rights Specialist at Fortify Rights, available at: <https://time.com/5529321/rohingya-myanmar-genocide-fortify-rights-diaspora/>

⁹⁰ See *The Daily Star*, 29 May 2019 at: <https://www.thedailystar.net/backpage/news/rohingya-return-unhcr-undp-extends-deal-myanmar-1750258>; <http://www.newagebd.net/article/74859/rohingyas-slam-un-asean-repatriation-plan-without-consulting-them>; also:

<https://www.thenewhumanitarian.org/news/2019/08/21/Rohingya-refugees-returns-repatriation-Bangladesh>

⁹¹ <https://www.japantimes.co.jp/news/2019/06/07/asia-pacific/outcry-asean-predicts-smooth-rohingya-return-myanmar/#.XP3GHG8zY1g>

At another level, advocating for implementation of the GCR in Bangladesh, while potentially helpful for promoting responsibility sharing for donor support, identifying diverse partners, developing local community support, and promoting inter-agency coordination and cooperation, should not detract from immediate humanitarian needs on the ground. The budgetary requirements for the Rohingya operation in Bangladesh are quantifiable and estimated at US \$1 billion per annum. Securing reliable funding for the current operation is an immediate challenge given the large number of other major humanitarian crises in the world today.⁹² While lack of funding should not detract from developing an ambitious humanitarian agenda, it is a serious consideration in terms of what solutions or paths to take. A humanitarian funding shortage may result in pressuring the Rohingya to prematurely return to Myanmar for example. Another scenario is that they will continue to live as refugees with even fewer resources. Neither option is desirable.

Despite the many challenges and obstacles, diplomatic efforts should never be underestimated. The position of donor states is not limited to supporting humanitarian efforts but is linked to leveraging Myanmar and other regional actors to take responsibility and implement tangible long-term solutions. The current political climate on the Rohingya issue is not easy (if it ever was) and there is a legitimate concern that the Rohingya crisis may lose the interest of the international community or be deprioritized, which will have an impact on available resources. Arguably the Bangladesh government will then face the challenge of coping without continued support from the international community to host one of the largest refugee populations on the planet.

Even if the government decides to manage the Rohingya crisis with limited external support, politically this may result in increased public criticism and resentment if there is a lack of solutions. Images of another Gaza Strip are not misplaced, and the appetite for Bangladesh to absorb almost a million of a neighbouring country's would-be citizens (but currently refugees and stateless) is not apparent. Another possible scenario is Bangladesh may be faced with having to permit full integration of a significant number of Rohingya refugees if a return solution is not forthcoming.

Diplomacy and dialogue with the Myanmar authorities must continue, ideally at the right level with consistent and authoritative interlocutors. Such efforts by states and other actors including the UN should take place in good faith and in a relationship of mutual trust. However past experience and problems identified by the FFM suggest any diplomatic discussions with Myanmar be gauged and approached with caution.

Pursuing accountability

The international community and UN institutions cannot overlook or minimize the serious violations of human rights and purportedly criminal conduct experienced by the Rohingya. Beyond individual and state accountability as part of an eventual criminal process and proceedings before the ICC and ICJ, the FFM has suggested the international community embargo Myanmar business interests and impose targeted sanctions against companies tied to the Tatmadaw. This would serve to cut off financial and other support for Myanmar's armed forces which has used "its own businesses, foreign companies and arms deals to support brutal operations against ethnic groups that constitute serious crimes under international law, bypassing civilian oversight and evading accountability."⁹³

⁹² <https://www.unhcr.org/figures-at-a-glance.html>

⁹³ See FFM news release of 5 August 2019: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E> ; FFM report on the economic interests of the Myanmar military (UN doc ref: A/HRC/42/CRP): <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

At an individual level there may be options to impose sanctions against military officers and their family members residing abroad.⁹⁴ Identifying and seizing any hidden assets outside Myanmar is another area the international community through national departments of justice may explore.

An important group of potential witness to any criminal process are the Rohingya themselves. Refugees who provide evidence to a criminal investigation or related human rights process may never be able to safely return to Myanmar. Criminal investigations are already underway by the ICC and eventually IIM, and this work needs to be handled professionally to collect, preserve and secure witness testimony and other evidence. The results of the investigations also require careful assessment before further legal action under international and domestic law can be taken. The physical protection of individual witnesses including family members, some of whom may remain in Myanmar or in Bangladesh as refugees, is a delicate and complicated issue which was highlighted by the IIM in its initial report.⁹⁵

Reparations for the Rohingya

While it is difficult to pinpoint individual responsibility for displacement due to a cyclone, earthquake or extreme weather conditions, this is not the case when there are documented attacks or violence towards a specific religious community, ethnic group, or women and girls or sexual minorities by government actors or agents. Apart from being able to return home in safety and dignity, the Rohingya also demand reparations and restitution for their losses.

The International Independent Investigative Mechanisms for Syria and Myanmar established by the UN General Assembly and Human Rights Council for the first time provided mandates that extend beyond traditional human rights monitoring, documentation and reporting to include the preparation of files to be used in national, regional and international criminal processes. The creation of these mechanisms led to calls for similar structures to look at other “atrocities crimes” in countries such as Sri Lanka.⁹⁶

The importance of ensuring international and national accountability, justice and reparations to victims of serious human rights violations including refugees⁹⁷ cannot be understated. Failing to take

⁹⁴ <https://www.bbc.com/news/world-asia-49014631>; <https://www.theguardian.com/world/2019/jul/17/us-imposes-sanctions-on-myanmars-military-leaders-over-rohingya-abuses>

The 2012 *Magnitsky Act* in the United States and other legislation passed in Canada and the UK and several other countries is arguably applicable to members of the Tatmadaw and Myanmar government officials as a result of the events in northern Rakhine State. See <https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf>, and <https://laws.justice.gc.ca/eng/acts/J-2.3/FullText.html>. On 21 February 2017 the UK House of Commons unanimously passed an amendment to the country’s *Criminal Finances Bill* inspired by the *Magnitsky Act* that would allow the government to freeze assets of international human rights violators in the UK. On 1 May 2018, the House of Commons added the “Magnitsky amendment” to the *Sanctions and Anti-Money Laundering Bill* that would permit the British government to impose sanctions on people who commit gross human rights violations.

⁹⁵ A/HRC/42/66, *op cit*, at p 9.

⁹⁶ <http://opiniojuris.org/2019/04/10/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim/>;
<http://opiniojuris.org/2019/04/11/is-it-time-to-create-a-standing-independent-investigative-mechanism-siim-part-ii/>

⁹⁷ See ‘Reparations and Refugees’ by Bernadette Ludwig, in I Ness (editor) *Encyclopedia of Global Human Migration*, 2013, pp 2566-2570, Wiley-Blackwell, Hoboken, New Jersey.

decisive action sends a signal such occurrences can happen again with impunity. In addition to directly impacting victims, accountability through a criminal justice process provides psychological closure for families and communities. While lost property or loved ones may never be returned, those who are responsible for the loss and harm can be punished for their crimes. The argument to support pursuing justice for victims, including refugees, is that it is ethically and morally the right thing to do. All civilized nations need to stand up and support that certain acts are unacceptable and those responsible will be held to account and brought to justice. Different approaches, including establishing truth and reconciliation commissions and even amnesties, may also provide an effective route to healing and accountability.

Article 75 of the *International Criminal Court (ICC) Statute* recognizes the need to establish principles relating to reparations to victims including “restitution, compensation and rehabilitation”. This provision permits the Court on its own initiative or upon request, to “determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”⁹⁸ Apart from the *ICC Statute*, there is a significant body of jurisprudence based on international civil liability and other international law which provides reparations and damages for injury to aliens and others as a result of wrongful acts by states or state agents.⁹⁹ There is also scope to seek reparations from the International Court of Justice if any contracting state were to bring a claim against Myanmar under the *Genocide Convention*.¹⁰⁰

In the refugee context there are a handful of historical examples of UNHCR administering indemnification funds to refugees who were victims of the German national socialist regime as well as British citizens of Asian origin who were expelled from Uganda.¹⁰¹ The UN-based compensation commission for Iraqi nationals who lost property and fled as refugees is another example.¹⁰² Despite earlier efforts at the former UN Commission on Human Rights¹⁰³ (now HRC) to develop the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, as well as sporadic development of regional principles¹⁰⁴ and some

⁹⁸ http://legal.un.org/icc/statute/99_corr/cstatute.htm

⁹⁹ See Dinah Shelton, *Remedies in International Human Rights Law* (3rd ed), Oxford University Press, 2015; Steven Ratner, Jason Abrams, James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed), Oxford University Press, 2009; Nina Jorgensen, *The Responsibility of States for International Crimes*, Oxford University Press, 2009, at pp 192-207; John Murphy, ‘Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution’, *Harvard Human Rights Law Journal*, vol 12, 1999, at pp 28-56; Christian Tomuschat, ‘State Responsibility and the Country of Origin’, in Vera Gowland Debbas (editor), *The Problem of Refugees in Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers, 1995; David Matas, *No More: The Battle against Human Rights Violations*, Dundurn Press Limited, Toronto, 1994, chapter 12 on ‘Compensation’; Luke Lee, ‘The Right to Compensation: Refugees and Countries of Asylum’, *American Journal of International Law*, vol 80, 1986; Payam Akhavan and Morten Bergsmo, ‘The Application of the Doctrine of State Responsibility to Refugee Creating Situations’, *Nordic Journal of International Law*, vol 58 (3-4), 1989, at pp 253-254.

¹⁰⁰ See Packer, *op cit*; and ‘The Situation of the Rohingya: Is there a role for the International Court of Justice?’, Michael A Becker, PhD Researcher, Gonville and Caius College, Cambridge, available at: <https://www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/>

¹⁰¹ See Luke Lee, ‘Questions of Responsibilities and Reparations’, *Refugee Survey Quarterly*, 16 (3), 1997.

¹⁰² <https://uncc.ch/>

¹⁰³ <https://digitallibrary.un.org/record/172321>

¹⁰⁴ Principle 4 of the Cairo Declaration of Principles of International Law on Compensation to Refugees: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/cairo-declaration-of-principles-of-international-law-on-compensation-to-refugees/6BB54211294E>; and Article VIII of the Asian-

thoughtful academic contributions¹⁰⁵, there is limited discussion in international fora, including within UNHCR, concerning development of a universal scheme to provide reparation or compensation to refugees.

This may be explained by the issue being considered politically unfavourable and practically unattainable. Even if such a scheme were in place, the argument goes, with the large number of refugees originating from developing countries obliged to seek asylum in other developing countries, it is doubtful whether individual refugees would be in a position to collect damages or compensation from the state of origin. With respect to the Rohingya similar compensation arrangements have been proposed.¹⁰⁶ While in principle a good idea, moving such an initiative forward will take significant diplomatic effort to engage and harness support from the international community.

Concluding remarks

There are no easy options or solutions to the current Rohingya crisis. Some of the proposals in this paper are being actively discussed by governments and within the UN, civil society and human rights communities. The long experience in Bangladesh and Asian region in dealing with refugees has created awareness of the challenges and potentially long road ahead. A former UNHCR Head, the late Sadako Ogata, once said: “There are no humanitarian solutions to humanitarian crises. Only political solutions”. It should be recalled however that the UN and UNHCR in particular have protection mandates. In this vein a political solution for the Rohingya refugee crisis is insufficient, but hand in hand there is a need to promote and implement protection and rights-based solutions in the interim and long term.

Powerful states which have influence can and should leverage Myanmar to ensure conditions, protection and monitoring measures are in place to make any potential return process feasible and sustainable. No one knows what may happen if the Rohingya refugees are left without a future. Resentment and anger can only lead to greater hardship, difficulties and risks. Refugees themselves are not a security concern, but failing to find solutions for refugees can lead to security risks at various levels.

The good news is there is continued support for the Rohingya and Bangladesh. Regional players such as China and other powerful states can show leadership including but not limited to supporting appropriate action in the SC. At the same time regional solutions beyond repatriation should be explored and accelerated to promote responsibility sharing. The governments of Bangladesh and Myanmar have much at stake and the most to lose in this process. Regional pressure and support can only help.

African Legal Consultative Organisation (AALCO) 1996 ‘Bangkok Principles’ on the Status and Treatment of Refugees: <http://www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf>

¹⁰⁵ *Journal of Refugee Studies* ‘Special Issue: Accountability and Redress for the Injustices of Displacement’, vol 27 (2), June 2014.

¹⁰⁶ <https://www.thedailystar.net/opinion/human-rights/myanmar-should-pay-reparations-rohingyas-1575334>;

<https://www.dhakatribune.com/world/south-asia/2019/02/12/myanmar-should-pay-us-6-billion-in-compensation-for-rohingya-crisis-study-finds>;

https://www.researchgate.net/publication/329362946_Rohingya_mass_exodus_Who_should_pay_compensation_and_how_much/download

Another positive outlook is the Bangladesh authorities remain engaged with international and regional organizations and the NGO community in dealing with the current situation. The immediate track is continuing to support Bangladesh and the Rohingya with humanitarian assistance while diplomatic discussions advance. Looking ahead, inclusive and systematic refugee representation in important decisions which affect them, especially around repatriation, is a must. Failure to engage with and include the Rohingya will limit or prevent buy-in to whatever is negotiated on their behalf. As with other refugee groups, the Rohingya, in all their diversity, need to be a part of and own any proposals or solutions which impact them.

The humanitarian dimension of the current crisis can continue to be well managed with sound leadership, strategic planning, creative diplomacy and advocacy, and a degree of political good luck. But luck alone is insufficient and will not lead to solutions the Rohingya deserve, and Bangladesh and international community legitimately demand. The tools, precedents and international goodwill are currently in the Rohingyas' favour. It will take mobilising and consolidating *collective political good will* with sustained international pressure and crucial support from civil society and the Rohingya themselves, in addition to institutional courage and commitment from the UN, to find lasting solutions.