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**The politics behind the establishment of United Nations-mandated fact-finding missions: the case of Myanmar**

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*To Carmen*

## **DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## **ABSTRACT**

On 9 October 2016, a group of Rohingya militants, equipped with machetes, attacked police stations in northern Rakhine State (nRS), one of the most impoverished states in Myanmar, looting and killing nine police officers and injuring another five. In turn, military and police targeted and attacked Rohingya armed groups, killing many innocent civilians. On 24 March 2017, the European Union, supported by the United States, the United Kingdom and other countries, sponsored a United Nations resolution which gives effect to a UN fact-finding mission to determine the facts on violations, especially in Rakhine State. With a view to challenging conventional explanations and views of United Nations-mandated fact-finding, this research study operationalizes a dynamic view of UN fact-finding.

At first blush, a strong case can be made that these relatively extensively researched, and verified, across-case dynamics and processes arguably underlie the establishment of the UN-mandated fact-finding mission to Myanmar. However, structural explanations, like the gridlock in the United Nations Security Council (UNSC), do not adequately take into account the timing of the establishment of this United Nations-mandated fact-finding mission. The *tatmadaw's* military operations have for many years been seen to involve systematic violations of human rights. Crimes such as arbitrary arrest, torture, or forced labour already featured centrally in the work on Myanmar by human rights organizations in the 1980s, and these and many other apparent human rights violations, to a certain extent, continue to preoccupy the United Nations.

Furthermore, not only do structural explanations fail to take sufficient account of the dynamic interplay between domestic and international fact-finding and the strategic context in which they are established, but how the UN mission 'reflects' the complexity of Myanmar's strategic context, characterised by the emergence and contestation of two audiences of legitimation. In this regard, this research study brings together two branches of scholarly literature' and focuses on the politics of the 'here and now' and the contingencies of within-case dynamics that underlie the establishment of the UN-mandated fact-finding mission to Myanmar. In this regard, structural explanations cannot fully account for how the UN-mission went from constituting an implicit challenge to the so-called 'Annan Commission' to being framed as 'complementary' to the Annan Commission.

Bringing together two bodies of scholarly literature, this research study highlights how four factors in Myanmar's strategic context were key to the establishment of the UN-mission, namely, 1. increasing international debate and division over the 'authority' of Aung San Suu Kyi; 2. a political shift within the UN headquarters towards an activist role; and 3. a critique of the United Nations' (UN) dominant approach in Myanmar, which has triggered a fourth, namely, 4. the contestation over the identity of the 'audiences of legitimation.' This is most aptly illustrated by the establishment of the UN-mandate fact-finding mission to Myanmar, which 'reflects' the complexity of Myanmar's strategic context, characterised by the contestation, navigation and co-optation of these now competing sources of legitimacy: the politics of personality and the politics of Rohingya victimhood.

With a view to operationalizing Frederic Megret's (2016) 'dynamic' view or conceptualization of international human rights fact-finding, it is argued that the establishment of the UN fact-finding mission to Myanmar is to be understood primarily in the context of the contested nature of the identity of 'audiences of legitimation'. Furthermore, this research study employs a process-tracing research methodology, looking to critical historical junctures where explanations challenge conventional wisdom of the literature, for example, that the UN-mandated fact-finding mission is intended to (only) discover the 'truth about the past' or conceptualization of fact-finding that conflate what is 'factual' with 'the law' or presuppose a 'fact-law distinction'. Rather, United Nations-mandated fact-finding is a form of 'discursive practise', established (primarily) with a view to the cultivation and maintenance of legitimacy.

## LIST OF ACRONYMS

Amnesty International	- AI
British Broadcasting Corporation	- BBC
Commissions of Inquiries	- COIs
Du Chee Yar Tan	- DCYT
European Union	- EU
Fact-Finding Mission	- FFM
Global Governance Institutions	- GGI
Government of Myanmar	- GoM
Head of Missions	- HOM
Human Rights Upfront Initiative	- HRUF Initiative
Human Rights Watch	- HRW
International Criminal Court	- ICC
International Criminal Law	- ICL
International Crisis Group	- ICG
International Human Rights Fact-finding	- IHRFF
International Humanitarian Law	- IHL
Myanmar Peace Support Initiative	- MPSI
National League for Democracy	- NLD
Non-Governmental Organization	- NGO
Northern Rakhine State (nRS)	- nRS
Office of the United Nations High Commissioner for Human Rights	- OHCHR
Peace Donor Support Group	- PDSG
Resident Coordinator	- RC
United Kingdom	- UK
United Nations	- UN
United Nations Development Programme	- UNDP
United Nations General Assembly	- UNGA
United Nations High Commissioner for Human Rights	- UNHCHR
United Nations Human Rights Council	- UNHRC

United Nations Secretary-General

- UNSG

United Nations Security Council

- UNSC

United States of America

- USA

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## INTRODUCTION:

On 9 October 2016, a group of Rohingya militants, equipped with machetes, attacked police stations in northern Rakhine State (nRS), one of the most impoverished states in Myanmar, looting and killing nine police officers and injuring another five.<sup>1</sup> In turn, military and police targeted and attacked Rohingya armed groups, killing many innocent civilians. Myanmar's political turmoil does not only have "political, religious, gender, ethnic, racial, class, structural and security factors", but has "local, national and transnational causes and consequences" (Moore, 2017:38). It is especially the so-called 'Rohingya problem' that brings into sharp focus "the interwoven, and multi-layered, nature of violence in Myanmar" (Moore, 2017:38).<sup>2</sup> In the wake of the events of 9 October 2016, there was a general outcry by the international community, taking to task the Government of Myanmar (GoM) for its impunity, brutality and "calculated policy of terror" (Office of the United Nations High Commissioner for Human Rights, 2017a:42). While certain analysts have contended that this series of events has revealed "a new dimension to the conflict between the Rohingya and the Buddhist majority" (Singh & Jani, 2016), others have interpreted these events:

...against the long-standing pattern of violations and abuses; systematic and systemic discrimination; and policies of exclusion and marginalization against the Rohingya that have been in place for decades in nRS (OHCHR, 2017a:42).

The politics of United Nations-mandated fact-finding goes to the heart of this research study. The 'politicization' of domestic and international fact-finding - which encapsulates the idea of a failure to observe the principles of 'universality', 'non-selectivity' and 'objectivity' (Farrell & Murphy, 2017:50) – is often couched as one of the central challenges to these bodies. On 24 March 2017, the European Union (EU), supported by the United States of America (USA), the United Kingdom (UK) and other countries, sponsored a resolution (A/HRC/34/L.8/Rev.1) which mandates an UN fact-finding mission to establish facts on violations, especially in Rakhine State (United Nations Human Rights Council, 2017). Draft resolution A/HRC/34/L.8/Rev.1 gives effect to an "independent fact-finding mission" to be selected by the President of the Human Rights Council to determine "the facts and circumstances" of the "alleged recent human rights violations by military and security forces, and abuses", in Myanmar, especially Rakhine state, including "arbitrary detention, torture

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<sup>1</sup> After the military junta's seizure of power in 1989, the new leaders formally changed the name of the country from 'Burma' to 'Myanmar': "The choice of naming the country often carries a political connotation; some democracy activists continue to call the country Burma to protest the illegitimacy of the military junta" (Tan, 2012:1645). This research study will adopt the name Myanmar without prejudice to the correctness of either choice, unless directly quoting sources will use 'Burma', or 'Burma' and 'Myanmar' interchangeably.

<sup>2</sup> With very few legal and political rights, the Rohingya community -not an officially recognised ethnic group in Myanmar – is of Bengali decent, some having migrated to Myanmar multiple generations ago, while some having migrated illegally more recently (Walton & Hayward, 2014: endnote 7).

and inhuman treatment”, “rape and other forms of sexual violence”, “extrajudicial, summary or arbitrary killings, enforced disappearance, forced displacement and unlawful destruction of property”, with the aim of “full accountability for perpetrators and justice for victims” (UNHRC, 2017).

There is a range of views regarding the purposes of this international UN-mandated fact-finding body. One school of thought contends that the fact-finding mission could assist Myanmar “down the path of democracy” (Htun & Giannini, 2017). Another school of thought, however, proposes that the mission is a political tool: “the UN appears to be intervening while it is in fact doing nothing” (Gholamzadeh, 2017). In the aftermath of the violence, two competing narratives had emerged that would set the stage for the eventual establishment of the UN-mandated fact-finding mission. On the one hand, one narrative, “used by the central government and military and reflected by ethnic Rakhine interviewees, frames the crisis using national security rhetoric” (Aron & Gilmore, 2017:4). On the other hand, Human rights narratives refocused international attention on the central government’s role in perpetuating the statelessness of the Muslim community. Given the scale of the exodus, the UN Secretary General (UNSG) Antonio Guterres spoke out, and his use of the term ‘ethnic cleansing’ cleared the path for many others to apply this name to the problem (Mahoney, 2018:21). By contrast, according to a British Broadcasting Corporation report, the Former UN Secretary General Kofi Annan said he would not describe the violence committed against Myanmar’s Rohingya minority as ‘genocide.’ Kofi Annan was appointed Chairperson of the Aung San Suu Kyi-established Rakhine Advisory Commission, mandated in 2016 to identify the factors that have resulted in violence, displacement and underdevelopment.

Fact-finding is commonly defined as a “method of ascertaining facts” through the evaluation and compilation of various information sources (Boutruche, 2011:106). The importance of international fact-finding missions has been established in international human rights law. In 1991, the General Assembly was convinced that the adoption of the *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security* would contribute to strengthening the role of the United Nations (UN) and enhancing its effectiveness in maintaining international peace and security (United Nations General Assembly, 1991). Philip Alston highlights that the

...duty arising under international human rights law to respect and protect life imposes an obligation upon governments to hold an independent inquiry into deaths where an extrajudicial execution may have taken place (Alston, 2011:81).

One way to respond to the problems with national-level Commissions of Inquiry is “to try to ensure that the necessary procedural safeguards are followed, and to increase external monitoring of the arrangements made. The other response, which is increasingly common, is

to insist that international fact-finding be undertaken, either in place of, or as a complement to, domestic initiatives” (Alston, 2011). Knuckey & Alston (2016:10) argue that while the “reality is that authentic domestic responses are ultimately the most likely to give rise to deep and enduring solutions,” the international dimensions of fact-finding can be of particular importance for two reasons:

First, meaningful and effective domestic investigations are unlikely to be facilitated by the very governments that stand accused of serious human rights violations ... This can leave some form of international involvement as an important route for breaking through the stalemate ... Second, even when governments do take action at the domestic level, there are very often flaws or limitations built into the techniques adopted ... official inquiries of this sort can be effectively captured, diverted, or muzzled by governments, and international scrutiny or prodding will often be needed (Knuckey & Alston, 2016:11).

Apart from supplementing and acting as a complement to domestic fact-finding, especially when conducted as fact-finding, international human rights documentation is seen as paving the way for “dealing with the past”. Creating a record of past abuses is indeed ‘helpful with the prosecution of perpetrators, identification of victims for reparations programs, and the planning of memorials’” (D’Alessandra, 2017:59-60).

The broad spectrum of views concerning the purposes of the international UN-mandated fact-finding to Myanmar can be divided into two broad categories. A strong case can be made that these relatively extensively researched, and verified, across-case dynamics and processes arguably underlie the establishment of the UN-mandated fact-finding mission to Myanmar. The inadequacy of domestic investigations seems to be among the *primary* reasons for why the international community ‘stepped in.’ In a public statement by Amnesty International (AI) since the events of 9 October 2016, the international human rights group states that

... none of the commissions established by the authorities are independent, impartial, effective or credible (Amnesty International, 2017:1).

The deadlock within the United Nations Security Council (UNSC) is also an important explanation for why a different UN organ gave effect to the UN fact-finding mission, namely, the UN Human Rights Council. China remains one formidable barrier to the establishment of any UN Security Council-mandated Commissions of Inquiry (COI). China, a permanent member of the Security Council with veto power, has distanced itself from the resolution adopted by the Human Rights Council to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State (OHCHR, 2017c). From this perspective, the ‘corrective’ function played by the Human Rights Council provides an important entry-point in terms of understanding the processes which underpin the establishment of the UN-mandated fact-finding mission to Myanmar. The political problem of

accountability also goes some way to explaining the processes which underlie the establishment of the UN mission to Myanmar. Steven R. Ratner (2013) outlines how fact-finding bodies, or those who create them, have responded to the 'political problem' of accountability. Ratner (2013:70) highlights that

the real aversion to and source of complaints about fact-finding bodies is fundamentally political – an aversion by states and some nonstate actors to accountability itself.

A former UN resident coordinator in Myanmar, Charles Petrie, acknowledged the likelihood of investigators gaining access were “pretty slim” for precisely this reason (quoted in Perria, 2017). There are various limitations, however, to structural explanations for the establishment of the UN-mandated

Structural explanations do not adequately take into account the timing of this UN fact-finding mission. The *tatmadaw's*<sup>3</sup> military operations have for many years been seen to involve systematic violations of human rights. Crimes such as arbitrary arrest, torture, or forced labour already featured centrally in the work on Myanmar by human rights organizations in the 1980s, and these and many other apparent human rights violations, to a certain extent, continue to preoccupy the United Nations. Even though inhibited from visiting Myanmar between November 2003 and November 2007, Paulo Sergio Pinheiro, UN Special Rapporteur to Myanmar, described the “the killing, terrorising or displacement of civilians” as part of a “deliberate strategy” of the *tatmadaw* (Haacke, 2016:805). Given the environment of armed conflict, the atrocities in his view constituted both crimes against humanity and war crimes (Haacke, 2016:805). Upon exiting his position, Pinheiro called on the UNSC to establish a Commission of Inquiry to hold to account those guilty of crimes perpetrated against ethnic minorities and “to rupture the culture of impunity to deter future mass atrocities” (Haacke, 2016:805). Tomas Ojea Quintana, who succeeded Pinheiro in May 2008, also claimed that certain human rights violations in Myanmar might entail categories of crimes of humanity or war crimes under the terms of the Rome Statute of the International Criminal Court (ICC) and called for a commission of inquiry (Haacke, 2016:805). However, neither a UNSC-mandated fact-finding mission was ever established, nor – until the establishment of the UN-mandated fact-finding mission to Myanmar – a United Nations Human Rights Council (UNHCR) - mandated fact-finding mission to Myanmar.

Apart from not adequately explaining the timing of the establishment of the UN mission in 2017, structural explanations do not sufficiently take into account how the UN mission in question 'reflects' the complexity of Myanmar's strategic context, characterised by the contestation, navigation and co-optation of the politics of legitimisation. In a news report

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<sup>3</sup> *Tatmadaw* (literally 'royal force') is the vernacular name for Burma's armed forces (Selth, 2012:2).

released by Al Jazeera on 30 May 2017, Indira Jaising, former Chair of Myanmar Fact-finding Mission, remarked in an interview with the news agency:

Minorities all over the world are facing persecution. The situation of the Rohingya community in Myanmar is especially deplorable because they face the risk of a genocide (quoted in Waduge, 2017).

She concluded saying that "We are hoping that our recommendations will make an impact and awaken the conscience of the international community" (Al Jazeera, 2017). On 27 July 2017, the United Nations released a statement underlining the replacement of Indira Jaising by Marzuki Darusman as Chair of Myanmar Fact-finding Mission. The statement did not give reasons for the replacement. But 'rumours' are that her statements made the UN mission vulnerable to 'perceived bias.' Yet, the Commission has not only directly challenged the Annan Commission's diagnosis of the situation, it has also been dubbed by the newly-appointed Chairperson as a 'complement' to the so-called 'Annan Commission,' indicating not only that who is to be recognised as an 'audience' of UN legitimisation is itself a contested question, but that the politics of personality is a key component of that politics. What gets described as a 'fact' in a human rights context has important consequences. The politics of fact-designation goes to the heart of this study, which, by contrast to a structural approach, conceptualises 'human rights fact-finding' as part and parcel of discursive strategies (Megret, 2016).

Since Myanmar commenced its transition from a military government to a nominally civilian-led one in 2010,<sup>4</sup> 'national reconciliation' has become a pervasive concept amongst its politicians and champions for peace. The 2010 election was seen as a vital opening for dialogue and cooperation, as well as a potential tool for peace in a country ravaged by more than 60 years of civil war (Sawatzky, 2018). In *Caretaking Democratization: The Military and Political Change in Myanmar*, Renaud Egretteau accentuates that, to many outsider observers, Myanmar's political context seems to have been entirely reconfigured at the turn of the 2010s. However, in contradistinction to "a flurry of news reports and political analyses jubilantly depicting an unfolding 'Burma Spring'," experienced scholars of the Burmese polity have been careful in their examination of "an ongoing incremental process of

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<sup>4</sup> "Myanmar's political opening is highly contested. Some see Myanmar's reforms as a "survival strategy of the quasi-military government to overcome the danger of factionalism and to increase regime durability by creating power-sharing institutions ... Others see the current opening as the beginning of a "protracted transition" to unfold in the years to come ... Some authors have also posited that it was the military's desire to establish domestic and international legitimacy that triggered Myanmar's elites to change ... Robert Taylor contends that it was the country's dire economic situation that stimulated change" (Bünthe & Dosch, 2015:3). Bünthe and Dosch (2015:3), however, argue that "the country's liberalisation is a deliberate strategy of the military, whose aim is to achieve economic renewal and a recalibration of foreign relations".

change – a process, as a matter of fact, which they seldom label as ‘democratic’” (Egreteau, 2016:9), arguing that the

... further one moves from Yangon or Naypyitaw, the more difficult it becomes to reconcile the optimistic narratives about positive change and liberalization with the political realities of regions where militarization, insurgent warfare and trafficking of all sorts remain a way of life (Egreteau, 2016:7).<sup>5</sup>

The so-called ‘Rohingya crisis,’ which attracted unprecedented global attention in 2012, was an exemplary case in point. In 2013, the then-Secretary-General Ban Ki-moon stressed that the South-east Asian country must continue its democratic transition and overcome inter-communal violence that was threatening it (United Nations, 2013). The 2014 US human rights report described the humanitarian and human rights crisis in Rakhine State as “the most troubling exception and threat to the country’s progress” (quoted in Haacke, 2015:66). In 2015, the UN High Commissioner for Human Rights (UNHCHR) Zeid Ra’ad Al Hussein warned that guaranteeing “accountability for the military will be a key test for the transition”. Obama had categorically linked one to the other, arguing that democratization itself is contingent on resolution of the Rohingya issue (Choudhury, 2017). With the onset of ‘intercommunal’ violence in Rakhine State in 2012, scholarly, human rights and political orthodoxies were fundamentally reshaped by the logic of ‘Rohingya’ victimhood, the ‘climactic’ moment being the events of 9 October 2016, underpinned by various continuities and discontinuities in Myanmar’s strategic context. It is this strategic context that the research study will endeavour to unpick with a view to discovering the politics behind the establishment of the UN-mandated fact-finding mission to Myanmar.

The politics of legitimation is key to UN-mandated fact-finding. A common presumption is that transitional justice, defined as “the conception of justice associated with periods of political change” (Teitel, 2003:69), will be recognized as “a legitimate and (value-) neutral tool”, since it is rooted in “international norms and standards” (Rubli, 2012:9). Undergirding this belief is the “universality of those norms and standards, such as human rights” (Rubli, 2012:9). “Due to their externality”, they appear to be indifferent to “local power struggles and political instrumentalization” (Rubli, 2012:9). Rubli (2012:9) argues that, in so doing, transitional justice champions refute “the inherent political nature of the process”. In *Do Facts Exist, Can they Be ‘Found’, and Does it Matter?*, Frederic Megret (2016:46) offers a ‘dynamic view’ of ‘international human rights fact-finding’:

...we are left with nothing but the struggle over facts, a struggle that should be appreciated at its just value as certainly not doomed but evidently fraught with ambiguities.

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<sup>5</sup> Yangon (formerly known as Rangoon) is the largest city in Myanmar. While Naypyitaw is the modern capital of Myanmar, north of former capital, Yangon.

What the UN-mandated fact-finding mission to Myanmar reveals about fact-finding is the discursive nature and dynamism of international UN-mandated fact-finding and, echoing previous studies, that agency – or personalities – is a key dimension of these politics.<sup>6</sup>

Apart from Megret (2016), however, several key authors inform the theoretical framework of this research study. In Cronin's (2002) article entitled *The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism* is a vital point of entry in this regard. Providing a theoretical backdrop, Bruce Cronin advances the argument that, in the context of the United Nations, intergovernmentalism and transnationalism are "two forces that encompass different sets of interests and reflect distinct constituencies" (Cronin, 2002:53). Bexell & Jonsson's article entitled *Audiences of (De) legitimization in Global Governance* also throws a bright light on the legitimization processes in the United Nations. In *Legitimacy in Global Governance: sources, processes, and consequences*, Bexell & Jonsson (2018:119) develop two key analytical distinctions to advance the empirical study of audiences: namely, between 'constituencies' and 'observers' of Global Governance Institutions (GGIs); and between 'targeted' and 'self-appointed' audiences.

With a view to shedding light on the overarching aim of this research study, the following research objectives – using 'process tracing' as a qualitative technique – are explored:

- evaluate how Myanmar's strategic context has evolved over time;
- examine the history of domestic and international fact-finding in the context of Myanmar;
- determine how the 'accountability debate' has evolved over time; and
- tease out how the interface between Myanmar's strategic context, the history of domestic and international fact-finding, and framings of the 'accountability debate' can be characterised.

In the final analysis, this research study demonstrates how Myanmar's strategic context has not only played a 'constitutive role' in the establishment of the UN mission, but how the UN mission, as part and parcel of these discursive processes, both challenges and reinstates

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<sup>6</sup> In *The Goldstone Report without Goldstone*, Richard Falk (2011:98-99) examines the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* and the identification the UNHRC fact-finding mission on the Gaza war so exclusively with its chair: "There was always something rather disturbing about identifying the UNHRC fact-finding mission on the Gaza war so exclusively with its chair ... One reason for this identification was probably that the typically opaque and cumbersome official UN name, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, was unusable in public discourse. More importantly, however, the degree of attention paid to the person of Goldstone reflected the media's unwillingness to resist the temptation of utilizing his known identity as a prominent Jew and an eminent international jurist to draw attention to a high-profile inquiry into controversial Israeli practices. Critics of Israel also seized upon Goldstone's long history as a Zionist and friend of Israel to lend additional credibility to the findings of the report, which, as seemed inevitable, would be highly critical".

various political compromises and agendas. This research study is comprised of four Chapters.

In Chapter 1, I provide an historical overview of United Nations-mandated Fact-finding brings into sharp focus not only several crucial political junctures in UN-mandated fact-finding, but equally scholarly understandings of UN-mandated fact-finding. In Chapter 2, by way of a literature review, I provide the conceptual backdrop to the theoretical framework employed in this research study which combines two bodies of scholarly literature, namely, concerning 'Legitimacy in Global Governance Institutions' and United Nations-mandated 'human rights fact-finding', analysing the UN-mandated fact-finding mission to Myanmar as a form of 'discursive practise' (Megret, 2016:28), established (primarily) with a view to the cultivation and maintenance of legitimacy. The value of this research is threefold. Firstly, it reveals the dynamic interplay between domestic and international fact-finding and the political – and strategic – contexts in which they are established. Secondly, this research study has interrogated how the politics of legitimation underlies the establishment of UN-mandated fact-finding missions. Thirdly, and critically, focuses on the politics of the 'here and now' and the contingencies of within-case dynamics which underlie the establishment of the UN-mandated fact-finding mission to Myanmar.

In Chapter 3, the analysis bears out that several influential events/periods – characterised by the emergence and contestation of two audiences of legitimation – have influenced the eventual establishment of the UN-mandated fact-finding mission to Myanmar. In 3.2, I trace the emergence and the politics surrounding the debate on a UN Commission of Inquiry in 2010 and Myanmar's 2011 'democratic opening' and account for the 'backgrounding' of the 'accountability debate' in international policy and scholarly circles. In 3.3, I hone in on the onset of the 2012 'intercommunal' violence in Myanmar and the political compromises underlying the establishment of the so-called 'Kofi Annan Commission, explaining how the 'backgrounding' of accountability increasingly turned into a policy of 'deflection'. In 3.4 and 3.5, I interrogate the 2016 state-sponsored violence in northern Rakhine state, the processes underlying the establishment of the UN-mandated fact-finding mission to Myanmar and the 'foregrounding' of the accountability debate. To this end, I unpack the Myanmar's strategic context and the legitimising role of the UN mandated fact-finding mission to Myanmar.

In Chapter 4, I discuss my research findings. Apart from its theoretical value, this research raises critical questions about Myanmar's strategic context, the UN-mandated fact-finding mission to Myanmar, and the contested question of the 'audiences of legitimation', employed in this research study. By way of example, there are other distinct strategic

dynamics which arguably confound, but also influence, the political dynamics of Myanmar's strategic context which are the empirical focus of this research study. Furthermore, apart from those alleged in this research study, there are various other rationales for why the genocide-claim was possibly used by the former Chairperson of the UN mandated fact-finding mission to Myanmar. Finally, subsequent UN framings of the UN mission as complementary to the so-called 'Annan Commission' need not necessarily be read in the context of the contested nature of the identity of 'audiences of legitimation'.

## CHAPTER 1

### ***The United Nations-mandated Fact-finding mission to Myanmar in Context***

#### **1.1 General Comments**

An historical overview of United Nations-mandated Fact-finding brings into sharp focus not only several crucial political junctures in the history of UN-mandated fact-finding, but advances in scholarly understandings of international fact-finding. The 1992 Yugoslavia Commission brought to light the serious consequences of operating within a fundamentally political institution and how the states responsible for creating or supporting the establishment of a commission of inquiry determine, to a great extent, the perception of the legitimacy of that commission. The proliferation of mechanisms similar to the 1992 Yugoslavia Commission has been astonishing and, based on scholarly accounts flowing from these fact-finding enterprises, forces us to consider the role of an array of audiences in the establishment of international fact-finding, and that the credibility of a fact-finding process requires the support of a multitude of key actors: transnational advocacy networks, social movements, states that are at the receiving-end of international fact-finding missions, and global media. This historical overview, thus, provides conceptual insight for the theory of UN-mandated fact-finding employed in this research study.

#### **1.2 Contextualising Human Rights Documentation**

*The plasticity of 'facts' themselves, and the negotiation of what is and is not accepted as being 'factual, is not subsidiary to conflict but central to it (Eltringham, 2003:104).*

In *The Transformation of Human Rights Fact-finding*, Sarah Knuckey and Philip Alston (2016:5,11,15) identify at least three emerging trends in the changing context of international human rights fact-finding: 1.) a surge in a diverse array of human rights fact-finding missions established by intergovernmental organizations; 2.) advancing investigative methods; and 3.) a rich scholarly literature that challenges the foundations of human rights law and critiques the contemporary practise of human rights. UN fact-finding mechanisms can in fact be part of UN peacekeeping missions when these have human rights components, or can be appointed by the Security Council, the Human Rights Council, and designated by the High Commissioner, or even by the Secretary-General (See D'Alessandra, 2017: *supra* note 54). Given the diverse array of human rights fact-finding missions established by intergovernmental organizations, it is perhaps unsurprising that many across- and within-case scholarly (especially qualitative) research studies address, either directly or indirectly,

the following cross-cutting and interrelated questions: What is 'human rights fact-finding'? What are the 'processes' that underlie the establishment of international human rights fact-finding missions? What constitutes 'credible fact-finding'?

There is a tendency for UN fact-finding, however, to be construed as an exercise which is "entirely norm-driven or at least norm-determined": "It is the norms that tell us what facts one is looking for" (Megret, 2016:36). According to the 1991 UN Declaration on Fact-Finding, reports of commissions of inquiry should be limited to a presentation of findings of a factual nature and that, in determining which facts are *relevant* facts, the Commissions should be guided by their mandate (United Nations General Assembly, 1991). Numerous contemporary commissions are instructed in their mandate to adopt international law standards as a "frame of reference" to decide which facts are "relevant facts" (van den Herik, 2014:25). Although often termed 'fact-finding missions', commissions of inquiry are either mandated to do more than this or eventually go further than this in their work,

for example in making determinations on the legal framework that is applicable to the factual situations they are called upon to investigate and on the scope of the relevant legal rules and norms at issue, as well as engaging in analysis as to whether particular acts amount to violations of the particular branch or rule of international law under focus" (Henderson, 2017).

In various respects, the 1992 Yugoslavia Commission, established by the Security Council pursuant to Resolution 780 in 1992 to investigate war crimes in the Former Yugoslavia, was unprecedented.<sup>7</sup> Cherif Bassiouni (2001), who served as the Chairman of the 1992 Yugoslavia Commission following its first chairman's resignation, wrote eloquently about some of the challenges the mechanism encountered. Bassiouni's (2001) writing brought to light the serious consequences of operating within a fundamentally political institution. According to Bassiouni (2001:31), the establishment, methods and goals of fact-finding depend on the organ or body that establishes it, the mandate given to it, and the extent of political support from the permanent Security Council members, particularly the Western ones, "which determines its real authority and effectiveness". Indeed, the organ and, therefore, the states responsible for creating or supporting the establishment of a commission of inquiry determine, to a great extent, the perception of the legitimacy of that commission. Powerful states, however, are but one player on this theoretical 'stage.'

As alluded to above, the proliferation of mechanisms similar to the 1992 Yugoslavia Commission has been astonishing. For example, since 1993, the United Nations Office of

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<sup>7</sup> D'Alessandra (2017:63) points out that this is the first time that "a domestic or international fact-finding mechanism was mandated to inquire beyond traditional human rights law, with law amongst its competencies" It was also for unprecedented in that "a United Nations established international commission of inquiry contributed directly to the establishment of an International Criminal Tribunal, and fed its report and findings to the Office of the Prosecutor" (D'Alessandra, 2017:63).

the High Commissioner for Human Rights (OHCHR) was established, and tasked to support and deploy circa 50 commissions and fact-finding missions (D'Alessandra, 2017:63). Knuckey and Alston (2016:5) highlight that, while some fact-finding activity has become relatively routinized and novel fact-finding procedures are also now being activated under the auspices of various UN human rights treaty bodies, a broad swathe of fact-finding is relatively ad hoc, taking:

... the form of diverse types of inquiries established by a range of intergovernmental bodies, both international and regional, and is often set up on a one-off basis in response to a particularly serious or politicized incident or pattern of abuses. These fact-finding bodies are differently composed, are given varying mandates, use widely differing methodologies, and tend to serve a broad range of objectives.

In this context, there is a striking contrast between the readiness of the Security Council to establish commissions of inquiry (CoI) for Lebanon and Sudan and the of United Nations Security Council investigations of Syria in its civil war, “of the two sides in the two Gaza wars, or even of something like civilian casualties caused by drone attacks in Pakistan” (Ratner, 2015:109). Stephen J Rapp highlights that, at the same time that the United Nations Security Council in New York was blocked, the United Nations Human Rights Council in Geneva was able to establish commissions of inquiry or other fact-finding missions for Syria, Iraq, and South Sudan, and also in other situations where vetoes likely would have been cast, for example, North Korea, Eritrea, Sri Lanka, and Gaza (Rapp, 2016).<sup>8</sup> An illustrative example is the 2009 *Goldstone Commission on Alleged Violations of Human Rights and International Humanitarian Law during the Gaza Conflict*.

The investigation was commissioned by the United Nations Human Rights Council (UNHRC) into war crimes allegations arising from the Gaza war (2008–09). The report was tremendously critical of the Israeli system of military justice and expressed serious doubts about Israel’s willingness to investigate and prosecute crimes (Frulli, 2012:1335). But as Richard Falk (2012:102) soberly highlights, the

... realities of UN politics are presently such that although Israel and its supporters often cannot prevent the UN from launching investigations of serious allegations of international law violations (such as arose in connection with OCL or the 2010 flotilla incident), up to now they have been able to stymie any implementation involving the establishment and activation of accountability mechanisms.

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<sup>8</sup> Van den Herik (2014:24) also contemplates the contextual possibilities at play in the proliferation of Human Rights Council-established commissions of inquiry vis-à-vis the Security Council: “It may in fact also be that, occasionally, these Geneva-based commissions rather function as a correction mechanism to New York dynamics and in particular to a paralysed Security Council. In such a case, they would represent public opinion and have the *de facto* aim to express condemnation, to present a compelling conflict narrative so as to counter the Security Council inaction or to elicit alternative involvement by the International Criminal Court”.

Unsurprisingly, the report triggered immense controversy, generated an array of follow-up analyses, and brought to public awareness “the previously invisible issues relating to fact-finding methodologies and outcomes” (Knuckey & Alston, 2016:6).<sup>9</sup> While the inadequacy of domestic fact-finding, the dynamics within the Security Council, and the ‘corrective’ function of other UN organs like the UN Human Rights Council, are among the key processes underlying the establishment of international fact-finding missions, another key political fault line that shapes the establishment of UN fact-finding bodies is the political problem of accountability. An instructive case in point is the Secretary-General’s Panel of Experts on Accountability in Sri Lanka.

The Secretary-General’s Panel of Experts on Accountability in Sri Lanka was again potentially ‘precedent-setting.’ In *The Political Dimension of International Human Rights Fact-Finding*, Steven R. Ratner (2013) sketches how fact-finding bodies –and those who establish them – have addressed to the ‘political problem’ of accountability. Ratner (2013:70) points out that

... the real aversion to and source of complaints about fact-finding bodies is fundamentally political – an aversion by states and some nonstate actors to accountability itself.

After the end of the Sri Lankan civil war in 2009, when the United Nations Secretary-General was considering creating a commission of inquiry to look into the last phase of that war, even though Ban Ki-moon could *legally* create a fact-finding body,<sup>10</sup> the issue was far more tricky *politically* (Ratner, 2013:71). Ratner explains, nevertheless, how the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, an alternative to a fully-fledged Commission of Inquiry, was not enough to “ensure acceptance and silence the critics of fact-finding”:

The government of Sri Lanka attacked the Panel of Experts when it was created, denied us access to the country, met with us only once in New York during our mandate, and vilified the report after it was issued (Ratner, 2013:71).

Ratner (2013:72) summarises that the key moral to be learned from the case study in question is that the legitimacy of a fact-finding process is not just about the science underpinning it, but the backing of important actors, a context-specific mandate, an alertness to the range of audiences who will read to a report, and a recognition of the long-term

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<sup>9</sup> Initially, Justice Richard Goldstone, when approached to lead the mission, concluded that the mandate ‘was stacked against Israel, and would have been a one-sided investigation’ (quoted in Grace, 2015:49). The Israeli Government raised “the issue of the renegotiated mandate, among other factors, to justify Israel’s decision not to cooperate with the mission” (Grace, 2014:50).

<sup>10</sup> It is accepted that Article 99 of the UN Charter does not only confer upon the Secretary General a right to bring matters to the attention of the Security Council, but that this right carries with it a broad discretion to conduct inquiries unilaterally and to engage in informal diplomatic activity in regard to matters which may threaten the maintenance of international peace and security (Farrell & Murphy, 2017:44).

objectives of the process – justice and truth for the victims of human rights abuses, national reconciliation, and an improved focus on structural violence to prevent the relapse into atrocities. Frederic Megret (2016:29) contrasts the conventional view with a more dynamic one of fact-finding as a form of “strategic practice” geared towards the production of truth claims, “but more generally the creation of social consensus”. However, a key implication of this insight, and a core argument of this research study, is that as “the spectrum of audiences” broadens in global governance, “discord is likely to grow” (Bexell, 2014:297). Moreover, audiences of legitimation are not simply ‘out there’ but are constructed through the interface between “legitimation efforts of governing bodies and the reactions of targeted or other groups to those efforts” (Bexell, 2014:297).

## CHAPTER 2

### Theoretical Framework

#### 2.1 General remarks

There are three distinct conceptualizations of United Nations-mandated fact-finding which correspond with three distinct understandings of ‘facts.’ A key feature of the first conception of international human rights ‘fact-finding’ is that it *conflates* what is ‘factual’ and ‘the law’ (United Nations General Assembly, 1991). The second conception of UN-mandated fact-finding presupposes a ‘fact-law distinction’ (Krebs, 2017). While the above two conceptions can be conceptualised as ‘conventional’ conceptualizations of international fact-finding, the third conception, which is employed in the context of this research study, is a dynamic perspective, which conceptualises ‘international human rights fact-finding’ as inherently part and parcel of ‘discursive strategies’ (Van Den Herik, 2014; Megret, 2016), particularly, ‘legitimation’ processes (Bexell & Jonsson, 2018). In the final analysis, the theoretical framework employed in this research study is informed by the works of several scholars and two branches of scholarly literature.

#### 2.2 Conventional versus ‘dynamic’ conceptions of fact-finding

As highlighted in the Introduction, fact-finding is commonly defined as a “method of ascertaining facts” through the evaluation and compilation of various information sources (Boutruche, 2011:106). Black’s Law Dictionary defines ‘fact’ as an “actual and absolute reality, as distinguished from mere supposition or opinion” (quoted in Megret, 2016:30). Fact-finding serves to illuminate “the circumstances, causes, consequences and aftermath” of an event or episode from a “systematic collection of facts”, which “can be done to dispel or verify allegations” (Boutruche, 2011:106). A number of non-governmental organizations (NGOs) have highlighted the importance of the UN mission in this regard. Theoretically, the process is chiefly geared towards “clarifying the disputed facts through impartial investigation” which may then enable “the parties’ objective of resolving the dispute. Among the parties it is often a difference of opinion about the facts that gives rise to the dispute in the first place” (Neale, 2011:85). It is, therefore, vital:

... to avoid giving biased mandates to inquiry bodies. Investigating situations of armed conflict should involve scrutiny of the behaviour of all parties involved. The requirements of balance and objectivity impose this condition, as does the nature of the investigated events and an essence of the violations of the laws of armed conflict or otherwise international humanitarian law (Neale, 2011:86).

A key feature of this conception of international human rights ‘fact-finding’ is that it *conflates* what is ‘factual’ and ‘the law’. As highlighted in the foregoing section, according to

the 1991 UN Declaration on Fact-Finding, reports of commissions of inquiry should be limited to a presentation of findings of a factual nature and that, in determining which facts are *relevant* facts, the Commissions should be guided by their mandate (United Nations General Assembly, 1991). Numerous contemporary commissions are instructed in their mandate to adopt international law standards as a “frame of reference” to decide which facts are “relevant facts” (van den Herik, 2014:25). A criticism of this conception is that it is ‘blind’ to the diversity of products that fall under the label of ‘facts,’ and to some of the fragile premises that seem to underscore the notion (Megret, 2016:29). The draft resolution which gives effect to the fact-finding mission to Myanmar mentions categories of crimes for investigation, for example, torture, where an absolute prohibition exists under international human rights law, with torture also characterised as a grave breach of International Humanitarian Law (IHL), and as a crime under International Criminal Law (ICL).<sup>11</sup>

A partial critique of this notion of ‘fact-finding’ and an alternative conception of ‘fact-finding’ presupposes a ‘fact-law distinction.’ In *The Legalization of Truth in International Fact-Finding*, Shiri Krebs defines the “legalization of truth” phenomenon as “the adoption of legal discourse to construct and interpret facts”. While the 1991 General Assembly resolution defined fact-finding in terms of obtaining “detailed knowledge of the relevant facts,” most U.N. fact-finding missions were not created to fulfill the goal of ascertaining facts alone:

Instead, these fact-finding missions were specifically tasked with other goals, such as determining state and individual responsibility for violations of international law, making recommendations regarding reform and reparations, and promoting accountability (Krebs, 2017:95-96).

These commissions have a “strong accountability focus” and, on occasion, even engage in “naming and shaming exercises” (van den Herik, 2014:4). The commissions are thus overall authoritative in nature and they employ the language of law, and progressively more even international criminal law, “to assert their authority” (2014:4).

In *The Accountability Turn in Third Wave Human Rights Fact-Finding*, Federica D’Alessandra explains that a “first stretch” of these mandates happened around the early to mid-1990s when, “besides international human rights law as understood within the UN system”, fact-finding bodies and commissions of “the third wave” started monitoring and assessing compliance with international humanitarian law, “when these operated in relation to international or non-international armed conflicts” (D’Alessandra, 2017:65). Likewise, since the mid-2000s, a “second stretch” to the relevant body of law appears to have occurred, “reaching beyond international human rights law and international humanitarian

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<sup>11</sup> D’Alessandra (2017) crucially highlights that, in international criminal law, “torture can be constituted as a crime against humanity, a war crime, and as an act of genocide.”

law,” to encompass international criminal law as a constituent element of the legal framework applicable to these monitoring bodies (D’Alessandra, 2017:65). D’Alessandra (2017:65) explains that

human rights inquiries have largely explained that their understanding of accountability goes beyond that of criminal prosecutions, ... scholars have highlighted a limited application of international criminal law as emphasised within their mandates, which ‘can be inferred from the explicit reference in the mandate to, for example, ‘crimes’ and ‘identifying those responsible’

This preponderance of language is evident when surveying the mandates of UN commissions of inquiry and other investigative mechanisms set up since the mid-2000s. Apart from mandating the UN fact-finding mission to Myanmar “to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular Rakhine state,” the draft resolution also stipulates, after listing various categories of violations that implicate distinct bodies of international public law, that these investigations should be carried out “with a view to full accountability for perpetrators and justice for victims” (Human Rights Council, 2017). Krebs (2017:97) explains that the ‘legalization of truth’ ‘echoes’ the ‘naming and shaming’ strategy adopted by many non-governmental organizations (NGOs). While this conception of ‘fact-finding’ also relies on a strong notion of facts as existing, it nonetheless suggests a note of scepticism about the diversity of products that fall under the label of ‘facts,’ and some of the fragile premises that seem to underscore the notion. Crucially, it upholds the a ‘fact-law’ distinction:

It is clear from this data that the past decade has brought a meaningful rise not only in the number of fact-finding missions, but also in the adoption of legal discourse and concrete legal goals such as accountability (Krebs, 2017:96-97).

This framework can, nevertheless, can be further contextualised. According to Larissa van den Herik (2014:34), the overarching distinction between “traditional and contemporary commissions of inquiry” does not correspond to “the fact/law distinction in the sense that traditional commissions were pure fact-finders and contemporary commissions are law-apppliers” (2014:34). “The fact/law distinction is simply not that easy to make” as fact-based “findings may...have as many or even more legal implications as legal characterizations” (2014:34). The overarching distinction between traditional and contemporary commissions is not their recourse to international law, “but rather the underlying purposes of their mission” (2014:34).

In *Do Facts Exist, Can they Be ‘Found’, and Does it Matter?*, Frederic Megret (2016:28) offers a ‘dynamic view’ of ‘international human rights fact-finding.’ She argues that:

‘Facts’ are part and parcel of discursive strategies. This does not tell us anything about whether facts exist in some essential way, but it does tell us something

about the existence of a background politics of fact designation, and an inevitable tendency to compete for 'facts'.

In some contexts, the capacity to portray one's activities as driven by 'facts alone' may significantly bolster one's legitimacy, since to "claim that something is a fact is to claim a certain authority, which one may of course want to claim for a variety of ends" (Megret, 2016:28). In *From Design to Implementation: The Interpretation of Fact-finding Mandates*, Rob Grace (2015:28-29) highlights that because the context from which fact-finding mandates arise is political in character, the text of fact-finding mandates reflects political compromises struck between "different entities within a mandating body," "the political biases of members of the mandating entity" and "the general lack of technical expertise held by the mandators".

This research study examines the UN-mandated fact-finding mission to Myanmar as a form of 'discursive practise' (Megret, 2016:28), established (primarily) with a view to the cultivation and maintenance of legitimacy. As such, it combines two bodies of scholarly literature. Apart from the scholarly literature on UN-mandated fact-finding, which recognises the 'accountability turn' in international human rights fact-finding, this mini-dissertation draws on the scholarly literature on Legitimacy in Global Governance Institutions. In so doing, it assesses the UN-mandated fact-finding mission to Myanmar as a mechanism through which

...various individuals, groups, governments, and institutions vie to map out a narrative of the past that legitimates their agendas or desire for justice, to assert or reject the right to legal redress for and the moral outrage about 'the crime of all crimes', and to acknowledge or disavow memories, experiences, suffering, and losses linked to mass murder (O'Neill, 2010:195).

Legitimation is the process by which actors seek to build legitimacy for a rule or ruler (Hurd, 2007). "Where legitimacy as a belief is a subjective and an individualistic quality", legitimation is a process that is intrinsically "social and political" (Hurd, 2007). Actors and institutions continuously work to legitimize their power, "and challengers work to delegitimize it" (Hurd, 2007). "Material incentives and normative appeals" are distinct strategies for legitimation and their realization hinges on how the audience responds to them (Hurd, 2007). In contrast to studies which focus on legitimation *strategies*, this research study hones in on the 'audiences of legitimation.'

The value of this research is threefold. Firstly, it reveals the dynamic interplay between domestic and international fact-finding and the political – and strategic – contexts in which they are established. Secondly, this research study has interrogated how the politics of legitimation underlies the establishment of UN-mandated fact-finding missions. Thirdly, and critically, it focuses on the politics of the 'here and now' and the contingencies of within-

case dynamics which underlie the establishment of the UN-mandated fact-finding mission to Myanmar. At the heart of a fact-finding mission is a struggle over what is a “fact”, which is not about what happened but about what narrative about events is accepted as legitimate, and by whom. To this end, this research project employs two key constructs: ‘fact-finding as a ‘strategic exercise’ and ‘audiences of legitimation.’

## **2.3. Theoretical Framework**

### **2.3.1 Fact-finding as a ‘strategic exercise’**

In positing a relationship between power and legitimacy, or between practical capacity and social sanction, one crucial question remains — in which social constituency must an actor command legitimacy for his or her power to be augmented? (Reus-Smit, 2007:164)

This question posed by Christian Reus-Smit— and the fundamentally contested nature thereof – lies at the heart of the newly mandated UN fact-finding mission with Myanmar. With a view to operationalizing Frederic Megret’s (2016) ‘dynamic’ view or conceptualization of international human rights fact-finding, this research study argues that the establishment of the UN fact-finding mission to Myanmar is to be understood primarily in the context of the contested nature of the identity of ‘audiences of legitimation’. Furthermore, this research study employs a process-tracing research methodology, looking to critical historical junctures where explanations challenge conventional wisdom and hypotheses of the literature, in this case, that the UN-mandated fact-finding mission is intended to (only) discover the ‘truth about the past.’

In *Do Facts Exist, Can they Be ‘Found’, and Does it Matter?*, Frederic Megret offers a ‘dynamic view’ of ‘international human rights fact-finding’: “Human rights fact-finders...work is embedded in a highly peculiar, historically situated attempt at establishing facts that are relevant to the understanding of what constitutes human rights violations” (Megret, 2016:36). “Ultimately,” according to Frederic Megret, “facts are constructed by our sense of what are socially relevant and salient facts” (Megret, 2016:36). Megret (2016:46) describes ‘fact-finding’ as

...a practice, one that is broader ultimately than its name suggests and includes the ability to legitimise, communicate, and strategize about facts. In the end, though, we are left with nothing but the struggle over facts, a struggle that should be appreciated at its just value as certainly not doomed but evidently fraught with ambiguities.

It stands to question, however, how will this conception of human rights fact-finding be ‘operationalized’ in the context of this research study with the UN-mandated Fact-finding

Mission to Myanmar as the empirical focus? To this end, I employ Bexell & Jonsson's (2018) notion of 'audiences of legitimation'.

### **2.3.2 'Audiences' of (de)legitimation**

In *The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism*, Bruce Cronin (2002) explains that the UN system consists of at least four distinct categories of actors serving at least three different constituencies: "the intergovernmental decisionmaking bodies (Security Council and General Assembly), the affiliated organizations and specialised agencies, the Secretariat, and the associated NGOs". "Its constituencies", Cronin (2002:64) continues, "are the member states, local populations who are the recipients of programs and services, and the broadly defined international community". He continues that, within the UN, "transnationalism and intergovernmentalism reflect distinct constituencies and therefore produce different behavioural incentives to the actors involved" (Cronin, 2002:64). As an International Organization, the United Nations is, according to Alan James,

...fundamentally nothing more than an association of sovereign states ... each member will be trying to use the United Nations to further its own interests ... States have not joined out of respect for the 'UN idea' (but) but for what they can get out of it (quoted in Cronin, 2002: 55).

As a Transnational Organization, the 'UN system' is also a complex network of specialised agencies, NGOs, and affiliated semiautonomous organizations that serve a variety of constituencies in a wide variety of areas (Cronin, 2002:58). However, according to Bexell & Jonsson (2018:120), thus far, "systematic knowledge is lacking on how, when, and why agents of (de)legitimation target certain audiences and the conditions under which audiences are instead self-appointed reactors to legitimation attempts".

Existing investigations of legitimation and delegitimation examine primarily the *practices* employed by agents in attempts to boost or undermine the legitimacy beliefs of others. Far less is known about the nature, the construction, and the reactions of the *audiences* of (de)legitimation efforts. Bexell & Jonsson (2018:119) develop two key analytical distinctions to advance the empirical study of audiences: namely, between 'constituencies' and 'observers' of GGIs; and between 'targeted' and 'self-appointed' audiences. While 'constituencies' are "audiences with institutionalised political bonds to a governing authority," "observers lack such a connection" (Bexell & Jonsson, 2018:120). Another key distinction is, thus, between targeted audiences – those constructed by agents of (de)legitimation strategies – and self-appointed audiences – those constructed by respondents themselves (Bexell & Jonsson, 2018:120). It is a matter of empirical inquiry to ascertain which audiences are applicable in a given (de)legitimation process, "and to explain

how these audiences vary between different (de)legitimation settings” (Bexell & Jonsson, 2018:122).

Against the backdrop of Myanmar’s evolving strategic context, the central contention of this research study is that the key political problem at issue in the establishment of the UN mission is that the identity of the ‘audiences of legitimation’ is itself a contested question, reflecting a broader tension between intergovernmentalism and transnationalism, “two forces that encompass different sets of interests and reflect distinct constituencies” (Cronin, 2002:53). The various processes at play can, thus, be summed up in terms of 1.) the tension between ‘intergovernmentalism’ and ‘transnationalism’; 2.) the emergence of two ‘audiences of legitimation’; and 3.) the contestation of the identity of the ‘audience of legitimation’.

## **2.4 Methodology**

The underlying methodology is informed by Stefano Guzzini’s (2012:4) interpretivist, historical and multi-layered approach to process tracing whereby links between possible causes and observed outcomes are mapped out in a way that take the actors’ understandings of international events and phenomena in question as the starting point of analysis, rather than the events and phenomena themselves. Four influential events/periods – characterised by the emergence and contestation of two regimes of legitimation – influenced the eventual establishment of the UN-mandated fact-finding mission to Myanmar. Drawing on both primary and secondary resources, documentation will be used as a data gathering technique.

Drawing on two sets of scholarship concerning ‘Legitimacy in Global Governance Institutions’ and United Nations-mandated ‘human rights fact-finding,’ respectively, in the following section I provide an in-depth empirical and theoretical analysis of the motives of the United Nations in Myanmar, the key actor being studied in this research study, and the context of the establishment of the UN-mandated fact-finding mission to Myanmar. In Chapter 3.2, I trace the emergence of the politics of personality (Steinberg, 2010, Selth, 2017), by interrogating the debate on the UN Commission of Inquiry (Tan, 2012), the 2011 ‘Burmese Spring’ (Egreteau, 2016), and the ‘backgrounding’ of the accountability question in international policy and scholarly discourses (Mathieson, 2018; Popham, 2016). In so doing, I evaluate the motives of the United Nations in the context of the Two Faces of the United Nations (Cronin, 2002) and, with Bexell & Jonsson’s (2018) notion of the ‘audiences of legitimation’, the United Nations legitimation processes in the context of its liberal ‘peace-building’ agenda (Petrie & South, 2013; Haacke, 2015). The central ‘audience of legitimation’ in this phase is especially Aung San Suu Kyi and her Burmese followers and international supporters (Zarni, 2013).

Chapter 3.3 traces the emergence of the politics of ‘victimhood’ as a source of legitimacy by examining the 2012 outbreak ‘inter-communal’ violence in Rakhine State (Leider, 2018; Prasse-Freeman, 2014), the establishment of the ‘Annan Commission’ (Advisory Commission on Rakhine State. 2017), and the ‘deflection’ of the accountability debate (Mahoney, 2018; Lubina, 2018). The United Nations’ motives, in light of the escalating ‘Rohingya crisis’, are interrogated utilising the “Two Faces of the United Nations’ and, drawing on the notion of ‘audiences of legitimation, the United Nations legitimation processes in the context of the United Nations Human Rights Upfront Initiative (Lynch, 2017; Mahoney, 2018), with the ‘audience of legitimation’ increasingly being the Rohingya movement. While there was rising and pointed criticism of Aung San Suu Kyi and her civilian-based government in light of the ‘Rohingya crisis,’ the United Nations’ legitimising beliefs in train since the 2011 democratic opening were fundamentally intact. The partnership between the international community, including the United Nations, and the newly-elected Myanmar government would find expression in terms of the establishment of the so-called ‘Annan Commission’, a ‘national entity’ established to identify the factors that have resulted in violence, displacement and underdevelopment in northern Rakhine State.

In Chapters 3.4 and 3.5, tracing the above now-competing sources of legitimacy, I hone in on the 2016 ‘State-sponsored’ violence (UNHRC, 2017), the establishment of the UN-mandated fact-finding mission to Myanmar (OHCHR, 2017), and the ‘foregrounding’ of the accountability debate (British Broadcasting Corporation. 2016; Al Jazeera, 2017; Waduge, 2017; Moulin, 2017; Aron & Gilmore, 2017). The United Nations’ motives, in light of the events of 9 October 2016, are interrogated utilising the “Two Faces of the United Nations’.

Furthermore, drawing on the notion of ‘audiences of legitimation, I examine the United Nations’ legitimation processes in the context of the establishment of the United Nations Fact-Finding Mission to Myanmar. The key ‘audience of legitimation’ is the ‘Rohingya movement’, This is signalled by the use of the term ‘genocide’ by the then-Chairperson of the International Fact-finding Mission (IFFM). While, the key ‘audience of legitimation’ is the ‘Rohingya movement’ the identity of the audience of legitimation is ultimately itself a contested question, significantly within the United Nations itself. I argue that the resolution can also be couched within the international community’s liberal peacebuilding agenda, a key constituency of the United Nations’ legitimation processes being the Myanmar government and, specifically, the so-called ‘Annan Commission.’

## CHAPTER 3

### ***The politics behind the establishment of the UN-mandated fact-finding mission***

#### **3.1 General Remarks**

By way of departure, it stands to question: What is the nature of Myanmar's strategic context? What are the attributes of the United Nations-mandated fact-finding mission to Myanmar? How can the interface between Myanmar's strategic context, domestic (and international) human rights fact-finding, and the 'accountability debate' be characterised? But crucially, how has this strategic context, if at all, played a 'constitutive' role in relation to the UN-mandated fact-finding mission? With a view to operationalizing a 'dynamic' conception of international human rights fact-finding, this research study demonstrates how a Myanmar's strategic context has not only played a constitutive role in the establishment of the UN mission, but how the UN-mandated fact-finding mission to Myanmar, as part and parcel of these discursive processes, both challenges and reinstates various political compromises and agendas. The analysis bears out that several influential events/periods – characterised by the emergence and contestation of two audiences of legitimation – have influenced the eventual establishment of the UN-mandated fact-finding mission to Myanmar.

#### **3.2 *The politics of personality as a source of legitimacy: the debate on the UN Commission of Inquiry, the 2011 'Burmese Spring', and the 'backgrounding' of accountability***

... Policy decisions over whether to sanction or to engage, to provide aid or to isolate, signify the key dilemmas to which governments, corporations, international organisations and non-governmental organisations (NGOs) are faced with in their response to the crisis of poor governance and instability in Myanmar (Roberts, 2006).

... relying on a victim-perpetrator framework to frame official investigations of the past injustice plays into the fear that such investigations will become paralysing and undermine the pursuit of political reconciliation or ongoing reform (Leebaw, 2011:17).

In *The Lady and the Generals: Aung San Suu Kyi and Burma's struggle for freedom*, Peter Popham (2016:268) describes how, in their never-ending war against ethnic peoples on the borders, "the crimes committed by the Burmese army have been closely documented by brave investigators and collected in many chilling reports". UN special human rights rapporteurs struggled with scant success to jolt the regime's conscience "by publishing details of these crimes". Nothing worked until 2009 when President Omar al-Bashir of Sudan, formerly a brigadier in the Sudanese army, was indicted by the International Criminal Court (ICC) in The Hague for his alleged crimes, "not dissimilar to those which the Burmese

army was accused of”, in Darfur (2016:268). This was the first time a sitting head of state had been indicted by the Court.<sup>12</sup> It was not surprising that prominent voices lobbied loudly for Myanmar’s generals to get the Omar al-Bashir treatment (2016:268). However, there was no indictment, and no further steps were taken towards launching one.

Since independence in 1948, the Myanmar state has battled dozens of different armed secessionist movements, “and none of those conflicts have been resolved in favour of a rebel group”: “Among the many ethno-linguistic groups that have taken up arms against the government, the largest and most tenacious has been the Karen” (Robinson, 2010:472). “The Panglong Conference of 1947, hosted in the town of Panglong in Shan State,” Dukalskis (2017:722) highlights, “brought together leaders of various ethnic groups, including the Burmese, Chin, Kachin, and Shan”. “The aim”, Dukalskis continues, “was to discuss independence and post-independence political arrangements, and the end result was the Panglong Agreement, signed February 12, 1947” (Dukalskis, 2017:722). The military’s conviction of the military that

... they are charged with an immutable responsibility to uphold Myanmar's unity and sovereignty is a genuine belief and should not be dismissed as simple propaganda (Roberts, 2006:48).

The overarching political calculus was, according to Peter Popham, that

... the military must stay in power to protect the nation from disintegration: that was the mantra ... But the wars were never won but dragged on and on, so there was neither cause nor opportunity for the military to return to their barracks. Burma was in a permanent state of civil war, and this justified every form of abuse and repression (Popham, 2016:xxvi).

The *tatmadaw*’s military operations have for many years been seen to involve systematic violations of human rights. Crimes such as arbitrary arrest, torture, or forced labour already featured centrally in the work on Myanmar by human rights organizations in the 1980s, and these and many other apparent human rights violations, to a certain extent, continue to preoccupy the United Nations. However, in the 1990s even critical assessments of the *tatmadaw*’s military operations did not generally charge Myanmar’s junta with mass atrocities: “This changed in the 2000s, as the focus of international concern shifted towards the *tatmadaw*’s military offensives then waged in Kayin (Karen) State and Bago Division” (Haacke, 2016:804). Not only have there been several in depth assessments of the international responses to Myanmar’s human right’s record,<sup>13</sup> but the exact substance, form,

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<sup>12</sup> The International Criminal Court was established through the Rome Statute, which “creates a permanent international court, stipulates how the Court shall conduct its proceedings and outlines how states shall cooperate with the Court” (Nouwen, 2012:173).

<sup>13</sup> “Despite these allegations, Myanmar’s former or current political-military leaders have not faced significant scrutiny or pressure from international organizations and the major powers” (Haacke,

scope and trajectory of international approach(es) have been the subject of on-going negotiation and evolution based on an array of (strategic and other) factors. An illuminating gauge of Myanmar's strategic context, which will be examined in this research study, is the UN Secretary General's Good Offices Mandate and how states have positioned themselves vis-à-vis this mandate which, now in its twenty fifth year, represents one of "the longest such diplomatic efforts in the history of the world organization" (Magnusson & Pedersen, 2012:1). The UN mission has expanded. This has not only empowered new actors but has also created new constituencies.

The person who arose as the international face of the democracy movement, Aung San Suu Kyi, was a newcomer to politics who had only of late returned to Burma following her academic studies in Britain (Zarni & Taneja, 2015:48). "As a political prisoner for almost fifteen years", Suu Kyi was widely praised for her "moral and physical courage", her "unwavering commitment to the principles of universal human rights" and her "steadfast advocacy of peaceful political change" (Selth, 2017). She had headed the executive committee of the National League for Democracy (NLD), the democratic opposition, as National Secretary, and even at times when communications between her and the committee were prohibited and prevented her views, or those alleged to be hers, to be publicly voiced, they have influenced policy, as members of the committee have explained (Steinberg, 2010:39). In certain spheres, criticisms of her policies abroad have been opposed by charges that one cannot condemn her positions because she is not able to defend herself (Steinberg, 2010:39).

Advocacy of human security dominated Myanmar policy discussions and media coverage. According to Zarni (2013), this was "because other Western interests in Burma were not deemed very important". Furthermore, the West was stuck in its "choice method" of "anointing a single voice – that is, Aung San Suu Kyi – as the sole voice of the voiceless Burmese people, 'the hope of Burma'" (Zarni, 2013). This has often meant that especially Western Nations, for whom the default position was non-engagement, have been very critical of the Good Offices mandate, which has generally striven for a policy of 'engagement' with the Military dictatorship.<sup>14</sup> Sanctions (since 1997, extended in 2004 and 2008) have

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2016:807). The UNSC never "came close to referring the situation in Myanmar to the ICC ... the General Assembly has adopted resolutions, which have concluded in a call to protect civilians and to put an end to the military operations targeting civilians in the ethnic areas ... Also, the UN Human Rights Council (HRC) in the 2000s strengthened its message of concern, but ultimately it only called on Naypyidaw to undertake a full, transparent, effective impartial, and independent national investigation into all reports of human rights violations and to bring to justice those responsible in order to end impunity" (Haacke, 2016:808).

<sup>14</sup> The politics surrounding the Good Offices mandate has been unpicked by Anna Magnusson & Morten B. Pedersen (2012), who argue that it "has frequently seemed as if the good offices have been scapegoated for the collective failure of Myanmar's opposition and the international community

been one instrument employed by the international community in response to the gross violation of human rights in Myanmar. Although

there has been a living debate about the impact on sanctions (with both sides having honest arguments), generally it must be admitted that the sanctions failed to produce anticipated results (...Myanmar's transition to democracy) due to non-participation of Asian neighbours in the sanctions scheme and the xenophobic nature of Burmese regime (Lubina, 2018:82).

"The coercive control of state behaviour", Cronin (2002:65) argues, is likely "the most important intergovernmental function of the UN", requiring "the use of military and economic sanctions, something that only states can apply effectively". Since Myanmar commenced its transition from a military government to a nominally civilian-led one in 2010, 'national reconciliation' has become a pervasive concept amongst its politicians and champions for peace. The 2010 election was seen as an vital opening for dialogue and cooperation, as well as a potential tool for peace in a country ravaged by more than 60 years of civil war (Sawatzky, 2018). Apart from the 2010 election, the new government, led by the Union Solidarity and Development Party (USDP) under U Thein Sein, started implementing several reforms, including, among others, "greater freedom of the press, association and assembly; the release of political prisoners; and the opening-up of the political sphere – though in a limited fashion" (Dosch & Jatswan, 2015:100). More significantly, these reforms enabled Myanmar to repair its damaged relations with the West, particularly the United States and the EU (Dosch & Jatswan, 2015:100). However, while "Myanmar's military and current regime have opted for organised forgetting of abuses and blanket amnesty for past crimes committed by the state" (Dukalskis, 2015:3), the

... question of how to come to terms with Burma's legacies of violence and human rights abuses has been on the agenda of several domestic and international civil society groups, scholars, and the United Nations (Dukalskis, 2015:3).

The locus of debate being the United Nations Security Council, these efforts reached a climactic turning-point in 2010 when the debate on a UN Commission of Inquiry gathered unprecedented momentum, bringing into sharp focus – to use Cronin's (2002) turn of phrase – the "Two Faces of the United Nations". In March 2010, following years of pressure to investigate Myanmar's government for its human rights violations, Tomas Ojea Quintana, the United Nations special rapporteur for human rights in Myanmar, "called for the establishment of a UN Commission of Inquiry into Myanmar's violations of international humanitarian and human rights law" (Tan, 2012:1653). He repeated this appeal a year later in March 2011 that

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to induce the military regime to democratize. And with everyone now clamoring to claim credit for the recent reforms, the actor that has received the least credit seems to be the UN" (Magnusson & Pedersen, 2012).

“a Commission would have investigated reports of violations of international humanitarian and human rights law in Myanmar, and consequently recommend further action to address the violations” (Tan, 2012:1653). At one point, many countries, including the United States, embraced the creation of a UN inquiry into Myanmar's violations of human rights, with some nations questioning the value of such a commission and others not voicing their support (Tan, 2012:1654). For instance,

... India pointed out that such an action would be ‘counter productive’ and may produce adverse effects on the country's population.<sup>[...]</sup> Although Japan is considering backing a Commission, other Asian nations did not join the call for an investigation. China actively campaigned against the establishment of a Commission by urging UN officials and leaders of European and Asian governments to oppose the initiative.<sup>[...]</sup> In particular, China put pressure on the United States' support of an inquiry into Myanmar (Tan, 2012:1654-1655).

On October 28, 2010, U.S. Secretary of State Hillary Clinton publicly confirmed the United States' support for the establishment of “an international commission of inquiry through close consultations with our friends, allies, and other partners at the United Nations” (quoted in Tan, 2012:1654-1655). Despite popular Western support for the Commission, however, the process never transpired, unlike the past Commissions that have been established by the Security Council. In a report by Harvard Law School's International Human Rights Clinic, international law experts pressed for the UN Security Council to establish a Commission for Myanmar, contending that the enormity of violations are comparable to – or are even greater than – those in the former Yugoslavia and Darfur (International Human Rights Clinic, 2009:2). Various explanations have been advanced for why the UN Commission of Inquiry was never established.<sup>15</sup> It is also the contention of this research study that the non-establishment of the fact-finding mission can be explained in terms of the dominance of intergovernmentalism as a force in world politics (Cronin, 2002), but for very different reasons to those articulated by Tan (2012). According to Mathieson (2018), international effusion for the democratic transition

... had no place for accountability measures or transitional justice, as the response to the nationwide peace process made clear: diplomats, donors, and political leaders wanted no form of accountability for past crimes (Mathieson, 2018).

The argument to ‘protect’ Myanmar's ‘democratic transition’ has frequently found expression in various ways, including the ‘peace versus justice’ argument. In this debate, peace was seen as “a prerequisite for the consolidation of democracy, the promotion of

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<sup>15</sup> For example, according to Audrey Tan (2012:1655), by “examining the history and structure of the UN Security Council commissions and discussing the establishment of Commissions into both the former Yugoslavia and Darfur, we can gain further insight into reasons why a Commission for Myanmar was never established”.

development, and the protection of human rights” (Dosch & Sidhu, 2015:100), an approach, moreover, that “does not seem to factor in the possibility of backward steps and is based on a scenario of ongoing, linear political and economic reforms” (Dosch & Sidhu, 2015:85). Not only was there the incentive of international and national cross-cooperation,<sup>16</sup> according to Zarni & Taneja (2015:47), far-reaching international admiration for Suu Kyi’s leadership certainly helped centre international policy on the domestic requirements and processes for democratic reform, “and ultimately legitimised Suu Kyi’s long-standing insistence on dialogue with the regime” (Zarni & Taneja, 2015:47). According to Andrew Selth (2017), “there was [also] an element of political opportunism on both sides”. In as much as Aung San Suu Kyi was key to legitimating the Myanmar government in the eyes of the international community,<sup>17</sup> the politics of personality legitimised the international community’s peacebuilding aspirations, which included a host of targeted ‘audiences,’ with Norway playing the leading role.<sup>18</sup> These ‘audiences’ throw light on delegated representative authority as a key aspect of legitimacy and legitimation processes. They also put a spotlight on how ‘audiences’ are produced in the first place. To quote Bexell & Jonsson (2018:129), audiences are not formed in advance of (de)legitimation processes, but rather are generated in the course of those processes and shaped by patterns of exclusion and inclusion.

Apart from the international community’s peacebuilding aspirations, which were also legitimised by the United Nations, there are a range of explanations (e.g. reactions to reforms) why Myanmar’s democratic reforms elicited a recalibration of external relations. For example, according to Selth (2012:7), due to “this more nuanced approach”, Myanmar became much less of a barrier to the expansion of “US relations with other Asia–Pacific countries”. Bunte, Marco and Dosch’s (2015:6) argue that building “some kind of truce and a genuine reconciliation with the National League for Democracy (NLD) was a precondition for a recalibration of external relations”. Therefore, since taking office, the Thein Sein

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<sup>16</sup> “From a position of relative isolation, Myanmar has seen a tremendous change in engagement by broader actors within the international community, particularly major bilateral donors, the UN, and international NGOs. All of these actors have waded in with enthusiasm in an effort to address areas of tremendous need that are now accessible because of new openings. Perhaps the most dramatic example of this can be seen in the case of donors, including Australia, Finland, Japan, Norway, Switzerland, and the UK who have all announced substantial increases in bilateral assistance to be applied towards humanitarian, development and peacebuilding needs” (Clarke, 2013:15).

<sup>17</sup> As highlighted in the previous section, EgretEAU insightfully highlights that, from its perspective, the post-junta leadership led by President Thein Sein saw the “political consecration” of ‘The Lady’ as an opportunity to “restore its image in the eyes of the international community” (EgretEAU, 2016:69). As Western governments began to review their sanctions policy as early as 2012 – once Aung San Suu Kyi was first elected to parliament – the wider diplomatic community reopened its doors to a Burmese state long treated as a pariah (EgretEAU, 2016:7).

<sup>18</sup> Norway has maintained a distinct status in the country both as a result of its peacebuilding efforts and the legacy of the Peace Prize, an act which brought the political and security situation in Myanmar to global attention and prompted greater international pressure for Ms. Suu Kyi’s release and for reforms both in governance and foreign policy as well as a halt to the ethnic conflicts in the country (Alexandra & Lanteigne, 2017:224).

government has endeavoured to mend its relationship with the foremost opposition party (Bünthe, Marco and Dosch's, 2015:6). Understanding that he could only restore the country with the assistance of opposition leader Daw Aung San Suu Kyi, U Thein Sein approached her and bid her to Naypyidaw on 17 August 2011 (Bünthe et al., 2015:6). Her approval to the president's reform pathway was pivotal to making Western states end their economic sanctions (Bünthe et al., 2015:6). A day later, she stated that she believed that 'the president wants real change' (quoted in Bünthe et al., 2015:6):

In November 2011, the Thein Sein government amended the political-party registration law and the election law, which allowed the opposition leader to run in future elections (quoted in Bünthe et al., 2015:6)

Aung San Suu Kyi abandoned her "confrontational approach" towards the regime and directed "the opposition towards reconciliation" (Bünthe et al., 2015:6).

At the heart of the politics of personality as a legitimation strategy is the construction of Aung San Suu Kyi as paragon of human rights and democracy. According to Peter A. Coclanis (2018), Western Liberals projected their own hopes onto 'the Lady'. "No living foreigner", according to David I Steinberg, "has shaped contemporary United States policy toward a single country more than Aung San Suu Kyi" (Steinberg, 2010:36). The character of the charisma now associated with Aung San Suu Kyi varies by location (Steinberg, 2010:37). Internally in Myanmar, it seems to have originated initially from the aura attributed to her father and later to a combination of her father's renown and her own abilities (Steinberg, 2010:37). Internationally, however, for those who have no emotional attachment to his significant part in Myanmar independence and the formation of the Union of Burma in 1948, it has been an outcome both of her own capacities and activities, "her symbolic personification of democracy coupled with both a seeming and real vulnerability," and "the bumbling and often oppressive nature of the Burmese military leadership" (Steinberg, 2010:37). Various authors have, however, painted a much more complicated relationship between United States and Aung San Suu Kyi (see Lubina, 2016).<sup>19</sup> Key strategic centres of political influence (and audiences of legitimation) were, in order of importance,

Aung San Suu Kyi and her Burmese followers and international supporters, individual and institutional, from grassroots to 'high-level advocacy' (a loose global coalition of activists, advocates, lobbyists, and institutions in the fields of

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<sup>19</sup> In *It's complicated: United States, Aung San Suu Kyi and U.S.-Burma relations*, Michał Lubina (2016) has argued that until "2011 Aung San Suu Kyi has been the point of reference for U.S. policy towards Burma/Myanmar. Her struggle with the Burmese military junta has attracted widespread attention and global affection towards her. As a result, Suu Kyi enjoyed unquestioned support from subsequent U.S. presidential administrations. This however, changed in 2011, when Suu Kyi was politically sacrificed during the U.S. pivot to Asia. Nevertheless, she faced it bravely and did not give in; just changed her tactics from confrontation to cooperation with the post-military regime. That gave her a stunning electoral victory in 2015 and power from behind-the-scenes in Myanmar. Suu Kyi's relations with Washington have remained cordial, yet complicated ever since".

Human Rights, Environment, Policy and Legislative Affairs, Corporate Social Responsibility, Religion, Social Justice, and Women's Affairs); and ethnic minority advocates. Their work was grounded in liberal ideals including freedom, democracy and human rights, as well as non-violence and new environmental/ecological outlooks and ideas (Zarni, 2013).

In the final analysis, the central 'audience of legitimation' was especially Aung San Suu Kyi and her Burmese followers and international supporters. In as much as (the release of) Suu Kyi encouraged a discussion on the question of the appropriate accountability mechanisms, 'The Lady' was ultimately pivotal to the abandonment of the notion: "Fear of being dragged to The Hague may well have persuaded the generals to improve their image. But the converse may also be true: once the risk of indictment had faded, thanks to Suu's intervention, the urgency of further reform dwindled away. After half a year of change, the process ground to a halt. Suu would not hear of any ICC indictment, and the generals knew it. The panic was over" (Popham, 2017). International deference to Suu Kyi's leadership led to the 'backgrounding' of the 'accountability debate.'<sup>20</sup> In the context of "efforts to manipulate the environmental structure by creating new audiences and new legitimating beliefs" (Suchman, 1995:587), the politics of personality, a mechanism for 'backgrounding' the accountability debate, would have enduring political and strategic currency. Egretau (2016:7) continues that, comparing

popular yet chaotic and bloody revolts of the Arab world in the early 2010s and the Eurasian colored revolutions of the 2000s, a flurry of new books, reports and magazine covers appeared, praising the unexpected advent of a non-violent 'Burmese Spring'.

While introducing a new horizon of strategic and policy coordination between the international community and the Myanmar government,<sup>21</sup> Myanmar's evolving strategic context would place the international community in the potentially dichotomous position of maintaining 'credibility' in the eyes of two key political constituencies. It also "marked the beginning of a divided approach to promotion of human rights in Myanmar within the UN

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<sup>20</sup> For a discussion on the 'backgrounding' and 'foregrounding' of questions of social justice in the context of international fact-finding, see Sharp (2016:4), who clarifies how fact-finding, as practiced by NGO heavyweights, can be thought of as an elite or hierarchical activity, among others, "in terms of the problems to which global fact-finders tend to devote most of their attention and the ways in which the practices and methodologies of fact-finding have tended over time, intentionally or not, to privilege certain questions of social justice over others".

<sup>21</sup> For example, in *Routledge Handbook of Contemporary Myanmar*, Andrew Selth (2017:31) states that, although "Myanmar continues to attract criticism from governments and organisations, for various reasons, one striking aspect of its re-emergence as an international actor in recent years has been the readiness of foreign countries to renew or strengthen ties with the country's armed forces and police. Before the advent of Thein Sein's reformist government, any relationship with the security forces was politically difficult, if not (in the case of some Western democracies) impossible. Yet, since 2011 several governments, international institutions and private foundations have offered Myanmar aid in this sector. These approaches were enthusiastically welcomed by Naypyitaw and, albeit more cautiously, by Aung San Suu Kyi".

system” (Olsen, 2016:42). Apart from Aung San Suu Kyi and her Burmese followers and international supporters, the international community’s recalibrated approach had a range of ‘audiences.’ The dramatic shift in US policy has been widely welcomed, but even experienced Myanmar-watchers have been unable to agree on what actually prompted Hillary Clinton’s visit. It was variously described as a calculated move to leave behind the discredited policies of the Bush era, an effort to boost Thein Sein’s standing and encourage the domestic reform process,

... a gesture of support to Aung San Suu Kyi, part of a broader attempt by the Obama Administration to re-engage with the Asia–Pacific region — as outlined in the president’s address to the Australian parliament that November [...] — and a ploy by the US to score points in its strategic competition with China. Burma’s shadowy defence relationship with North Korea has also been of concern (Selth, 2012:9-10).

A scientific consensus was also developing which gave additional authority or credibility to international peacebuilding efforts.<sup>22</sup> The Civil Society Dialogue Network (CSDN) is a three year project funded by the Instrument for Stability of the European Commission aimed at facilitating dialogue on peacebuilding issues between civil society and the EU institutions. In a paper entitled *Mapping of Myanmar Peacebuilding Civil Society – produced as background for the CSDN meeting entitled ‘Supporting Myanmar’s Evolving Peace Processes: What Roles for Civil Society and the EU?’* – Charles Petrie and Ashley South (2013:7), both independent consultants and writers, stress that “the international community can support peace-building initiatives which build trust and confidence in the peace process, and at the same time test the sincerity of the Myanmar government and Army, and NSAGs to deliver the peace which citizens long for”. It is also significant that the United Nations, especially by way of the Secretary-General’s Good Offices mandate, indirectly and directly ‘legitimised’ international peacebuilding efforts:

It is fair to conclude that over the years the UN’s good offices helped cultivate the ground for those shifts by making “engagement” a less dirty word and highlighting to all sides the cost of maintaining their zero-sum positions (Magnusson & Pedersen, 2012:88).

There are also various direct ways by which the United Nations legitimised international peacebuilding efforts. On the governmental level, institution-building between Norway and Myanmar in the area of peacebuilding has been high on the agenda (Alexandra

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<sup>22</sup> In this regard, “epistemic communities can help formulate policies. Their role in this regard will depend on the reasons for which their advice is sought. In some cases, decision makers will seek advice to gain information which will justify or legitimate a policy that they wish to pursue for political ends. An epistemic community’s efforts might thus be limited to working out the details of the policy, helping decision makers anticipate the conflicts of interest that would emerge with respect to particular points, and then building coalitions in support of the policy” (Haas, 1992:15).

& Lanteigne, 2017:224). Norway created the “twin institutions of the Myanmar Peace Support Initiative (MPSI) and the Peace Donor Support Group (PDSG) in 2012 at the request of Myanmar authorities” (Alexandra & Lanteigne, 2017:224). The MPSI was initiated to engage with “the Myanmar government, the country’s military, as well as non-state armed and political groups, civil society actors and communities, as well as international actors”, to deliver tangible support to “the ceasefire process and emerging peace process” (Alexandra & Lanteigne, 2017:224). Crucially, in terms of its political-institutional bonds, the PDSG founding members included Norway, Australia, the United Kingdom, the European Union, the United Nations and the World Bank, but later expanded to include Canada, Denmark, Finland, Indonesia, Japan, Sweden, Switzerland, and the United States of America by 2015 (Olsen, 2016:supra note 7).

In 2010, David I Steinberg (2010:50) indicated that many “want to see justice done for the many egregious abuses that have been perpetrated on the Burmese peoples, but that is mostly unlikely under any scenario at this time”. Clara Portela (2013), however, paints the key considerations and dilemmas faced by Europe and the United States – and posed by the evolving strategic context – at the time. Myanmar’s rise from decades of military dictatorship poses “the West with a dilemma” (Portela, 2013:36). While Europe and the United States are eager to acknowledge the “transition to democratic rule” and to ensure that they secure an “economic toehold in a country with such immense natural resources”, there are still major issues regarding Myanmar’s human rights record, “in particular the treatment of ethnic minorities such as the Muslim Rohingyas” (Portela, 2013:36). Circumstances for labourers in “Burmese mines, building sites and factories, including the use of forced labour,” Portela (2013:36) stresses, “remain a real worry”. To be relevant to all the social and political forces in Myanmar, what the European Union needs to do is “to help them address their most pressing problems – and to be seen to be doing so” (Portela, 2013:36).

### ***3.3 The emergence of the politics of ‘victimhood’ as a source of legitimacy: ‘Inter-communal’ violence in Rakhine State, the ‘Annan Commission’, and the ‘deflection’ of the accountability debate***

In September 2016, the Myanmar government formed the Advisory Commission on Rakhine State. The inclusion of international members and the appointment of Kofi Annan as its chairman signalled that the central government recognized the value of international co-operation on Rakhine while buying the government time (Lambert, 2017:38).

In September 2016, the Kofi Annan Foundation and the Office of the State Counsellor (Aung San Suu Kyi) established an Advisory Commission on Rakhine State to identify the factors that have resulted in violence, displacement and underdevelopment. The Advisory Commission on Rakhine State website describes the so-called Annan Commission – the

majority of whose members are from Myanmar – as a ‘national entity’ and as a “a neutral and impartial body which aimed to propose concrete measures for improving the welfare of all people in Rakhine state” (Kofi Annan Foundation, 2016). Yet, it was not mandated to investigate specific cases of alleged human rights violations and it was requested by the State Counsellor not to use the terms ‘Bengali’ or ‘Rohingya’ but in its place ‘the Muslim community in Rakhine’ (House of Commons, 2018:17). With the onset of inter-communal violence in Myanmar, the crisis in Rakhine state became another sphere of strategic and policy coordination and negotiation,<sup>23</sup> eventuating in the establishment of the so-called ‘Kofi Annan Commission.’ Mahoney stresses that

The international community ... wholeheartedly supported the Rakhine Advisory Commission, starting with Aung San Suu Kyi’s first announcement of its creation (Mahoney, 2018:31).

While the Commission’s is framed ‘to identify the factors that have resulted in violence, displacement and underdevelopment,’ a more nuanced analysis of the establishment of the Annan Commission takes into account the contingencies of Myanmar’s evolving strategic context, especially the emergence of the politics of ‘Rohingya’ victimhood.

In June 2012, a little over a year after the new quasi-civilian government came to power, riots broke out in western Rakhine state after the rape and murder of a Buddhist girl by three Muslim men: “Rakhine Buddhists retaliated by killing ten Muslims in an attack on a bus, and the fighting quickly spread between Rakhine Buddhists and Rohingya Muslims, with Rohingya Muslims suffering a disproportionately greater loss of life and property” (Walton & Hayward, 2014:7-8). In October 2012, violence again burst across Rakhine state, “bringing the death toll to at least 200, and with more than 100 thousand displaced” (Walton & Hayward, 2014:7-8). Although the conflict in Rakhine state initially appeared to be an isolated incident fueled by specific regional tensions, “violence directed at Muslims soon appeared in other parts of the country. In the central Myanmar town of Meikhtila (in ethnic Burman territory),” protests on March 2013 gave rise to many deaths “as Buddhists burned Muslim homes, mosques, and schools in response to a jewelry store dispute and the murder of a Buddhist monk by a group of Muslims” (Walton & Hayward, 2014:7-8). Walton & Hayward continue that:

Anti-Muslim violence also occurred in May 2013 in the town of Lashio, located in Shan state (an area with active armed, ethnic-opposition groups that occasionally clash with the Burmese military). Another flare-up of riots

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<sup>23</sup> “As a joint project of the Government of Myanmar and the Kofi Annan Foundation, the costs of the Advisory Commission were shared. The Government of Myanmar covered a significant proportion of the costs; the balance was mobilised by the Kofi Annan Foundation from governmental partners. The Kofi Annan Foundation received support for its Rakhine Commission work from the Governments of Denmark and Norway, as well as from the Swedish Postcode Fund” (Kofi Annan Foundation, 2016).

occurred in and around Thandwe, a town in Rakhine state, in early October 2013. President Thein Sein was already en route to the region when the violence erupted, and he visited affected areas and met with local officials (Walton & Hayward, 2014:8).

With the onset of 'intercommunal' violence in Rakhine State in 2012, scholarly orthodoxies were fundamentally reshaped by the logic of 'Rohingya' victimhood. In *Moral Quandary in Myanmar studies: Looking at the Rohingya crisis as an outsider*, Hunter Marston (2017), who explores the divergent perspectives of international scholars and the people of Myanmar, avers that analysts and scholars of Myanmar "seem split on the issue". While many struggle to reconcile their support for the democratically elected government with their consternation at its inability to check the rise of radical Buddhist nationalism and the violence that has plagued Rakhine State, others have been jolted into new activist postures and ready to depart from "the traditional neutrality and detached objectivity prized in the realm of academia" (Marston, 2017). Tensions started to emerge between the existing legitimating beliefs and Myanmar's changing strategic context. After sectarian violence broke out between the Muslim Rohingya and Buddhist Rakhine in western Myanmar in 2013,

a clear narrative developed. Given that thousands of Rohingya were killed and hundreds of thousands were forced from their homes, and given that these numbers significantly outstripped the life of property lost by the Rakhine, common sense began to congeal around a general understanding: the Rohingya, the most marginalised of Burma's Muslims, are the clear victims (Prasse-Freeman, 2014:117).

According to Leider (2018:104), post-2012 accounts on the 'Rohingya' built on the track record established by the Western human rights reports from the 1990s, "which commodified Rohingya victimhood after the exodus of the 1991-1992 as a narrative of helpless and discriminated Muslim minority". The dominant account of a binary conflict between a Buddhist state's security apparatus backed by xenophobic nationalists on the one hand, and a disenfranchised Muslim populations on the other "has supported a description of Rohingya victimhood" that currently possesses a "hegemonic grip" over Rohingya-related debates and conversations among "diplomats, political leaders, the media and the international public" (Leider, 2018:104).

Worked up by human rights defenders, the accounts of Rohingya victimhood early on resulted in calls for retributive justice directed at the state and security forces (Leider, 2018:101). The Rohingya were increasingly called "the most persecuted minority in the world", a label the origins of which was increasingly attributed (rightly or wrongly) to the United Nations (Ibrahim, 2016). Rallying around the politics of victimhood, the onset of intercommunal violence occasioned the rise of a new strategic centre of political influence. According to Jacque Leider, there has been a rise in "a new front of international Rohingya

caretakers (NGOs, think tanks, academics, and legal experts) who have used a purely human rights-based approach to indict the Myanmar authorities about discrimination of the Rohingya Muslims” (Leider, 2018:107). The international community’s legitimization processes took on a new quality with the rise of a new front of international Rohingya caretakers. In contrast to the ‘targeted audiences,’ ‘constructed’ by international efforts peacebuilding efforts, these ‘audiences’ are ‘self-appointed’. This draws attention not only to the fact that they do not have institutionalised channels to participate in decision making at a GGI – and must influence the United Nations through other means – but to the fact that groups may constitute themselves as *self-appointed* audiences, even when they are not – in comparison to targeted audiences – recognised as an audience by the agents of (de)legitimation.

In light of the escalating ‘Rohingya crisis,’ tensions would arise between the two strategic centres of influence highlighted thus far, which would find expression, at least partly, within the UN system itself in terms of the United Nations Human Rights Upfront (HRUF) Initiative,<sup>24</sup> the focal point of debate being between the human rights and the development components of the United Nations.<sup>25</sup> In 2015, The *Myanmar Times* captured the controversies within the United Nations as follows:

A fierce debate within the highest echelons of the United Nations over how to deal with Myanmar on the issue of the Rohingya is moving from behind closed doors into the public domain, casting doubts over whether the UN body has formulated a coherent strategy (Dinmore, 2015).

The article, quoting a UN official, pits Prince Zeid against Renata Lok-Dessalien in no uncertain terms: “It is Prince Zeid versus Dessallien and she is feeling the heat. She is a big supporter of the Rakhine chief minister and has bought the government line”. In *The Failed UN Mission in Myanmar*, The Irrawaddy, assessing, among others, the sudden termination of Renata Lok-Dessallien stint as UN Resident and Humanitarian Coordinator, indicates that dependable sources testified that Lok-Dessallien had been critiqued for neglecting

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<sup>24</sup> Too often has the United Nations system failed to mobilize all of its tools to protect populations from serious human rights violations: “A notable example is the UN’s inadequate human rights response in Sri Lanka in 2009, during the conclusion of the country’s long-running civil war. In 2013, the UN launched the Human Rights up Front (HRUF) initiative to avoid such failures in the future and to create a more accountable, coherent and prepared system ... As presented by the UN, Human Rights up Front has three interlocking goals: (1) to transform the UN’s organizational culture, (2) to make operational changes that frame the UN’s work on human rights protection as a priority for all UN entities and (3) to empower UN officials as they work with member states on achieving the aforementioned goals” (Kurtz, 2015:4).

<sup>25</sup> While the Resident Coordinator system “is ‘owned’ by the entire system, it nevertheless remains managed by the UN Development Programme, the central development actor of the UN” (Kurtz, 2015:28). In *The Contribution of Human Rights to Protecting People in Conflict*, Michael Keating and Richard Bennett (:350) state that “[o]ne of the key areas of tension is the widely held view that advocating for human rights will jeopardize the international community’s relationship with the host government. Due to tensions with the government that can result from human rights advocacy, international actors, including the UN, often prioritise other areas of work, such as political, humanitarian, and development agendas.”

Myanmar's human rights situation. The mission's "tread-softly approach" has been challenged by some other senior officials, primarily U.N. High Commissioner for Human Rights Zeid Ra'ad Al Hussein and former Deputy Secretary-General Jan Eliasson, who was mandated with implementing the former U.N. Secretary-General Ban Ki-moon's U.N. Human Rights Up Front Initiative, "which called for placing the promotion of human rights at the center of the U.N.'s work in the field" (Lynch, 2017). But they faced, according to Lynch, stiff resistance from United Nations Development Programme's (UNDP) former executive director, Helen Clark,

...and the former special envoy, Vijay Nambiar, according to former U.N. officials and internal U.N. documents reviewed by FP. In private meetings, Clark and Nambiar repeatedly argued that frank criticism of Myanmar's human rights conduct would be counterproductive and that the government was doing its best to improve, the officials said (Lynch, 2017).

In Andrew Gilmour's (2014) words, HRUF provides "conceptual cover and institutional backing" for activism driven not only by senior UN officials, but also by civil society and member states. The HRUF initiative draws attention not only to the self-appointed audiences of the United Nations in light of the onset of the 2012 intercommunal violence, but to UN efforts to 'target' these audiences. In spite of this tension and these contestations, however, there are various reasons why they did not lead to the 'foregrounding' of the 'accountability debate.'

In January 2014, a violent episode took place in Du Chee Yar Tan (DCYT), a village in Rakhine state that, according to Walton & Hayward, 2014:8), "underscores the complex politics surrounding incidents of religious violence". At the time, President U Thein Sein had agreed to the opening of an Office of the High Commissioner for Human Rights (OHCHR) in a series of pledges to US President Barack Obama,

... with the president's office taking steps towards agreeing to a full office of the rights organization to help with capacity building and monitoring and reporting. Soon that initiative was delayed over disagreements between the government and the UN over the alleged massacre in a village in Arakan State called Du Chee Yar Tan (Mathieson, 2018).<sup>26</sup>

It is uncertain what impact the differences over Du Chee Yar Tan had "on institutional trust in the government's cooperating with the UN rights regime (Mathieson, 2018). The government responded to ensuing criticism of these attacks by nominating a new Chief Minister to lead Rakhine State, "and his job was to bring the situation under control and rebuild some broken relationships" (Mathieson, 2018). He reopened the space in central Rakhine for humanitarian operations, but always holding to the same discourse: "the

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internationals were at fault for insufficiently caring about the ethnic Rakhine population” (Mahoney, 2018:18). In light of this ‘legitimacy critique’ by the Myanmar government, UN framings of the ‘Rohingya crisis’ soon became increasingly beholden to the argument for ‘protecting’ Myanmar’s democratic transition. According to Liam Mahoney (2018:18):

The crisis in Rakhine State is complex, but international actors have focused on a one-dimensional analysis focused on the aspect of local intercommunal conflict with the ethnic Rakhine, and deliberately underemphasized the more important and influential dynamic of the decades-long national and military strategy of segregation, confinement, deliberate impoverishment, and ethnic cleansing.

The argument for ‘protecting’ the democratic transition made the policy of silence sound like a positively good thing. It was all very convenient for everyone, serving neatly to avoid tougher problems: “A fundamental problem was that this approach treated the state actors as partners in responding to a humanitarian crisis, rather than perpetrators of the human rights abuses causing that crisis” (Mahoney, 2018:23). This contrasts with Leider’s (2018:102) line of argument, according to whom, it is striking that matters of peace and reconciliation have been “painfully absent from conversations on communal relations in Rakhine State”, while they have shaped “the core of political conversations on promoting democracy in Myanmar’s ethnopolitical eco-system for many decades”.

This ‘partnership model’ would find expression in terms of the establishment of the so-called ‘Annan Commission.’ Even though Aung San Suu Kyi credibility was not, as yet, ‘conceptually’-hinged to the ‘Rohingya crisis,’ a defining feature of this period was the fact that Myanmar’s ‘democratic transition’ and the need to address the ‘Rohingya issue’ were seen as ‘mutually-dependent.’ In 2013, the then-Secretary-General Ban Ki-moon stressed that the South-east Asian country must continue its democratic transition and overcome inter-communal violence that is threatening it (United Nations, 2013). The 2014 US human rights report indeed describes the humanitarian and human rights crisis in Rakhin State as “the most troubling exception and threat to the country’s progress” (US State Department 2013: 1) (quoted in Haacke, 2015:66). The brunt of the criticism prior to the elections was levelled against the military. In 2015, the UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein warned that guaranteeing “accountability for the military will be a key test for the transition” (OHCHR, 2015). Obama had categorically linked one to the other, arguing that democratization itself is contingent on resolution of the Rohingya issue (Choudhury, 2017). At this stage, however, the State Department stressed that, although it is “without question that [the Rohingya] continue to face persecution, we did not determine that it was on the level of genocide” (Lewis, 2016). This indicates that the ‘Rohingya’ movement was increasingly a targeted audience, one with – as indicated above – increasing political-

institutional links within the UN itself. This changed with the 2016 general elections and the election of Aung San Suu Kyi as State Counsellor and the de facto leader of Myanmar.

In 2016, in an article for the Brookings Institute entitled *Aung San Suu Kyi's new government: What to look for in Myanmar*, Lex Rieffel (2016) lists 5 policy areas that can serve as measures of the new government's progress. For the first 'policy area' *Relations with the armed forces and the peace process*, Rieffel stresses that since "the NLD election victory last November, Daw Suu has worked hard to obtain support from the military establishment for the NLD's policy agenda". Rieffel (2016) highlights that by

... all accounts, she has met fierce resistance and has had to accept many troubling compromises, as petty as where the swearing in of President Htin Kyaw on March 30 took place. But the military is important to sustain domestic peace. This won't come easily. Many rounds of negotiations led by the government-supported Myanmar Peace Center yielded a partial agreement last October, but attacks by both sides have continued without interruption.

Rieffel (2016) continues that there is "no outreach to the Rohingya minority community, and not a single Muslim is included in the new government", concluding that peace "ultimately depends on creating a meaningful federal structure that is grounded in amendments to the 2008 Constitution".

Burma/Myanmar seems to be a perfect ground for transitional justice as it has been a playground for civil war since 1948 (in last three decades limited to Borderlands) and a long-failed transition to democracy that seemed to finally succeed in 2015. According to Lubina (2018:78), "the prospects of achieving (some sort of) transitional justice in Burma/Myanmar are today as remote as they had been before 2011". Lubina continues, however, that the post-2015 political context in Myanmar has produced circumstances where transitional justice is neither desired by the majority of political actors nor conceivable in the predictable future: "There are several important political reasons behind this agenda, most of which can be classified as a "peace" argumentation within the peace vs justice debate" (Lubina, 2018:89). First of all, NLD government has "prioritised peace and reconciliation" and focused on "reconciliation between leaders of the NLD and the military"; in this approach, reconciliation is understood as between the NLD (the former democratic opposition) and the military (Thomson, 2016)" (Lubina, 2018). Lubina (2018) continues that

Suu Kyi herself has repeated her message about "healing past wounds" between military and opposition many times ... Moreover, Suu Kyi's stance on restoring peace in the country (ending the smouldering, yet still active conflict on the peripheries) is vague (neither she nor her officials have not made any concrete statements) and based on the principle of non-irritating the military.

Thus far, Lubina concludes, "this has not produced breakthrough results as Tatmadaw continues its traditional, violent approach to solving ethnic problems which backfires [on] Suu

Kyi (particularly on the Rohingya issue)".<sup>27</sup> Faced with demands for legitimization both domestically *and* internationally, Aung San Suu Kyi established the Annan Commission. As highlighted above, the credibility of Aung San Suu Kyi depended increasingly upon her ability to resolve the Rohingya crisis. Significantly, the Commission, as an area of national and international cooperation and negotiation, also reflects certain political compromises struck between the international community and the Myanmar government. The establishment of the Commission reflects the increasing pressure on the military and – by extension – on Myanmar’s civilian-based government due to the politics of Rohingya victimhood, with which – an examined in the next section – it soon became entangled. Liam Mahoney argues that the ‘Annan Commission’ was “a mechanism designed by the state, not to resolve the Rohingya crisis, but to deflect the pressures they faced about this crisis” (Mahoney, 2018:31).

A BBC article published on 6 December 2016 gave strength to this argument when, in the aftermath of the event of 9 October 2016, it claimed that “the Former UN Secretary General Kofi Annan says he would not describe the violence committed against Myanmar’s Rohingya minority as ‘genocide’” (BBC, 2016). Given the key strategic changes in Myanmar’s strategic context at the time, however, it is more likely that the key ‘audience’ at the time of its establishment were key powerbrokers within the United Nations architecture itself. In *Can Kofi Annan’s Commission Solve the Rohingya Conundrum*, Kipgen (2016) argues that the “timing of Annan’s visit is important for the Myanmar government because it happens at a time when the attention of the international community, including the media, is relatively focused on the Southeast Asian nation”:

First, Annan’s visit comes right after the highly vaunted 21st century Panglong conference where the Myanmar government is seeking to secure peace and reconciliation with the country’s ethnic minorities. Several dignitaries, including Ban Ki-moon, the incumbent UN secretary general and successor of Annan himself, attended the conference ... Second, the commission’s first visit also comes days before Suu Kyi’s planned visit to the United States, where she will meet President Barack Obama and also address the 71st session of the UN General Assembly.

While there was rising and pointed criticism of Aung San Suu Kyi and her civilian-based government in light of the ‘Rohingya crisis,’ the legitimising beliefs in train since the 2011

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<sup>27</sup> Even before assuming her role as State Counsellor, Aung San Suu Kyi was the subject of international scrutiny. In an article for *The Guardian* entitled *Why is Aung San Suu Kyi silent on the plight of the Rohingya people?*, Sara Perria asks: “how could such an iconic figure of human rights be so reticent when it comes to defending an ethnic minority from her own country?” Perria argues that “Burma’s opposition leader appears to be cowed by her need to dampen ethnic tensions and win votes from an electorate in the thrall of Islamophobia”, concluding that: “Aung San Suu Kyi might decide to maintain her silence, calculating it is in her interests to have the government on its own to deal with any backlash across the country but especially in Rakhine as the elections draw near” (Perria, 2015).

democratic opening were fundamentally intact. In 2016, Suu Kyi sat down with Obama in the Oval Office. Hoping “the message on democratic reforms had been received in Myanmar,” Obama lifted U.S. sanctions that had been in place for almost two decades (Dias, 2017). “Essentially you were restricting the type of investment that could pull Burma toward the international community”, says Ben Rhodes, President Barack Obama’s Deputy National Security Adviser: ‘We believed that if she and her government were more stable and confident in their position, that they would be in a stronger place to take risks on behalf of the Rohingya’” (Dias, 2017). Indicative of the mood at the time, in his report to the United Nations General Assembly’s (UNGA) Third Committee on the situation of human rights in Myanmar (A/70/332),

... the Secretary-General invited member states to consider a gradual scaling down of the good offices mandate by the end of 2016, as well as other modes of engagement thereafter, but there seem to be different views among member states on this proposal (Security Council Report, 2016).

This meant that, in many ways, Antonio Guterres waded into a policy vacuum on Myanmar when he was elected last year. The U.N. General Assembly had just terminated the post of U.N. special representative to Myanmar, a signal of the international community’s views that Myanmar’s democratic transition, “now led by the Nobel Peace Prize-winning leader Aung San Suu Kyi”, was on course and the requirement for “foreign intervention in the country’s politics had passed” (Lynch, 2017). With the onset of the events of 9 October 2016 and the establishment of the UN mission, however, the politics of victimhood would grow in direct tension with the politics of personality as a source of legitimacy and, by extension, the identity of the audience of legitimation would itself become a fundamentally contested question.

### ***3.4 Navigating two competing sources of legitimation: ‘State-sponsored’ violence, the establishment of the UN-mandated fact-finding mission to Myanmar, and the ‘foregrounding’ of the accountability debate***

... in the current situation, there is no neutral ground on which the conflict can be described and judged impartially. And silence is no alternative either, in view of the humanitarian disaster. But those expressing their views must be aware that they will inevitably become a part of the conflict (Ebbighausen, 2017).

On 9 October 2016, a group of Rohingya militants, equipped with machetes, attacked police stations in northern Rakhine State (nRS), one of the most impoverished states in Myanmar, looting and killing nine police officers and injuring another five. In turn, military and police targeted and attacked Rohingya armed groups, killing many innocent civilians. . At the time, the international community did not only find itself clearly on one side of the ‘peace versus justice’ debate, and fully behind the government position regarding the ‘communal’

nature of the 'Rohingya crisis,'<sup>28</sup> but – as indicated above – gave full support to the Daw Aung San Suu Kyi government-sponsored 'Kofi Annan Commission'. In contrast, however, to previously struck political compromises where the politics of personality was the overriding legitimization technique, a similar 'compromise' – given the propitious coalescing of at least four factors – was not strategically and politically feasible. This brought into sharp focus not only the "Two Faced of the United Nations" and the emergence and contestation between distinct 'audiences of legitimation,' but the 'foregrounding of the accountability debate,' setting the terms for a debate that would lead to the eventual establishment of the UN-mandated fact-finding mission to Myanmar.

There was increasing international debate and division about the credibility of Aung San Suu Kyi in the aftermath of the attacks. Two competing narratives have emerged: "One narrative, used by the central government and military and reflected by ethnic Rakhine interviewees, frames the crisis using national security rhetoric" (Aron & Gilmore, 2017:4). National security discourse has been employed by the central government and the military before to frame the Rakhine State conflict, "focusing on fears of Muslim migration into northern Rakhine" (2017:5). In the months after the attacks, this language has markedly increased. Government statements and government-sponsored media outlets have categorized the attacks as 'terrorist' in nature, a framing that validates a heavy-handed military response as indispensable to protecting national security and sovereignty:

Similarly, the government and military have used national security rhetoric to respond to international criticism of its handling of the crisis, downplaying abuse allegations through both a government-appointed investigatory commission headed by former general and current Vice President Myint Swe and through national media sources (Aron & Gilmore, 2017:5).

On the heels of this argument was a scathing legitimacy critique by the Myanmar government of the international community, which found expression in its lost report with UN Special Rapporteurs, especially Yanghee Lee. The new government of Suu Kyi, "predicted to be an ardent supporter of her mandate" (Mathieson, 2018), soon became more suspicious. Subsequent to the violence by security forces against Rohingya Muslims in Arakan State in October 2016 in the wake of an attack by Rohingya militants, "that attitude turned increasingly to rancor" (Mathieson, 2018). The relationship between the State Counsellor and the Special Rapporteur soured. The post-August 25, 2017 violence and Suu Kyi's stubborn refusal to recognize the scale of human suffering "has terminally severed the

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<sup>28</sup> Prior to events of 9 October 2016, there was sustained "emphasis on intercommunal over center-periphery dimensions to the conflict in international narratives, thereby reinforcing the intercommunal divisions locally" (Aron & Gilmore, 2017:4).

NLD's commitment to domestic and international human rights promotion" (Mathieson, 2018).

Before the UN fact-finding mission, three national commissions were established to investigate the 9 October 2016 attacks on border police posts by armed groups and the subsequent 'clearance operations' conducted by the Myanmar security forces (Amnesty International, 2017:1). On 1 December, President Htin Kyaw established the "Investigation Commission" with the mandate to "probe into the background situations that led to violent attacks" that occurred on 9 October and 12 and 13 November as well as "the truth about the incidents, and ... whether existing laws, rules and regulations were observed" (quoted in Amnesty International, 2017:1). Although the mandates of the Annan Commission and the Investigation Commission are different, "they nevertheless have some over-lapping aspects, which gave rise to some public confusion over the mandates of the respective commissions" (Advisory Commission on Rakhine State, 2017:16). While the findings of these UN missions have been debated and discredited, the debate on the 'credibility' of Aung San Suu Kyi brought into sharp focus the two strategic camps of influence. The international community, appalled by the events, turned to Suu Kyi, Nobel laureate and titular head of what amounts to a dual civilian-military government, to solve the problem or at least denounce the violence (Steinberg, 2017). In a controversial address, Aung San Suu Kyi had broken her silence on the Rohingya crisis in Myanmar:

In it, she claimed her government did not "fear international scrutiny" over its handling of violence in Rakhine state. But she was criticised for what some saw as her ongoing reluctance to address the crisis and the government's role in it (The Guardian, 2017).

The locus of the debate has been contestation over the nature of Aung San Suu Kyi's relationship with the military. While, on the one hand, some social and political commentators were more sympathetic, stressing that the newly elected government has tough choices, having to settle decades-long ethnic conflicts without upsetting the military (Dapice, 2017), others have interrogated the argument – long entrenched in international policy and human rights discourses – that lays emphasis on the "delicate power balance between malevolent forces of the military establishment and the benevolent forces of the democratically-elected civilian government," some claiming that the threat of a 'military coup' is a politically-manufactured myth (Ibrahim, 2018). The High Commissioner of Human Rights, Zeid Ra'ad Al Hussein, would later comment to the BBC that "She was in a position to do something ... She could have stayed quiet – or even better, she could have resigned" (Baynes, 2018). This debate was not limited to scholarly circles, but became a key fault-line in the human rights and policy communities:

Her unwillingness to speak out against the military crackdown, which came in response to insurgent attacks in western Rakhine State, has prompted some former admirers to suggest that Suu Kyi be stripped of the Nobel Peace Prize she was awarded in 1991 (Nakamura & Gowen, 2017).

In the aftermath of the events of 9 October 2016, Human rights narratives refocused international attention on the central government's role in perpetuating the statelessness of the Muslim community:

While international actors interviewed did not contest the security issues at stake, the discourse used by many emphasized the impact of military operations on the Muslim population within the security zone. Focus has fallen particularly on access restrictions which have worsened the humanitarian needs of already-vulnerable communities, as well as the reported grave human rights violations (Aron & Gilmore, 2017:5).

Aron & Gilmore (2017:5) continue that International narratives have “provoked backlash among government and military actors,” who feel that human rights organizations and international media have diminished the presence of “an extremist threat to the country and dismissed the military’s duty to respond to that threat”. According to Leider (2018:109), by “the end of 2017,” there seemed to be a prevailing belief among the international community that applying pressure on the Myanmar authorities (and especially the military) is the sole way to enforce “the return, the security and the implementation of basic rights for the Rohingya”, while supporting the elected government “to proceed with the recommendations of the Kofi Annan Advisory Commission report”. “It looks as if the narrow, normative approaches that had dominated Western policies and journalism on Myanmar in pre-2011 times”, Leider (2018:109) concludes, “have been recently tested and are now reset, apparently still considered valid despite the country’s ongoing political changes”. This has not warded off criticism of the Annan Commission.

While the international community wholeheartedly supported the Rakhine Advisory Commission, starting with Aung San Suu Kyi’s first announcement of its creation, according to Liam Mahoney (2018:31), it “was a mechanism designed by the state, not to resolve the Rohingya crisis,” but rather “to deflect the pressures they faced about this crisis”. “It served that purpose”, Mahoney stresses, right from the outset: “the existence of the commission gave the international community an oft-repeated excuse to relax all pressure for the entire year of its investigation” – “a year in which the government launched the first stage of its ethnic cleansing campaign (in October 2016)”. Rather than speak out between October 2016 and August 2017,

... key international players kept saying “Let’s wait for the Annan Commission’s report.” The Commission’s work therefore effectively reduced pressure, lowering the political cost of the first campaign of attacks, and this arguably may have affected the Tatmadaw’s calculation that it could equally successfully get away

with the second ethnic cleansing campaign after August 2017 (Mahoney, 2018:31).

Before August 2017, Aung San Suu Kyi was still getting credit from diplomats and analysts for establishing the Rakhine Advisory Commission, but the government was under no internal political pressure to stop repressing the Rohingya, who have no political allies in Myanmar (Mahoney, 2018:31). Instead, there appeared to be a movement towards strengthening national and international cooperation.<sup>29</sup> Even after full-scale ethnic cleansing, “the international community continues to cite the ‘Annan Commission’s’ work as if it were a sign of hope”, even once one of the most eminent “members of the follow-up advisory commission, former US diplomat Bill Richardson”, resigned in objection in January 2018, “calling it a ‘whitewash’” (Mahoney, 2018:31).

Following the events of October 2016, the Flash Report became

... the latest rallying point for advocacy that periodically surfaces with respect to mistreatment of the Rohingya and the instability in Rakhine State. It joins a long list of excellent reports by the UN, researchers, and human rights organizations which over the decades have raised concerns about crimes against humanity, ethnic cleansing, and more recently, genocide being perpetrated against the Rohingya (Southwick, 2017:2).

In early February, a U.N. flash report detailed the alleged atrocities, asserting the “likely commission of crimes against humanity” (OHCHR, 2017a). The High Commissioner commissioned a OHCHR four-member team and requested access to Bangladesh from 8 to 23 January to interview Rohingyas who had entered Bangladesh from northern Rakhine State (nRS) in the aftermath of the 9 October 2016 attacks (OHCHR, 2017a). The team concentrated exclusively on collecting testimonies on events and incidents that had occurred in nRS since 9 October with a view to carrying out an assessment of potential human rights violations (OHCHR, 2017a).

Given the scale of the exodus, the UN Secretary General Antonio Guterres spoke out, and his use of the term ‘ethnic cleansing’ cleared the path for many others to finally apply this name to the problem (Mahoney, 2018:21). Some scholars have interrogated the politics behind the ‘ethnic cleansing’ designation, which can be contrasted with the politics underlying the ‘genocide’ label (Khan, 2017). Calls for a U.S. determination of ‘ethnic cleansing’ had intensified, “as the United Nations and leading Western governments have used the term” (Pennington, 2017). U.N. human rights chief Zeid Ra’ad al-Husseini said it “seems a textbook example of ethnic cleansing” (quoted in Pennington, 2017), while French President Emmanuel Macron echoed that opinion, as have leaders of many in the Muslim world” (Pennington, 2017). The newly-elected Secretary General also reappointed a UN

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<sup>29</sup> In 2018, the Good Offices mandate would be renewed (Pedersen, 2018).

special envoy. The formal mandate of the new envoy is at first glance different from that of her predecessors:

While earlier UN resolutions contained a long list of concerns headed by demands for the military to respect the democratic will of the people, the most recent one is overwhelmingly focused on the Rohingya refugee crisis for which the new democratically elected government is widely seen to share responsibility (Pederson, 2018).

While not absolute,<sup>30</sup> these events suggested a 'political shift' in the UN headquarters towards an activist role with regards to the Rohingya crisis. The "ethnic cleansing" characterization had already been clearly voiced by High Commissioner for Human Rights (United Nations, 2017). Amid increased international attention in the wake of the publication of the UN Flash report, two internal commissions – one military and one police – were established to investigate possible wrongdoing. According to state media, both commissions were established at the request of the Investigation Commission. Both commissions had the mandate to establish whether the military or the police had committed illegal actions "including violations of human rights" during the "clearance operations" (Amnesty International, 2017:2). In a public statement by Amnesty International, the international human rights group states that

... none of the commissions established by the authorities are independent, impartial, effective or credible (Amnesty International, 2017:1).

In early 2017, a rare meeting between the State Counsellor and the Commander in Chief took place the day after the release of the OHCHR report: "the military announcement to form a commission to investigate the allegations came soon thereafter" (Aron & Gilmore, 2017:14). A number of weeks later, the National Security Adviser declared the formal closure of operations in northern Rakhine and a handover of control to police forces: "This announcement preceded consideration of the situation in Myanmar at the UN Human Rights Council in March 2017, which included in its agenda discussions on the situation in northern Rakhine" (Aron & Gilmore, 2017:14). Apart from the OHCHR report, a simultaneous report – by the Special Rapporteur Yang Lee (UNHRC, 2017) – prompted a discussion and resolution in the UN Human Rights Commission to discuss proposals of a formal Commission of Inquiry and eventually decide on launching an official fact-finding mission.

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<sup>30</sup> In *The UN High Commissioner for Human Rights' fears on Myanmar's shrinking political space* Morgane Dussud (2018) analyzes the High Commissioner's announcement that he will not seek a second mandate: "The High Commissioner for Human Rights Zeid Ra'ad al-Husseini announced on December 20, 2017 that he wouldn't be seeking a second mandate, due to the "appalling climate for advocacy" in the current geopolitical system. This comes as a worrying warning regarding the inability of the UN system to respond to multiplying conflicts across the globe, from Syria to Yemen, and from Myanmar to Iraq, with acts amounting to crimes against humanity".

The call for a Commission of Inquiry or other similar international investigation mechanisms was also supported by national and international human rights organisations, including Amnesty International and Human Rights Watch (HRW), as well as by the Arakan Project.

A pivotal aspect of this theoretical stage, however, has been the ongoing debate about the culpability – and credibility – of Aung San Suu Kyi. In an article entitled *Will the Rohingya Exodus Be Aung San Suu Kyi's Fall From Grace?*, Elizabeth Dias highlights that this:

... is how icons fall. The U.S. had championed Suu Kyi not just as the great savior of her country but also as the model of nonviolent disobedience in Southeast Asia. The U.N. had expressed expectations for Burma, as Myanmar was long known, under her leadership. Now she has revealed different priorities. “She sees herself very deliberately now as a political actor inside of a changing Burma, not as an icon that essentially speaks out on human rights,” says Ben Rhodes, President Barack Obama’s Deputy National Security Adviser. ‘Her single-minded pursuit of that objective of political reform inside of Burma has created a very glaring and tragic blind spot’ (Dias, 2017).

In Congress, a variety of reactions are on display: “Senate majority leader Mitch McConnell, who has championed Suu Kyi for decades, called her the week before her speech as public pressure on her rose” (Dias, 2017). He then defended her to the Senate: “She is the same person she was before,” he said, continuing that she “is trying to improve conditions” (Dias, 2017). Senator John McCain of Arizona wrote her a letter, asking her to reverse her decision denying U.N. Human Rights Council access to northern Rakhine (Dias, 2017). McCain and others also struck language from the National Defense Authorization Act that would have increased U.S. military-to-military engagements with Myanmar’s army. Senator Dianne Feinstein of California, who participated in Suu Kyi’s Congressional Gold Medal ceremony in 2012, wants Congress to re-evaluate its relationship with the army and Suu Kyi’s government:

At the very least, the leaders who planned and executed this campaign of ethnic cleansing should be sanctioned, all military-to-military contact should be suspended, and preferential trade benefits with Burma should be ended (quoted in Dias, 2017).

Given how the person Aung San Suu Kyi has become so integrally linked to international responses to Myanmar and, particularly, the Rohingya crisis, it is unsurprising that international criticism of Aung San Suu Kyi soon refracted onto the international community.

On 15 March 2017, HRW published an article entitled *EU Risks Complicity in Crimes Against Rohingya* in which international human rights organization’s Philippe Bolopion (2017) stresses that “Burma is spiralling into violence once again,” and as the former military dictatorship engages in another wave of mass atrocities, “the European Union has become

suddenly shy at the diplomatic wheel”. Unless it takes action, “the bloc’s hands-off approach risks rolling back hard-won progress and fostering extremist violence” (Bolopian, 2017). In one “dramatic critique” of the United Nations’ dominant approach, a collection of INGO country directors who had previously worked as country directors in Sri Lanka during the end of its civil war wrote a closed letter to Kofi Annan in November 2016, “copied to selected diplomatic and UN leadership” (Mahoney, 2018:24). The letter drew attention to the distressing parallels between the Sri Lanka debacle and the warning signs present in Myanmar:

The letter spoke of the urgent need to avert a crisis of atrocity, calling attention to the risk of war crimes against civilians trapped in the middle of security operations, not only in northern Rakhine but also in Kachin and Shan states (Mahoney, 2018:24).

Subsequently, a confidential presentation by the same authors to the Rakhine Heads of Missions (HOMs) group went in to “greater detail about the preconditions and crisis points” resulting in mass atrocities that were “all in evidence already in Myanmar”, and the necessity to immediately recalibrate the United Nations’ approach (Mahoney, 2018:24).<sup>31</sup> The response of the Resident Coordinator and the HOMs group was to “resist and silence this message”, and maintain their “dominant quiet track” in spite of “all evidence of its failure” (Mahoney, 2018:24). Be that as it may, the INGO directors also still sustained “the quiet approach, and did not share their letter more widely” (Mahoney, 2018:24). The humanitarian coordinator / UN resident would later be dismissed by the newly appointed Secretary-General.<sup>32</sup>

On 24 March 2017, the European Union, supported by the United States, the United Kingdom and other countries, sponsored a two-pronged UNHRC-adopted resolution (A/HRC/34/L.8/Rev.1) which mandates an international fact-finding mission to establish facts on violations, especially in Rakhine State. Firstly, the UNHRC established an independent international fact-finding mission (FFM) appointed by the UNHRC’s President to investigate “the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State” (quoted in Kaufman, 2018:5). The resolution

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<sup>31</sup> The Heads of Missions (HOMs) Rakhine initiative was a group of “selected ambassadors, certain heads of UN agencies and a few INGO representatives. This emerged as an influential advisory group ostensibly aimed at providing some leadership and coordination to the overall international approach to Rakhine State” (Mahoney, 2018:22).

<sup>32</sup> In *Is the U.N. Ready for the ‘Asian Century’? The Rohingya Crisis Suggests Not*, Richard Gowan (2017) “new Secretary-General Antonio Guterres appears to have taken office convinced that the U.N. needed to reboot its political approach to Myanmar. This summer, the U.N. announced that its top official in the country, Renata Lok-Dessallien, would move on after reports of her “glaringly dysfunctional” setup went public. In the byzantine world of senior U.N. appointments, this is the equivalent of a public political assassination, although Guterres has since claimed he still has faith in Lok-Dessallien”.

requested an update at its thirty-sixth session (in September 2017) and a full report at its thirty-seventh session (in March 2018) (Kaufman, 2018:5). Secondly, the UNHRC re-mandate the Special Rapporteur on the situation of human rights in Myanmar, first established in 1992 and extended yearly. Through this resolution, the UNHRC appealed to the Myanmar government to cooperate with both the the Special Rapporteur and the FFM (Kaufman, 2018:5).

Three factors, namely, 1. increasing international debate and division over the 'authority' of Aung San Suu Kyi; 2. a political shift within the UN headquarters towards an activist role; and 3. a critique of the United Nations' dominant approach in Myanmar, triggered a fourth, namely, 4. the contestation over the identity of the 'audiences of legitimation.' . This is most aptly illustrated by the establishment of the UN-mandate fact-finding mission to Myanmar, which 'reflects' the complexity of Myanmar's strategic context, characterised by the contestation, navigation and co-optation of these *now* competing sources of legitimacy.

### ***3.5 Myanmar's strategic context and the (re)legitimising role(s) of the UN-mandated fact-finding mission to Myanmar***

In a telephone interview with Al Jazeera, Indira Jaising stressed that minorities the world over "are facing persecution. The situation of the Rohingya community in Myanmar is especially deplorable because they face the risk of a genocide". She concluded, stressing the hope that the UN Mission's "recommendations will make an impact and awaken the conscience of the international community" (Al Jazeera, 2017). While the key 'audience of legitimation' is the 'Rohingya movement', the identity of the audience of legitimation is ultimately itself a contested question, significantly within the United Nations. On 27 July 2017, the United Nations released a statement underlining the replacement of Indira Jaising by Marzuki Darusman as Chair of Myanmar Fact-finding Mission (OHCHR, 2017d). It continues that the "Mission members will be meeting in Geneva in August to discuss the approach they will employ in discharging their mandate", concluding, as "in all such cases, the Mission will make it a priority to reach out to and engage constructively with the Government and other relevant interlocutors" (OHCHR, 2017d). The statement did not give reasons for the replacement. But 'rumours' are that her statements made the UN mission vulnerable to 'perceived bias' (Lewis, 2017). According to Bexell & Jonsson (2018:131-132), however, the

... emergence of self-appointed audiences is facilitated by a mediatized public sphere that provides the information needed for groups beyond constituencies to engage in legitimation or delegitimation on GGIs ... The public availability of

information on GGIs clearly plays a key role in the formation of self-appointed audiences in legitimation processes.

A challenge to the prevailing strategic context, Jaising's dismissal would suggest that her comments were contrary to the political consensus that underpins the fact-finding mission mandate, which navigates two regimes of legitimation. This line of argument, however, raises a series of counter-arguments which will be explored in the discussion below. Firstly, how can the UN mission have challenged the political consensus underling the UN mandated fact-finding mission when a slew of United Nations, European actors and the US, among the key mandating entities of the UN mission, have themselves labelled the crisis as 'ethnic cleansing'? Secondly, if the politics of the 'ethnic cleansing versus genocide' designation comes into play, can it still be claimed that the key audience of legitimation is the 'Rohinga' movement, given that the UN mission can then be characterised more so as a 'symbolic' structure, in which it risks, like arguably the Annan Commission, "resembling what legal sociologist Lauren Edelman calls 'symbolic structures', giving the illusion of compliance while limiting the actual realization of human rights" (Southwick, 2017: 2-3)?

The UN resolution which gives effect to the UN-mandated fact-finding mission has various audiences and political stakeholders in mind. Perhaps most saliently, it addresses the concerns of the cross-section of stakeholders who have rallied behind the call for an internationally-mandated fact-finding mission.<sup>33</sup> Moreover, apart from taking "note of the general observations of Myanmar on the report of the Special Rapporteur submitted to the Council at its thirty-fourth session," it recalls:

the report of the United Nations High Commissioner for Human Rights on the situation of human rights of Rohingya Muslims and other minorities in Myanmar<sup>[...]</sup> and the recommendations contained therein, and the flash report of the Office of the United Nations High Commissioner for Human Rights of 3 February 2017, entitled "Interviews with Rohingyas fleeing from Myanmar since 9 October 2016", prepared following a mission to Bangladesh (UNHRC, 2017).

Be that as it may, the UN resolution's 'accountability turn' has been couched in a 'peacebuilding framework,' the key political stakeholder being the Myanmar government.

In this regard, apart from the need for the Myanmar government to cooperate with the UN mission, the UN resolution also highlights – and affirms – other aspects of national and international cross cooperation and on-going negotiation. For example, the UN resolution recognises "the positive developments in Myanmar towards political and economic reform,

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<sup>33</sup> In a *Joint Letter to Governments on the UN Fact-Finding Mission on Burma*, a group of human rights organizations asserted that the Fact-Finding Mission is "in the interests of the government of Myanmar" and "the people of the country" since it would signal "the government's willingness to uphold the rule of law, work collaboratively with the international community to help establish the facts, identify perpetrators, and deter future crimes by all parties to the conflict" (Human Rights Watch, 2017a).

democratization, national reconciliation, good governance and the rule of law” and “the efforts made to promote and protect human rights and combat corruption”, and encouraging the Government “to take further steps to address outstanding concerns” (UNHRC, 2017). Furthermore, it commends the Myanmar government for “the formation of a democratically elected government,” while calling upon “all actors to consolidate the democratic transition with full respect for “the rule of law and human rights by bringing all national institutions, including the military, under civilian control,” and “to ensure the inclusion of all ethnic and religious minorities in the political process” (UNHRC, 2017). Given the complex interplay between national and international fact-finding,<sup>34</sup> a key area of international cross-cooperation highlighted in the UN resolution is the so-called ‘Annan Commission’.

The UN resolution has been seen in the context of the so-called ‘Kofi Annan Commission.’ Charles Petrie, a former UN resident coordinator in Myanmar, recognised that the probabilities of investigators gaining right of entry were “pretty slim” (quoted in Perria, 2017). It could, nevertheless, increase the possibilities of Myanmar’s government implementing the Advisory Commission on Rakhine’s recommendations:

The Geneva resolution should be seen in the context of Annan’s interim report released on 16 March, Petrie said, describing them as ‘closely linked’... ‘So, right now, the best-case scenario is that they will focus on one [Annan] to try and defuse the other [Geneva],’ said Petrie (Perria, 2017).

As an area of ongoing national and international cross cooperation and negotiation, the UN resolution recognises the Myanmar government’s “initial steps ... to address the underlying causes of the situation in Rakhine State,” including by establishing “the Central Committee for the Implementation of Peace, Stability and Development in Rakhine State” and “the Advisory Commission on Rakhine State, established on 5 September 2016 at the behest of the State Counsellor of Myanmar, Daw Aung San Suu Kyi, and chaired by former Secretary-General Kofi Annan,” and “commencing work on a long-term socioeconomic development plan for Rakhine State” (UNHRC, 2017).<sup>35</sup> Petrie’s assessment, however, backgrounds other aspects of Myanmar’s strategic context, the need for a more fine-grained *problematique* which embeds the UN fact-finding mission in a broader set of political

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<sup>34</sup> In *The Transformation of Human Rights Fact-finding*, Knuckey and Alston illustrate the complex interplay between domestic and international fact-finding initiatives. Regarding the interplay between international and domestic fact-finding, Alston & Knuckey (2016:9) highlight that “it would be a mistake to think that these two different levels of fact-finding are separate from one another. In practice, there is a complex interplay between the international and domestic, and the standards and approaches that are adopted at one level inevitably influence those used at the other”.

<sup>35</sup> The UN resolution also “the concurrence of the Government of Myanmar with the recommendations of the interim report of the Advisory Commission made public on 16 March 2017, and looks forward to their prompt implementation for stability, peace and prosperity in Rakhine State, in full consultation with all the communities concerned” (UNHRC, 2017).

relations and within-case dynamics, and the ways in which the UN mission re-instates long-standing political compromises.

On 19 September 2017, the Human Rights Council held an interactive dialogue with the Independent International Fact-Finding Mission on Myanmar after it had heard an oral update by Marzuki Darusman, Chairperson of the Fact-Finding Mission. However, “while multistakeholder dialogues are enveloped in narratives of inclusion, in practice they are often only accessible to those in positions of structural power” (Bexell & Jonsson, 2018:129). In this vein, Carl Death (2011) sees ‘political theatre’ at play at global summits, where ‘consultations’ aim to persuade global audiences that political elites are responding to citizens. Extending the theatre metaphor, in global governance the ‘frontstage’ may be open to public view, but ‘backstage’ power disparities are less transparent” (Bexell & Jonsson, 2018:129). At the conference, Darusman suggested that the

... Fact-Finding Mission was looking ahead towards producing a report which would be complementary to that report, as the Annan report was not mandated to look into specific human rights violations. The Fact-Finding Mission would be undertaking a more specific mandate in that regard (OHCHR, 2017e).

While these statements bear out Knuckey & Alston’s contention that the standards and approaches that are adopted at one level inevitably influence those used at the other, a conference hosted by the EU Commission suggests that that Myanmar’s changing evolving *strategic* context does not only play a constitutive role in terms of the establishment of the UN mission, but the UN mission challenges this strategic context while re-inscribing various political compromises. In *Burma, EU at Odds Over UN Fact-finding Mission*, Reuters quotes the EU’s top diplomat Federica Mogherini at a news conference who described the fact-finding mission as “focusing on establishing the truth about the past” (quoted in Reuters, 2017). Daw Aung San Suu Kyi said that she would only endorse the recommendations from a ‘separate advisory commission’ headed by former UN chief Kofi Annan, adding – while stressing the inter-communal nature of the crisis – that the UN-established fact-finding mission would ‘divide’ communities (Reuters, 2017). Asked about the move, Daw Aung San Suu Kyi said:

We are dissociating ourselves from the resolution because we don’t think the resolution is in keeping with what is actually happening on the ground (quoted in Reuters, 2017).

In contrast, however, by the end of the interview, Mogherini called the ‘Annan Commission’ the ‘roadmap’ and the ‘way forward’ (Moulin, 2017), not only pre-judging the relationship between the Annan Commission and the UN mission, but constructing an implicit hierarchy and a relationship of subordination between these two separate entities. In terms of the underlying political calculus, Bhatia sums it up best when she says that

democratic governments are “too invested in Aung San Suu Kyi and the country’s progress to date to press her much harder”, fearing repercussions against “both themselves and their values” (Bhatia, 2017). The significance of an incumbent “who is inclined to uphold democratic principles”, even if only when it is politically convenient, is assumed to “outweigh the damage done by the persecution of the Rohingya” (Bhatia, 2017). In the context, Darusman’s comments can be understood as an effort “to conform to the dictates of preexisting audiences” (Suchman, 1995:587), for example, regional blocs (i.e. the EU), within the United Nations’ current strategic environment. In the final analysis, the establishment of the UN mission ‘reflects’ the complexity of Myanmar’s evolving strategic context, characterised by the navigation, contestation and the co-optation of competing sources of legitimacy. In Chapter 4, I conclude by discussing the threefold value of my findings and raising critical questions about Myanmar’s strategic context, the UN-mandated fact-finding mission to Myanmar, and the contested question of the ‘audiences of legitimation’.

## CHAPTER 4

### *A discussion*

#### **4.1 General remarks**

The value of this research study is threefold. Firstly, it throws light on the dynamic interplay between domestic and international fact-finding and the political – and strategic – context in which they are established. Secondly, it interrogates the politics behind the establishment of UN-mandated fact-finding missions. And thirdly, this research study brings into intense relief the politics of the ‘here and now’ and the contingencies of within-case dynamics that underlie the establishment of the UN-mandated fact-finding mission to Myanmar. Be that as it may, this research raises critical questions concerning the theoretical framework employed in this research study by highlighting more ad hoc, case-specific explanations for finding the evidence. There are other distinct strategic dynamics which arguably confound, but also influence, the political dynamics of Myanmar’s strategic context which are the empirical focus of this research study. Furthermore, apart from those alleged in this research study, there are various other rationales for why the genocide-claim was possibly used by the former Chairperson of the UN mandated fact-finding mission to Myanmar. Finally, subsequent UN framings of the UN mission as complementary to the so-called ‘Annan Commission’ need not necessarily be read in the context of the contested nature of the identity of ‘audiences of legitimation’.

#### **4.2 Theoretical value of the dynamic view of international fact-finding**

Firstly, drawing on Megret’s (2016) dynamic conception of international human rights fact-finding, this research study reveals the dynamic interplay between domestic and international fact-finding and the political – and strategic – context in which they are established. To this end, I traced the emergence of the politics of personality as a central legitimation technique which has structured international engagement. By the time Myanmar’s 2011 democratic opening arrived, there was a ‘backgrounding’ of the accountability debate discussion about Myanmar’s ‘democratic’ transition, facilitated by the intervention of Aung San Suu Kyi. This was most clearly illustrated by the debate on the International Commission of Inquiry prior to Myanmar’s 2011 democratic opening. Next, I examined the emergence of the politics of Rohingya victimhood as a source of legitimacy, which challenged established scholarly, human rights and political orthodoxies regarding the ‘Rohingya issue.’ In 2012, with the outbreak of ‘inter-communal’ violence in Myanmar, the ‘backgrounding’ of accountability increasingly turned into a policy of ‘deflection’.

With the election of Myanmar's first civilian-base government, the Annan Commission represented an attempt by the Myanmar government, but especially Aung San Suu Kyi, not only to deflect growing criticism, but to persuade key powerbrokers within the United Nations architecture itself. Nevertheless, the onset of intercommunal violence marked the creeping political influence of transnationalism. In part three, I brought into sharp focus how Myanmar's evolving strategic context – characterised by two competing sources of legitimation – had played a constitutive role in the establishment of the UN-mandated fact-finding mission, the empirical focus of this research study. In the aftermath of the events of 9 October 2016, underscored by the establishment of the UN-mandated fact-finding mission to Myanmar, the accountability debate was, once again, 'foregrounded.' In the final analysis, the establishment of the UN mission 'reflects' the complexity of Myanmar's evolving strategic context, characterised by the navigation, contestation and the co-optation of competing sources of legitimacy.

Secondly, this research study, in light of scholarly literature on legitimacy in global governance, has interrogated the politics behind the establishment of UN-mandated fact-finding missions. In *Legitimacy in global governance*, Magdalena Bexell and Kristina Jonsson (2018:119) draw attention to actors who are at the receiving end of legitimation and (de)legitimation efforts, namely, the audiences, "a set of actors who hold or withhold legitimacy beliefs vis-à-vis GGIs". Echoing Bexell & Jonsson (2018:120), what this research has argued is that "audiences do not exist a priori, but they are constituted either by being targeted by GGIs or by being self-appointed". By way of argument, this research study has systematically examined the politics of personality and of Rohingya victimhood, and the various types of 'audiences of legitimation' to which they gave rise, which feature centrally in the establishment of the UN-mandated fact-finding mission to Myanmar.

In as much as Aung San Suu Kyi was key to legitimating the Myanmar government in the eyes of the international community, the politics of personality legitimised the international community's peace-building aspirations, which included a host of targeted 'audiences,' with Norway playing the leading role. The international community's legitimation processes took on a new quality with the rise of a new front of international Rohingya caretakers. In contrast to the 'targeted audiences,' 'constructed' by international efforts peacebuilding efforts, these 'audiences' are characterised as 'self-appointed', even though they have acquired increased political-institutional bonds to the UN itself. While there was rising and pointed criticism of Aung San Suu Kyi and her civilian-based government in light of the 'Rohingya crisis,' the legitimising beliefs in train since the 2011 democratic opening remained fundamentally intact until the 2016 State-sponsored violence.

Thirdly, this research study, bringing together these two branches of scholarly literature,' focuses on the politics of the 'here and now' and the contingencies of within-case dynamics that underlie the establishment of the UN-mandated fact-finding mission to Myanmar. It is to the underlying three-pronged argument of this line of inquiry to which I now turn and critically analyse.

### **4.3 Legitimacy struggles and other features of Myanmar's strategic context**

This research study has endeavoured to demonstrate how the UN resolution, underpinned by various institutional and discursive processes, brings into sharp focus international efforts to navigate two competing 'audiences of legitimation.' This is brought most manifestly to the fore, among others, by the establishment of the UN fact-finding mission and the broader political context of national and regional cross-cooperation as manifest by the UN resolution. However, there are other distinct strategic dynamics, borne out by the UN resolution, which arguably confound, but also influence, the political dynamics of Myanmar's strategic context which are the empirical focus of this research study. Apart from expanding accountability relations, there are other factors underlying Myanmar's strategic context that have an equal bearing upon the establishment of the UN fact-finding mission to Myanmar. A strong case can be made that the political consensus that underpins this draft resolution takes account of other intergovernmental dynamics in Myanmar's strategic context apart from those emphasized in this research context. This includes the broad consensus that allegedly underpins the UN resolution:

In recognition of the broad consensus behind the measure, the Council adopted the resolution without a vote. Myanmar and several other countries – the Philippines, India, China, and Venezuela – dissociated themselves from the resolution. While Japan did not support the creation of the Fact-Finding Mission, it nonetheless welcomed the adoption of the resolution by consensus and expressed regret that Myanmar had dissociated itself from that consensus (Human Rights Watch, 2017).

A further dynamic ought to be taken into account: the political problem of accountability. In *The Political Dimension of International Human Rights Fact-Finding*, Steven R. Ratner (2013:70) argues that while much of "the backlash against human rights fact-finding is significant" and can and should be resolved by the fact-finding bodies themselves by means of "rigorous methodologies and a careful statement and application of the standard of proof", the actual aversion to and origin of complaints about fact-finding bodies is "fundamentally political – an aversion by state and some nonstate actors to accountability itself". The proposal for a Commission of Inquiry in the original draft of the resolution was objected to by Myanmar itself. There are various possible reasons for this. According to the *New York Times'* Nick Cumming-Bruce (2017) indicates that the resolution gives effect to "a fact-

finding mission, not a commission of inquiry — a change made by the measure’s sponsors, which include the United States, after Myanmar objected to the original language”.

Another key dimension is the politics of the UN Security Council. In *The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations*, Zachary D Kaufman (2018:10) has highlighted that initiatives by the UNGA or the UNHRC cannot be vetoed, “enabling those institutions to be viable sponsors of investigations in Syria, Myanmar, Burundi, and Yemen”.<sup>36</sup> Kaufman (2018:14) has asked whether the category of UN fact-finding, in the context of Myanmar, can “still hold value for the genuine pursuit of justice or are they feeble fallbacks in the absence of international consensus through the UNSC?” While these distinct strategic dynamics, borne out by the UN resolution, arguably supersede the political dynamics of Myanmar’s strategic context which are the empirical focus of this research study, other aspects of the establishment of the UN mission give additional weight to the argument advanced in this research context.

#### **4.4 The identity of the audiences of legitimation as a contested question**

In this regard, this research study has also argued that the establishment of the UN mission included discursive and institutional efforts to position the politics of Rohingya victimhood as the key legitimising strategy, thus targeting the ‘Rohingya caretakers’ as the key ‘audience of legitimation.’ This was most clearly illustrated by the appointment of the fact-finders, Indira Jaising’s genocide claim and, by implication, the UN mission’s direct challenge to the Annan Commission. During the course of this research study, however, two key considerations have been whether the HRUF has truly engaged with civil society, including Rohingya Caretakers. Furthermore, this raises concerns as to whether UN human rights activities, including the establishment of the UN mission, both highlights and helps resolve accountability deficits. Apart from these concerns, there are various other rationales for why the genocide-claim was possibly used by the former Chairperson of the UN mandated fact-finding mission to Myanmar. What is notable about the election of Indira Jaising as Chairperson of the UN mission is her track record for legal activism. Jaising’s genocide claim, however, needn’t be assessed in the context of the politics of Rohingya victimhood and its ‘audiences of legitimation.’ There are, nevertheless, also various other rationales for why Jaising could have adopted an activist posture.

Rob Grace (2015:57) unpacks the various rationales that underscore the decision by fact-finders to engage in activism, among others, arguing that “the act of assisting people in

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<sup>36</sup> “Perhaps if the UNSC, with its enforcement capability, had sponsored the investigative bodies for Burundi and Myanmar instead of the UNHRC, then those two states would not have blocked UN investigators from entering” (Kaufman, 2017:11).

need, regardless of the mandate's authority, has a strong normative pull that is often congruent with the mandate's aims". Furthermore, in addition to the strong normative pull of assisting people in need, there is also the contention that there is no watertight distinction between expertise and activism. In *International Judges and Experts' Impartiality and the Problem of Past Declarations*, Frederic Megret (2011:61) also unpicks the various motivations that underscore the choice to engage in activism, stressing that the "line between expertise and activism, particularly in the law, and even more so in a normatively dense subject like international law or human rights, can be a thin one". It is the contention of this research study, however, that Jaising's genocide-claim, an implicit challenge to the Rakhine Advisory Commission, need to be interpreted in conjunction with the appointment of a new Chairperson and the newly-appointed Chairperson's (i.e. Marzuki Darusman) framing of the UN fact-finding mission.

In this connection, the dismissal of Indira Jaising and Marzuki Darusman's framing of the UN mission as 'complementary' to the Annan Commission seek to *re-position* the politics of personality as the key legitimising strategy. The dismissal of Indira Jaising does not necessarily, however, have to be read in the context of the contested character of the identity of the 'audiences of legitimation'. According to Rob Grace (2014:59), determining whether to engage in activism falls into the "category of dilemmas" – alongside, for example, deciding to use legal lenses not overtly stipulated in the mandate – that are "hotly debated among practitioners and states". According to Megret (2016:39), the

striving to be impartial may be in tension with the ... problematic tendency to sometimes want to elect 'champions' of a particular cause with a long track record of writing and opining on the issue they are asked to investigate.

Furthermore, as highlighted in the literature review, among the ways to respond to the problems with national-level COIs is to insist that international fact-finding be undertaken, either in place of, or as a complement to, domestic initiatives. In this context, Darusman's framing of the UN mission can also be understood as a case study on the complex interplay between domestic and international fact-finding. To quote Knuckey & Alston (2016:9), it is not uncommon that "the standards and approaches that are adopted at one level inevitably influence those used at the other". This sometimes very dynamic interplay is well-illustrated by the case of Myanmar. Not only have four (widely discredited) domestic fact-finding missions been established in relation to international fact-finding efforts, but the UN mission has implicitly challenged the 'Annan Commission,' only later to be dubbed by the newly-appointed Chairperson as a 'complement' to the 'Annan Commission'. However, against the backdrop of Myanmar's evolving strategic context, the central contention of this research study is that the key political problem at issue in the establishment of the UN mission is that

the identity of the 'audiences of legitimation' is itself a contested question, reflecting a broader tension between intergovernmentalism and transnationalism, two forces that encompass different sets of interests and reflect distinct constituencies.

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