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'The People *v.* Myanmar': Of 'Compassion' in International Justice

By CHAN H.S. Icarus

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1. Introduction

From the international[1] to the domestic,[2] the various mechanisms for accountability over the situation in Rakhine in Myanmar might seem like a textbook example of the popular idea of justice 'cascading'.[3] Activists leading the international justice effort against Myanmar might feel that they are making the idea a reality. Payam Akhavan, co-counsel for The Gambia before the International Court of Justice ('ICJ'), has remarked:

> Throughout the ages, small groups of people who have been deeply touched by suffering and oppression, who have joined forces with a unified and indomitable purpose, have defied overwhelming odds and triumphed in the pursuit of truth and justice. Why should the cause of international justice be any different?[4]

Indeed, the apparent "accountability turn"[5] may offer hopes that, more than 70 years after the Holocaust, the "anti-impunity mindset"[6] may slowly be sinking in. International law does appear to gently civilize humankind, particularly our 'compassion' – our unique ability to 'suffer with'[7] others. It seems to herald, if not confirm, Judge Cançado Trindade's "new *jus gentium*".[8]

In that spirit, this policy brief looks at some structural obstacles to international justice in the way of a 'new *jus gentium*', using the Myanmar case before the ICJ as a reference point. Looking at the parties and the subject matter, I argue that the international justice system in fact manifests a 'compassion gap', which can and must be closed by a 'compassionate mindset'.

2. The Applicant

The 1948 Genocide Convention, the ICJ famously held, "was manifestly adopted for a purely humanitarian and civilizing purpose".[9] Other than their accomplishment, "the contracting States do not have any interests of their own".[10]

But that was 70 years ago. Unlike the International Criminal Court ('ICC'), where the victims now have some standing, those before the ICJ can only take the spectator's stand or, at most, the witness box. Practically, how much of a say do victims get in the case theory and strategy? Some norm entrepreneurs may want to push the envelope of the crime of genocide away from its Holocaust heritage, with its clear emphasis on physical-biological destruction of the group as such,[11] to cover persecutory or discriminatory acts more broadly. Tellingly, however, Wai Wai Nu, an activist who was at the provisional measures hearing, wrote:

> For me, it does not even matter whether these crimes are found to meet the legal definition of genocide. What matters is that we see justice and accountability for what has happened, and that's why last week meant so much for the Rohingya. So many Rohingya had waited so long to have the truth heard.[12]

'Justice', 'accountability' and 'truth' are no doubt goals of international justice; but, leaving aside their different *meanings*, empirical research has revealed how the *priorities* among parties often differ significantly, even within victim communities.[13] If the ICJ decides to stand firm on specific genocidal intent as it is *de lege lata* – which remains the distinguishing feature of the crime – what can be offered to the victims at the end of the road, when the acrimony in the litigation has corroded the goodwill and political energies?

In domestic strategic litigations, creative transactions and quasi-legislation beyond the four corners of the law often happen out of court. Here, then, to what extent can victims decide to 'settle' – when refugees in Cox's Bazaar are even threatened against repatriating to Rakhine, as going back is seen by some actors to "indicate an acceptance of Myanmar's measures"?[14]

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1 Besides the case before the International Court of Justice, there are at the time of writing investigations by the International Criminal Court ('ICC') and a universal-jurisdiction case in Argentina. All mainly rely on the outputs of various United Nations ('UN') human rights apparatuses like special rapporteurs, the fact-finding mission, and the relatively nascent investigative mechanism on Myanmar. This reliance raises problems as discussed by Dov Jacobs, "Limitations of Using Fact-Finding Reports in Criminal Proceedings: The Case of Myanmar", Policy Brief Series No. 118 (2020), Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2020 (http://www.toaep.org/pbs-pdf/118-jacobs/).

2 On Myanmar's part, there are the Offices of the Union Attorney-General and the Judge Advocate-General for civilian and military prosecutions respectively. They, in turn, draw on the report of Myanmar's Independent Commission of Enquiry (https://www.legal-tools.org/doc/h3k7jz/ (executive summary; 12 of the annexes are available in the Myanmar Collection of the ICC Legal Tools Database)). See also "Myanmar Submits First Report to World Court on Provisional Measures to Protect Rohingya", *The Irrawaddy*, 26 May 2020. For an overview of the domestic accountability efforts in Myanmar, see SONG Tianying, "Positive Complementarity and the Receiving End of Justice: The Case of Myanmar", Policy Brief Series No. 104 (2020), TOAEP, Brussels, 2020 (http://www.toaep.org/pbs-pdf/104-song/).

3 See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W.W. Norton, 2012.

4 Payam Akhavan, "From Empathy to Equity: Reflections on Integrity and Institution-Building", in CILRAP Film, 1 December 2018 (https://www.cilrap.org/cilrap-film/181201-akhavan/).

5 See Federica D'Alessandra, "The Accountability Turn in Third Wave Human Rights Fact-Finding", in *Utrecht Journal of International and European Law*, 2017, vol. 33, no. 84, pp. 59–76.

6 See Barrie Sander, "International Criminal Justice and the Symbolic Power of the Anti-Impunity Mindset", in Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.), *Power in International Criminal Justice*, TOAEP, Brussels, 2020, chap. 7 (forthcoming).

7 From the Latin '*compati*': Oxford Dictionary of English.

8 See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, 2010.

9 ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, *ICJ Reports*, 1951, p. 23 (https://www.legal-tools.org/doc/52868f/).

10 *Ibid*.

11 Powers including the United States took pains to water down Raphael Lemkin's draft cultural genocide provision: see Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective*, Oxford, 2016, pp. 23–29. Cf. the Draft Convention on the Crime of Genocide, ECOSOC, 26 June 1947, E/447, Article II, para. 3.

12 Wai Wai Nu, "Aung San Suu Kyi Was My Idol—Now She's Defending My People's Genocide", *Newsweek*, 18 December 2019.

13 See, for example, Phuong Pham *et al*., *When the War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda*, Berkeley, Tulane Initiative on Vulnerable Populations and International Center for Transitional Justice, 2007, p. 22.

14 SOMETAYA Ryuta, "Oppression Among the Oppressed: Inside Refugee Camps in Cox's Bazar", Policy Brief Series No. 105 (2020), TOAEP, Brussels, 2020 (http://www.toaep.org/pbs-pdf/105-sometaya/).

Notwithstanding the lofty *Reservations* Advisory Opinion, when rights as important as those protected by *jus cogens* norms must be espoused by States under *erga omnes* (*partes*) obligations, victims are left at the mercy and whims of political actors. After all, The Gambia, whose Attorney-General recently stepped down to take up a position in international criminal justice in The Hague, was even about to exit the ICC.[15]

While there may not be any manifestation where the interests converged, the latent structural issue remains. Those from northern Rakhine have more success in airing their grievances than many other groups in Myanmar and abroad, in part because they could also lobby for the support of the very international organization which, in the same session in 2019, "**commends** the efforts of the People's Republic of China in providing care to its *Muslim citizens*".[16]

Thus, while powerful actors – whether colonial powers in the past or foreign corporations and investors nowadays – take for granted their own 'extraterritorial jurisdiction', victims are forced to cling to their victimhood as a proxy of standing, by resorting to, and thus further entrenching, their victimization.

This plainly goes against 'compassion': suffering *with* is more than standing *for*. Akhavan's reflection is a reminder:

> There is a certain glamour to that metaphor we know as The Hague, conjuring as it does the imagery of sophisticated bureaucrats and diplomats, brilliant jurists and experts, distinguished academics and activists. After all, it is reassuring to belong to an exclusive club of cosmopolitan saviours. Perhaps this is exactly where the corruption begins, in a self-contained war crimes industry, exploiting the suffering of others for status and prestige. It is easy to express noble sentiments, when looking down at the arena of anguish from 30,000 feet. It is the utmost feeling of euphoria, to be on top of the world, without being a part of it.[17]

3. The Respondent

Just as the international justice system fails to represent the victims' interests but simplistically entrusts them into the hands of 'good Samaritans', it also tends to see the other side only as 'perpetrator', *as such*.

As human rights apparatuses under UN auspices have increasingly "juridified" amid the "accountability turn", they began publicizing names of alleged defendants, as was done here.[18] In addition to factual findings, they also make legal determinations (such as genocidal intent) on apparently legal standards, even when the fact-finders are neither qualified as, nor meant to be, lawyers.[19] Despite substantial doubts[20] and Myanmar's contest,[21] Judge Cançado Trindade's Separate Opinion is essentially a summary of those reports, taken at face value.[22] Perhaps he felt obliged to speak for the 'vulnerable' and 'defenceless'.[23]

The Muslims of northern Rakhine have doubtlessly suffered from repeated waves of conflict and outflow since 1942.[24] At the same time, it would be a stretch to portray Myanmar as the Goliath against whom fights David (unlike Afghanistan or Iraq). Many tend to forget that Myanmar is one of the world's poorest countries. While British colonizers only hardened, if not introduced, tension between groups, they failed to leave behind sufficient rule-of-law capacities and infrastructure. There was some transition from the military regime, which still shares power and constitutional reform appears difficult.[25] In addition, there are the numerous "ethnic armed organizations", not only the Arakan Army, but also groups outside Rakhine, some externally backed.[26] Despite the neat attribution for State responsibility in law, it is not reducible to some monolithic Leviathan.

If one must be reductionist, it would be 'The People *v.* Myanmar', a trial where the allegation of atrocity suspends, if not extinguishes, the accused's membership and rights in his or her community. Apart from the personal attacks against Myanmar's counsel for 'defending alleged genocidaires', the utter absence of Myanmar's factual narrative (as exemplified by Judge Cançado Trindade's Separate Opinion) makes the slogan of "*pro persona humana, pro victima*" sound rather narrow, if not hollow.[27]

Of course, a State is not entitled to *human* rights (unlike corporations); the ICJ is no criminal court; and there is no comparable international legal 'system'. Still, if our common goal is towards an international rule of law, then '*omnes*' will necessarily include every '*hostis humani generis*', let alone an alleged one.

Indeed, it is none other than *humankind* whom 'compassion' asks that we 'suffer with'. The victims, the victimizers, ourselves: everyone suffers, especially in an internal armed conflict such as that in Rakhine, albeit differently. Like justice, then, selective compassion is not compassion proper. 'Compassionate' international justice, in that reading, does not mean turning a blind eye; but it does mean accepting *our* flawed humanity as we resolutely denounce proven atrocities and punish their perpetrators, rather than merely casting stones at *others*' wrongdoing.

For one, this is informed by humility and honesty about the human condition – that we may not be that far away from wrongdoing as we would like to think.[28] At least, that may give us pause before casting the first stone, especially for a generation which tends to air our grievances in 140/280 characters and retweet without reading.[29] Just as international law learnt to see other humans not as lesser beings, we must continue to expand the object of our compassion: beyond 'victims' and indeed individuals.

4. 'Compassion' and 'Empathy'

Ironically, the deficit in 'compassion' which we witness is caused in part by a surplus of 'empathy'. It may be that international justice needs to be more 'emotional' and 'empathetic', as Akhavan has argued:

> Emotional connection is not superficial psychobabble […] It is in fact essential to reconciling abstract beliefs with concrete actions […] In feeling the pain of others, in embracing the oneness of humankind, we move from perfunctory incantation to profound inspiration; we move from our unusual talent for hypocrisy, to that authentic condition we call "empathy".[30]

However, 'empathy' (at least 'affective empathy') has recently been critiqued by some psychologists.[31] In fact, Arendt has openly criticized "the most powerful and perhaps the most devastating passion motivating revolutionaries, the passion of compassion".[32]

Like many other seemingly acrimonious debates, though, the difference may be one of definition rather than substance: whereas compassion seems often mistaken with passion (much like empathy is mistaken for sympathy), it

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[15] "African revolt threatens international criminal court's legitimacy", *The Guardian*, 27 October 2016.

[16] Resolution No.1/46-MM on Safeguarding the Rights of Muslim Communities and Minorities in Non-OIC Member States, operative para. 20 (bold in the original, italics supplied).

[17] Above note 4.

[18] See Morten Bergsmo, Marina Aksenova and Carsten Stahn, "Non-Criminal Justice Fact-Work in the Age of Accountability", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Fact-Finding*, Second Edition, TOAEP, Brussels, 2020, chap. 1.

[19] See Dov Jacobs, "Limitations of Using Fact-Finding Reports in Criminal Proceedings: The Case of Myanmar", footnote 1 above.

[20] For a critique, see Michael Becker, "The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar", *EJIL: Talk!*, 14 December 2019.

[21] As challenged by Schabas in court: 11 December 2019, CR 2019/19, p. 32, para. 34.

[22] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Separate Opinion of Judge Cançado Trindade, 23 January 2020 (https://www.legal-tools.org/doc/zq4jcy/).

[23] See, for example, *ibid*., para. 88.

[24] See Jacques P. Leider, "Mass Departures in the Rakhine-Bangladesh Borderlands", Policy Brief Series No. 111 (2020), TOAEP, Brussels, 2020 (http://www.toaep.org/pbs-pdf/111-leider/); *idem*, "Territorial Dispossession and Persecution in North Arakan (Rakhine), 1942-43", Policy Brief Series No. 101 (2020), TOAEP, Brussels, 2020 (http://www.toaep.org/pbs-pdf/101-leider/).

[25] See Anthony Ware and Costas Laoutides, *Myanmar's 'Rohingya' Conflict*, Hurt & Co., London, 2018.

[26] See, for example, SUN Yun, "China, the Arakan Army, and a Myanmar solution", *Frontier*, 23 March 2020.

[27] Separate Opinion of Judge Cançado Trindade, para. 64, see above note 22 (quoting his Separate Opinion in *Ukraine* v. *Russian Federation*).

[28] See Hannah Arendt, "Eichmann in Jerusalem: A Report on the Banality of Evil", *The New Yorker*, 1963 (five issues), and Slavenka Drakulić, *They Would Never Hurt A Fly: War Criminals on Trial in The Hague*, Abacus, 2004. Empirically, see, for example, Stanley Milgram, "Behavioral Study of Obedience", in *Journal of Abnormal and Social Psychology*, 1963, vol. 67, no. 4, pp. 371–78, and the 1971 'Stanford Prison Experiment' by Philip Zimbardo *et al*.

[29] Maksym Gabielkov *et al*., "Social Clicks: What and Who Gets Read on Twitter?", in *ACM SIGMETRICS Performance Evaluation Review*, June 2016.

[30] Above note 4. Perhaps he is echoing the call to examine the "sentimental life of international law": Gerry Simpson, "The Sentimental Life of International Law", in *London Review of International Law*, 2015, vol. 3, no. 1. pp. 3-29.

[31] See, for a recent example, Paul Bloom, *Against Empathy: The Case for Rational Compassion*, Ecco, 2016.

[32] "The Social Question", in Hannah Arendt, *On Revolution*, Penguin, 1990 [1963], p. 72.

can be almost a 'cold' cognitive insight into the human condition and suffering. While we often equate 'compassion' to 'empathy', 'suffering with' is not the same as 'feeling into' someone. With due respect, it is not sufficient to be deeply touched by suffering and oppression. Even though without using the word, Dag Hammarskjöld has left us with this 'waymark':

> Openness to life grants a swift insight – like a flash of lightning – into the life situation of others. A must: to force the problem from its emotional sting into a clearly conceived intellectual form – and act accordingly.[33]

The 'compassion' advocated in this policy brief is thus also hinged on reason.[34] Emotions such as passion must be tempered by compassion, lest it 'reflexively' entrench hatred and bigotry just as it brings about atrocities.

5. The International Crime of Genocide

Indeed, this 'compassion gap' can be fatal in an unjustified charge of genocide. While inevitably vertically-enabled by power structures and organization, some atrocities also have a horizontal dimension that taps into the darker side of our social nature – the same social identity that bestows on us a sense of belonging. Often, it manifests and is underlaid by a toxic cocktail of existential fear and hatred between members of groups, inevitably with complex social, political and historical roots.

As the Israel–Palestine example shows, group grievances are delicate and difficult for well-meaning outsiders to undo, particularly through international justice efforts. Recently, Laetitia van den Assum warned of the thinking in some diplomatic circles that, now that the international criminal lawyers have taken over, they can turn to other matters.[35] Instead, as the Annan Commission recommended in 2017, there is more to be done within Myanmar to ease deep-rooted inter-communal prejudice and distrust.[36]

Rather than creating conditions favourable to implementing needed changes, one risks further entrenching the binary us *versus* them paradigm by pitching a case of genocide against Myanmar on behalf of 'the Rohingya'. In a recent keynote, Philippe Sands QC, co-counsel for The Gambia, admitted "the problem with genocide":

> that by focusing on the protection of one group against another, there is a tendency to reinforce the sense of 'them' and 'us', to amplify the power of group identity and association, to reinforce the sense of victimhood of the targeted group, and hatred towards the perpetrators as a group.[37]

Some activists might brush this aside. Instead of 'Myanmar *v.* Rohingya', Wai Wai Nu said she chose to see the case as "the struggle of some of the people of Myanmar for the benefit of all of them".[38] Yet, is this not the Emperor's new clothes? Under the dualistic nature and rules of international justice as we know it, is not the State by definition the *parens patriae* that represents the people of Myanmar, whereas an applicant under the Genocide Convention perceives a need to pitch the case as straightforward physical elimination of the 'Rohingya' *as such*, due to the high hurdle of the specific intent?

Indeed, following Aung San Suu Kyi's opening statement before the ICJ in December 2019, some tried to make a point of her not using the term 'Rohingya', claiming that she thereby denies their very identity.[39] Yet, they fail to address the conundrum of identity in the crime of genocide which they invoke.

Regrettably, in his lecture, Sands too fell short of offering a solution, but simply defended Lemkin:

> He was surely right to recognise the *reality*, that in most (if not all) cases, mass atrocity is targeted not against individuals […], but against those who happen to be a member of a group that is hated at a particular time and place. Lemkin would say, and it is a powerful argument, that the law must *reflect* that *reality*, that it must also recognise and give legitimacy to feelings that probably all of us have, of kinship and association with one or more groups.[40]

But just as it would be quite a legal fiction to shrink the Holocaust as, say, 'extermination', we cannot pretend as if "reality" could be simply "reflected" either. "If men define situations as real", holds the 'Thomas theorem', "they are real in their consequences".[41] This is also studied by the historian,[42] the clinical researcher,[43] the sociologist,[44] and indeed the common lawyer.[45] A deliberate narrative of genocidal intent may indeed feed prejudice, hatred and fear in ways that undermine relations between communities. Any perceived 'expressive' or other need to allege intentional destruction of a group 'as such', should therefore be balanced with the 'reflexive' potential to entrench inter-communal tension and conflict. The reconciliation and accommodation of these two opposing imperatives – as the law *par excellence* does – lies at the heart of international justice.

The key in counteracting the 'negative reflexivity' in genocide lies in the 'positive reflexivity' or what I would call a 'compassionate mindset':[46] beliefs about the nature of human attributes which can shape reality. In cases of horizontal violence, rather than lumping every interest into the 'good Samaritan', the 'evil genocidaire' or the 'vulnerable victim group', international justice with a 'compassionate mindset' means we must *honour* the grievances of all parties, which – it goes without saying – does not equate to impunity should there be real evidence of violations. There can be accountability without (affective) blame, two distinct concepts which we tend to blur.[47] To practice 'positive reflexivity' or a 'compassionate mindset', however, we must first listen properly and seek to understand.

6. Practical Implications

'Compassion' is a mindset in which, and before, we act; but equally, compassion is what compassion does. Not because we are not offended by proven wrongdoing, but in spite of it. In this light, 'compassion' can be seen as basis for the prohibition of outlawry and trial by ordeal, the *Miranda* warning, equality of arms, and so on. Just as the individualization of international law could also be seen as a compassionate turn, I argue that this can be a next phase of the 'anti-impunity mindset' under a 'developmental' approach to international justice.

In particular, I argue that *complementarity* is compatible with a 'compassionate mindset'. Again, notwithstanding all the post-Cold War development of international criminal law, including the Rome Statute, the discourse and international justice efforts are largely framed by products of World War II such as the Genocide Convention and the ICJ Statute. Based on contemporary international law, should not the sensitivity to domestic efforts, which complementarity actually implies, permeate discussions on alleged international wrongdoing that may amount to core international crimes, regardless of the international justice forum in question? Should not the inter-relationship between international justice – including its accompanying discourse – and relevant domestic developments inform stakeholders in a manner that instils incontrovertible trust in international justice?

Related to this is the need to actively practise and support 'positive complementarity' broadly understood: aiding domestic justice efforts in terms of human and material resources that may be required, as well as morally and politically.[48] The UN and other international and foreign actors should

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[33] Dag Hammarskjöld, *Vägmärken*, Albert Bonniers Förlag, Stockholm, 1963, p. 16, translated by Hans Corell, "The Dag Hammarskjöld Legacy and Integrity in International Civil Service", in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, TOAEP, 2020, chap. 5 (forthcoming).

[34] Some have sought to term this aspect cognitive empathy as separate from affective empathy: see, for example, Jean Decety and Jason M. Cowell, "Empathy, Justice, and Moral Behavior", in *AJOB Neuroscience*, 2015, vol. 6, no. 3, pp. 3–14.

[35] Global Justice Center, "The ICJ Provisional Measures: Is Myanmar Protecting the Rohingya from Genocide?", 20 May 2020.

[36] *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State*, August 2017 (https://www.legal-tools.org/doc/c76b63/).

[37] Philippe Sands QC, "Beyond East West Street", lecture, International Holocaust Remembrance Day, Peace Palace, The Hague, 27 January 2020.

[38] Wai Wai Nu, 18 December 2019, above note 12.

[39] CR 2019/20, 12 December 2019, p. 19, para. 34 (Reichler).

[40] Sands, 27 January 2020, see above note 37 (emphasis supplied).

[41] See Robert K. Merton, "The Self-Fulfilling Prophecy", in *The Antioch Review*, 1948, vol. 8, no. 2, pp. 193–94.

[42] History is a "'level-two' chaotic system", where the very accuracy of a prediction undermines itself. See, for example, Yuval Noah Harari, *Sapiens: A Brief History of Humankind*, Vintage, 2015, pp. 267–68.

[43] The observer–participation (so-called 'Hawthrone') effects.

[44] For 'reflexivity' in its many shades, see Jane Kenway and Julie McLeod, "Bourdieu's reflexive sociology and 'spaces of points of view': whose reflexivity, which perspective?", in *British Journal of Sociology of Education*, 2004, vol. 25, no. 4, pp. 526–27.

[45] The so-called 'Hume's guillotine' of is-ought duality.

[46] Also called 'implicit theories'. For instance, that what we *do* (or fail to do) does not define who we *are* and, ergo, that we can be better than our erstwhile selves. See Carol Dweck, *Mindset: The New Psychology of Success*, Random House, New York, 2006.

[47] Clinical psychologists have recognized this much earlier. See, for example, Hanna Pickard, "Responsibility Without Blame: Empathy and the Effective Treatment of Personality Disorder", in *Philosophy, Psychiatry, and Psychology*, 2011, vol. 18, no. 3, pp. 216–19.

[48] See SONG Tianying, "Positive Complementarity and the Receiving End of Justice: The

offer to assist ongoing domestic justice efforts. Compare for a moment the combined resources put at the disposal of the ICJ, the ICC, parties before such courts, and all international civil society personnel working on Myanmar, with the resource situation of the justice system in a developing country like Myanmar. Should not this imbalance be a source of concern for fair-minded persons who care about the real situation on the ground?

Domestic ability and will to justice are crucial. But one again wonders if it is even realistic to expect willingness to co-operate with foreigners from a country historically strong-armed by imperialists and still transitioning from military dictatorship. "Only if domestic accountability fails, may international justice come into play",[49] said its State Counsellor in open court, which was dismissed by commentators as incredible, if not entirely ignored by mainstream Western media.[50] At the time of writing, Myanmar has convicted 13 officers and soldiers for violations during the 2017 Rakhine violence, in two completed courts-martial, and the Office of the Judge Advocate General has launched a formal investigation into Maung Nu and Chut Pyin, two Rakhine villages where reports allege that the highest numbers of persons were killed in the 2017 violence.

While we often recognize the struggles of oppressed minorities who succumb to stereotypical predictions of failure,[51] actors in the international community have repeatedly dismissed Myanmar's domestic accountability efforts, even if the actors lack legal qualifications.[52] For example, the ICOE executive summary and 12 annexes (which tally more than 230 of the report's overall 450 pages) were swiftly ridiculed the day after their release, notwithstanding its considerable attribution of responsibility to the Myanmar military.[53] Are such patellar reflexes indicative of objectivity, lack of bias, and concern to nourish domestic justice efforts – of compassion? How much has the international community attempted to make those often "poorly funded, understaffed" domestic processes work?[54] Do we actually consider this important?

"Despite their best efforts, post-conflict national judicial systems will lack investigative resources and the capacity for optimal compliance with due process standards", Akhavan reminds us again. "In such extreme circumstances, national courts will invariably fall short of ideal expectations of expeditious and fair trials. In order to do justice, they will require both time and resources for institutional capacity building in the context of a wider post-conflict transformation."[55]

7. Conclusion

The Myanmar situation raises a number of questions, inviting us to rethink the *raison d'être* of international (criminal) justice. Over the past two centuries, 'compassion' has crystallized into a legally-protected 'good' or interest in international law, but its conceptualization is too myopic both in terms of its object and dimension. The Myanmar case underscores the compassion gap in the current system in how it treats victims and alleged victimizers, which risks further entrenching destabilizing us–them dichotomy, unless we guide our actions with a 'compassionate mindset'. To bring about a 'new *jus gentium*', the international community and international justice can go one step further, in truly standing and suffering *with* humanity.

This is not just about Myanmar; far from it. It is well-known and discussed these days how the international legal order, including its values and institutions, is facing the risk of giving way to a more authoritarian one. But there are not just pull-, but also push-factors. From recent news of State visits to Myanmar[56] and infrastructure projects in Rakhine, it is not difficult to see who stands to profit the most from the international community's disengagement from Myanmar.[57] The three policy briefs published in this Series with geopolitical perspectives on Rakhine should help us see this.[58] As explicitly and powerfully stated by SUN Yun, a young Chinese scholar naturalized and working in the United States:

> Western actors who have single-mindedly called for externalization of accountability for alleged crimes committed against Rohingyas in northern Rakhine have contributed significantly to the strengthening of ties between China and Myanmar, culminating with the signing of the key agreement on the Kyaukphyu deep-sea port in January 2020.[59]

We need to ask ourselves whether it is feasible to warn against taking "easy money" while using sanctions as one's predominant *modus operandi* without losing coherence and persuasion.[60]

The foundational nature of the prohibitions of genocide, crimes against humanity and war crimes in international law gives them the potential to serve as a critical 'lowest common denominator' of humankind. This is an essential function in a world that may become increasingly fraught with dichotomies. They should not be conceptualized and used as conduct by 'enemies of mankind' in manners that reduce our ability to understand and acknowledge human suffering and flaws. If the approach is not sufficiently nuanced and sensitive to multi-level factual complexity, we risk that diplomacy and civil society advocacy under the banner of 'never again' may end up an empty proclamation by one constituency of the international community. That invites other constituencies to claim that international efforts at accountability are but a further proclamation.

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Case of Myanmar", note 2 above.

[49] 11 December 2019, CR 2019/19, p. 18, para. 25 (https://www.legal-tools.org/doc/yfx6vt/).

[50] Kyaw Phyo Tha, "Int'l Media Shows Lack of Fairness, Ignores State Counselor's Message to the ICJ", *The Irrawaddy*, 23 December 2019.

[51] See, for example, Claude Steele, "A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance", in *American Psychologist*, 1977, vol. 52, no. 6, pp. 613–29.

[52] See, for example, LEE Yanghee, in Global Justice Center, 20 May 2020, above note 35.

[53] See, for example, Human Rights Watch, "Myanmar: Government Rohingya Report Falls Short", 22 January 2020.

[54] See Derek Tonkin, "Mission Creep Untrammelled: The UN Fact-Finding Mission on Myanmar", Policy Brief Series No. 102 (2020), TOAEP, Brussels, 2020 (https://www.toaep.org/pbs-pdf/102-tonkin/).

[55] Payam Akhavan, "Complementarity Conundrums: The ICC Clock in Transitional Times", in *Journal of International Criminal Justice*, 2016, vol. 14, p. 1046.

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