

# LESSONS LEARNED: A SUCCESSFUL AND BALANCED FRAMEWORK FOR POST-CONFLICT TRANSITIONAL JUSTICE IN MYANMAR

*Joanna Gisel\**

I. INTRODUCTION.....	294
II. BACKGROUND .....	297
A. <i>Relationship between Transitional Justice         and Rule of Law</i> .....	297
B. <i>Current and Past Situation in Myanmar</i> .....	299
1. <i>Origins of the Conflict in Myanmar</i> .....	299
2. <i>The Current Judicial System in Myanmar</i> .....	302
C. <i>Genocide, the Gacaca Courts, and         Rule 11 bis in Rwanda</i> .....	303
1. <i>The Rwandan Genocide</i> .....	303
2. <i>Post-Conflict Courts and Judicial             Mechanisms in Rwanda</i> .....	304
III. ANALYSIS .....	309
A. <i>The Successes and Failures of the Gacaca         Courts in Rwanda</i> .....	309
B. <i>The Successes and Failures of the         Implementation of Rule 11 bis in Rwanda</i> .....	312
C. <i>Application of Lessons Learned to the         Unique Situation in Myanmar</i> .....	316
IV. CONCLUSION .....	321

*“[I]t is vitally important that Myanmar learn lessons from other countries  
that have experience in these processes.”<sup>1</sup>*

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\* J.D. Candidate, 2021, University of Dayton School of Law. The Author would like to thank Professor Chris Roederer for his advice and guidance through the nuances of transitional justice.

<sup>1</sup> Tomás Ojea Quintana (Special Rapporteur), *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 75, U.N. Doc. A/HRC/19/67 (Mar. 7, 2012). The country of Myanmar is often referred to as Burma. See John M. Epling, *How Far Have We Come and Where Do We Go from Here? A Culturally Sensitive Strategy for Judicial Independence in Myanmar*, 27 DUKE J. COMP. & INT’L L. 107, n.1 (2016). The Tatmadaw changed the name of the country from Burma to Myanmar in 1988 to assert the distinctiveness of the military government and the Burmese people. See James F. Guyot & John Badgley, *Myanmar in 1989: Tatmadaw V*, 30 ASIAN SURV. 187, 188 (1990). For the sake of consistency, this Comment will refer to the country in question as Myanmar throughout its entirety.

## I. INTRODUCTION

According to a 2018 report by the United Nations Human Rights Council (“HRC”), the Rohingya Muslims of the Rakhine State region in Myanmar face “a continuing situation of severe, systemic and institutionalized oppression from birth to death” at the hands of the Myanmar government, the military known as the Tatmadaw, and the majority Buddhist population.<sup>2</sup> As a part of this “institutionalized oppression,” the government and Tatmadaw have forcibly displaced the Rohingya and other ethnic Muslim populations in Myanmar in numbers surpassing 140,000 people.<sup>3</sup> The atrocities do not stop at simple displacement but include wide-spread rape and sexual violence, forced labor, death by beating and fire, and the razing of Muslim villages.<sup>4</sup> Although Myanmar is in the throes of this violent and arguably genocidal conflict, the situation is reminiscent of other genocides in our world’s history, all of which eventually came to an end. Rather than suggesting a means for attaining this end, this Comment considers a future post-conflict Myanmar, a country in which ethnic and religious healing must take place in order to secure enduring peace.

Transitional justice is defined by the International Center for Transitional Justice (“ICTJ”) as “the ways countries emerging from periods of conflict and repression address . . . human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.”<sup>5</sup> The United Nations (“U.N.”) Office of the High Commissioner for Human Rights describes the four tenets of transitional justice as follows:

- (a) the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty; (b) the right to know the truth about past abuses and the fate of disappeared persons; (c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and (d) the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.<sup>6</sup>

In recent decades, scholarship on transitional justice has expanded

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<sup>2</sup> U.N. Hum. Rts. Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, ¶ 11–20, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018) [hereinafter *Report on Myanmar*].

<sup>3</sup> *Id.* ¶ 29.

<sup>4</sup> *Id.* ¶ 36–39.

<sup>5</sup> *What is Transitional Justice?*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/about/transitional-justice> (last visited May 16, 2021).

<sup>6</sup> U.N. Off. of the High Comm’r for Hum. Rts., *Transitional Justice and Economic, Social and Cultural Rights*, at 5, U.N. Doc. HR/PUB/13/5 (2014).

significantly, addressing the many different approaches to transitional justice and attempting to find an approach that adequately accomplishes these tenets.<sup>7</sup> These approaches include, but are not limited to, criminal prosecutions, truth commissions, reparations, and institutional reform.<sup>8</sup> Each have been implemented in various settings.<sup>9</sup>

While each approach has attained some success in post-conflict areas, a method of transitional justice that creates a stable and sustainable rule of law, while also realizing a level of truth, healing, and justice, has not yet been implemented. Such a method must primarily rely on a deep and thorough understanding of the “rule of law” needs for any given transitional society.<sup>10</sup> However, this thorough understanding is not easily achieved, as the role of the rule of law in transitional justice is nuanced and definitions of the rule of law are amorphous.<sup>11</sup>

Those seeking to create a sustainable rule of law in a post-conflict society must consider the cultural background and structures of the society in question and weigh these considerations against internationally accepted rule of law norms.<sup>12</sup> To expand on this idea, there is a dialectic between universalist, or ethnocentric, approaches to the rule of law—those that use the outside “evaluators’ domestic criteria and values as universal standards”—and culturally relativist approaches—those that rely “exclusively on the foreign [post-conflict] culture’s criteria and values as standards for evaluation.”<sup>13</sup> Approaches that rely more heavily on ethnocentrism risk an

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<sup>7</sup> See generally Ian Holliday, *Thinking About Transitional Justice in Myanmar*, 22 S.E. ASIA RES. 183 (2014).

<sup>8</sup> *What is Transitional Justice?*, *supra* note 5.

<sup>9</sup> See *id.*

<sup>10</sup> Elizabeth Andersen, *Transitional Justice and the Rule of Law: Lessons from the Field*, 47 CASE W. RES. J. INT’L L. 305, 309 (2015)

Reframing the purpose of transitional justice as re-establishing the rule of law provides a framework for choosing among transitional justice approaches and processes that is both principled and flexible, accommodating *context-specific* transitional justice solutions that contemporary research shows are most effective. In one context, re-establishing the rule of law might require vetting and lustration of security forces responsible for past abuses and prone to future violations. In another, truth-telling or reparations processes that help re-establish a broad-based rule of law culture may be in order.

*Id.* (emphasis added).

<sup>11</sup> See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2009, 2016–18 (1997).

<sup>12</sup> See Anderson, *supra* note 10, at 309–10 (“These assessments could take advantage of best practices in rule of law development assistance, including participatory research in affected communities, local ownership of program design, sustainability guarantees, and plans for monitoring and evaluating the intervention.”).

<sup>13</sup> Epling, *supra* note 1, at 128. Many scholars have characterized universalist standards as ethnocentric—“attributing to human actions meanings, reasons, and causes that are common in our modern Western context but that are lacking in other contexts, resulting in an *inadequate understanding* and explanation of many of these actions.” Miguel A. Cabrera, *A Critique of Ethnocentrism and the Crisis of Modernity*, 47 HIST. & THEORY 607, 607 (2008) (emphasis added). In other words, “universalist” standards often focus far too much on Western values and are not in fact “universal.” *Id.* For the purposes of this Comment, I will refer to the universalist approach as “ethnocentric” to illustrate the pitfalls of this approach.

inability to take root in a culture that cannot relate to those prevailing norms.<sup>14</sup> Meanwhile, culturally relativist approaches conversely risk ignoring important values and norms, like those embodied in human rights, for the sake of “respecting” another culture.<sup>15</sup> This dialectic makes the development of a sustainable rule of law in post-conflict societies extremely delicate because weighing too heavily on either side of the dialectic may hinder the success of this development.

One way in which international leaders have somewhat mitigated these difficulties is through Rule 11 *bis*—a procedural rule used similarly in both the United Nations International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>16</sup> In the briefest of terms, this Rule allowed for the transfer of ICTR and ICTY defendants back to national courts in certain circumstances, provided that the national court could properly adjudicate the cases.<sup>17</sup> Thus, the Rule theoretically created an interaction and a balance between international and national courts—between an often ethnocentric approach to the rule of law and a culturally relativist approach to the rule of law.<sup>18</sup>

An analysis of Rule 11 *bis* in transitional societies and its relationship with the ethnocentrism-cultural relativism dialectic is valuable to post-conflict judiciaries because history has shown that the judiciary in a post-conflict society is integral to the legitimacy of a new, transitional regime.<sup>19</sup> Although many aspects of the rule of law will be lacking in post-conflict Myanmar, a well-functioning relationship between international and domestic justice will be an important area on which transitional justice initiatives must focus. Fortunately, scholarship on the role of the international and domestic judiciaries in transitional justice has not been created from a vacuum.<sup>20</sup> Past transitional societies have implemented various forms of courts, providing lessons on the successes and failures of their attempts to build a sustainable rule of law.<sup>21</sup> The practice of assessing past implementations of transitional

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<sup>14</sup> See Cabrera, *supra* note 13, at 607; Andersen, *supra* note 10, at 312 (“[T]rials conducted in English or French in the Hague had little resonance or positive impact on the affected populations . . . and they did nothing to develop the capacity of local justice sector institutions.”).

<sup>15</sup> See Epling, *supra*, note 1, at 128.

<sup>16</sup> See Olympia Bekou, *Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 FORDHAM INT’L L. J. 723, 723–24 (2009).

<sup>17</sup> Nicola Palmer, *Transfer or Transformation?: A Review of the Rule 11 BIS Decisions of the International Criminal Tribunal for Rwanda*, 20 AFR. J. OF INT’L & COMP. L. 1, 1 (2012).

<sup>18</sup> See Bekou, *supra* note 16, at 728. “Indeed article 9 of the ICTY Statute indicates that the Tribunal was not intended to replace or displace national courts; rather, the Tribunal coexists with national courts under a system of concurrent jurisdiction.” Andersen, *supra* note 10, at 313 (noting that Rule 11 *bis* played a role in attempting to bridge the gap between the international and the national).

<sup>19</sup> See Teitel, *supra* note 11, at 2030.

<sup>20</sup> See Hollie Nyseth Brehm & Shannon Golden, *Centering Survivors in Local Transitional Justice*, 13 ANN. REV. L. & SOC. SCI. 101, 101 (2017).

<sup>21</sup> See, e.g., Lars Waldorf, *Transitional Justice and DDR: The Case of Rwanda*, INT’L CTR. FOR TRANSITIONAL JUST. (June 2009), <https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf>.

justice will be vital to the people of Myanmar as they navigate their treacherous post-conflict environment.

This Comment argues that as Myanmar approaches the moment in time for transitional justice processes, the foundation of these processes must be built according to the strengths and weaknesses of their implementation in similar post-conflict environments and according to the unique conditions in Myanmar. Myanmar must place a special emphasis on the post-conflict, rule-of-law judiciary by integrating ethnocentric norms regarding the rule of law and Myanmar's culturally relativist understanding of the rule of law. To this end, Part II discusses the background to this study. This background includes an exposition of the current state of the relationship between transitional justice and the rule of law, along with the turbulent history of Myanmar. This background also describes brief histories of the role of post-conflict courts and Rule 11 *bis* in Rwanda, a post-conflict state utilized by this Comment as a case study. Next, Part III examines the rule-of-law successes and failures of the gacaca courts and Rule 11 *bis* in Rwanda before applying the lessons learned to Myanmar's unique situation. Lastly, Part IV will offer a brief summary and concluding thoughts concerning transitional justice and rule of law in post-conflict Myanmar.

## II. BACKGROUND

### *A. Relationship between Transitional Justice and Rule of Law*

The judiciary arguably plays an integral, well-established, and consistent role in transitional justice and the rule of law.<sup>22</sup> As stated previously, the four major approaches to transitional justice include criminal prosecutions, truth commissions, reparations, and institutional reform.<sup>23</sup> These processes range from those that give victims the most voice (truth commissions) to those that give victims compensation but little voice whatsoever (reparations).<sup>24</sup> However, the four categories overlap and support each other considerably.<sup>25</sup> This Comment will focus on the approaches of criminal prosecutions, truth-exposing courts, and institutional reform in the judiciary.

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<sup>22</sup> See Teitel, *supra* note 11, at 2030. This is not always the case, as sometimes the judiciary can obstruct transitional justice. See Lavinia Stan, *Transition, Justice and Transitional Justice in Poland*, 6 ROMANIAN POL. SCI. REV. 257, 263 (During Poland's transition from communist rule, "[w]ith some exceptions, communist judges and prosecutors were obedient instruments of the repressive apparatus, detaining opponents without legal basis, orchestrating show-trials with predetermined outcomes, fabricating evidence, and sending thousands to prison for their political opinions.").

<sup>23</sup> *What is Transitional Justice?*, *supra* note 5.

<sup>24</sup> *Can We Handle the Truth? International Day for the Right to the Truth*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/gallery-items/truth-commissions> (last visited Jan. 17, 2021); *Reparations*, INT'L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Jan. 17, 2021).

<sup>25</sup> *What is Transitional Justice?*, *supra* note 5.

Criminal prosecutions are perhaps the most visible processes in international transitional justice. Similar to domestic criminal prosecutions, transitional criminal prosecutions are “focused on generating individual accountability for mass atrocity crimes.”<sup>26</sup> Widely recognized examples of this type of judicial transitional justice were the ad hoc criminal tribunals formed by the United Nations following the atrocities in Rwanda and Yugoslavia—commonly known as the ICTR and ICTY, respectively.<sup>27</sup> Despite calling international attention to the crimes that were committed, these tribunals were criticized for being “distant from and largely inaccessible to the communities they were intended to serve” and thus void of any “local ownership.”<sup>28</sup> Without this local ownership, there was no “local agency, control, or ‘buy in’ when it came to core justice-related [issues].”<sup>29</sup> Further, not every perpetrator of every crime is captured when these tribunals occur, and some victims’ voices are left out and lack vindication.<sup>30</sup> These are the difficulties in ethnocentric approaches to the rule of law.<sup>31</sup> *Domestic* tribunals, rather than international, are sometimes implemented, but these often face logistical difficulties in a state with only post-conflict institutional abilities.<sup>32</sup>

A positive aspect to pursuing very visible criminal prosecutions in a post-conflict society is that they work to establish a permanent rule of law. In contrast with truth commissions, which typically assume the guilt of the perpetrator and the innocence of the victim, criminal prosecutions lay the foundation for rule of law practices such as due process and a fair trial.<sup>33</sup> Affording the perpetrators rights, rather than indiscriminate punishment, helps to prevent further conflict between two alienated groups while still implementing justice.<sup>34</sup> Importantly, “hybrid” tribunals that are a mix of

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<sup>26</sup> Holliday, *supra* note 7, at 187.

<sup>27</sup> Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J. 149, 163 (2013).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 161.

<sup>30</sup> See *Criminal Justice*, INT’L CTR. FOR TRANSIT’L JUST., <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited Mar. 13, 2021).

<sup>31</sup> The International Criminal Court (“ICC”) was created partly in response to what some viewed as the success of the ICTY and ICTR. Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT’L L. & POL. 503, 504 (2004). Because “the early tribunals enabled the world to see that international criminal tribunals can deliver justice and help resolve problems in countries struggling with the difficulties that come with protracted conflicts,” the international community, through the Rome Statute, agreed to create a *permanent* international court to prosecute crimes occurring worldwide. *Id.* Despite the ICC’s foundation on “sovereign equality” among member states, the ICC in practice relies heavily on support from the resource-rich Western nations, inevitably leading to the imposition of “the West’s values on the developing world.” *Id.* at 555–56. Further, the ICC “gives powerful nations a means of politically influencing less powerful ones.” *Id.* at 556. Thus, the ICC perpetuates the ethnocentrism mentioned in this Comment. See *id.*

<sup>32</sup> *Criminal Justice*, *supra* note 30.

<sup>33</sup> See Brehm & Golden, *supra* note 20, at 106.

<sup>34</sup> See, e.g., Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT’L L. & POL’Y 125, 147 (2008) (“Failure to [follow due process] weakens gacaca in the eyes of the local populace and the international community.”). Importantly, the international community has oft debated whether a true balance exists between the rights of those viewed as the

international criminal prosecutions and local proceedings have been implemented with varying success.<sup>35</sup> Rule 11 *bis* is a facet of this “mix,” and one that must be adapted in response to its historical effects.

Moreover, institutional reform is vital to transitioning societies. According to the ICTJ, “[i]nstitutional reform is the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents.”<sup>36</sup> The judiciary is an important subject of institutional reform, and many possible avenues may lead to a sustainable rule of law in the judiciary. One of these avenues is the development of local courts that are steeped in both domestic culture and international rule of law norms.<sup>37</sup> From a theoretical perspective, this approach has the opportunity to create a dialectical balance:

If we re-conceptuali[z]e the relationship between the Self and the Other as a dialectic relationship between heterogeneous and hybrid entities, we can generate comparative law approaches that go beyond ethnocentrism and cultural relativism. These approaches utili[z]e the dialectic force between the Self and the Other as a specific comparatistic source knowledge and basis to generate value judgements, make visible hybridi[z]ation, influence between different legal systems and the co-existence of similarities and differences and enforce intercultural legal dialogue and understanding.<sup>38</sup>

With these nuances and considerations in mind, one must turn to the factual situation in Myanmar so as to tailor a judicial plan appropriate for the specific situation presented.

## *B. Current and Past Situation in Myanmar*

### 1. Origins of the Conflict in Myanmar

When the National League for Democracy (“NLD”) government came to power in Myanmar in 2015, the international community was hopeful

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perpetrators of crimes and those viewed as the victims during international criminal tribunals. See generally William A. Schabas, *Victor's Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010). Aware of the tendency to presume the “perpetrators” of heinous crimes as guilty, Human Rights Watch stated that “the ICTR would not properly complete its mandate if it did not mete out justice to both sides.” *Id.* at 538.

<sup>35</sup> See Sharp, *supra* note 28, at 163–64.

<sup>36</sup> *Institutional Reform*, INT’L CTR. FOR TRANSIT’L JUST. <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform> (last visited Mar. 17, 2021).

<sup>37</sup> See Epling, *supra* note 1, at 128–29.

<sup>38</sup> Judith Schacherreiter, *Das Verhängnis von Ethnozentrismus und Kulturrelativismus in der Rechtsvergleichung: Ursachen, Ausprägungsformen und Strategien zur Überwindung*, 77 RABEL J. OF COMP. & INT’L PRIVATE L. 272, 299 (2013).

that ethnic conflict might abate as democracy triumphed.<sup>39</sup> This abatement did not occur, though, as ethnic conflict continues and has in fact worsened.<sup>40</sup> Religious and ethnic conflict between the Buddhist Burmese majority and the Muslim minorities has existed in Myanmar for decades.<sup>41</sup> Martin Smith notes that “conditions of ethnic and political strife have transcended all three eras of government since independence from Great Britain,” and anti-government disaffection has compelled many different ethnic and religious groups in Myanmar to perpetually pursue civil conflict.<sup>42</sup>

Under British authority, Myanmar was not an independent colony but simply an “Indian province.”<sup>43</sup> Thus, the British Indian government allowed Indians to freely immigrate to and from Myanmar.<sup>44</sup> As Muslim Indians flooded into Myanmar for work and were favored by the British, the ethnic Arakanese in Burma were repressed and experienced an increase in ethno-religious nationalism; thus, the seeds of discrimination against non-Buddhist peoples were planted.<sup>45</sup> In the Rakhine State region, before British colonization, small numbers of Muslims lived in peace with the native Arakanese in the region.<sup>46</sup> During the periods of increased migration under British colonial rule, the Arakanese were marginalized as more Muslims began moving into the area.<sup>47</sup> These sociopolitical changes sparked the Rakhine Buddhist population’s bitter hatred toward the Muslims, specifically the Rohingya.<sup>48</sup>

Following the end of British colonial rule in 1948, the Rohingya actually experienced a brief period of non-problematic existence with the Buddhists in Myanmar under the leadership of Prime Minister U Nu, who encouraged the recognition of the Rohingya “as a legitimate ethnic group that deserved a homeland in [Myanmar].”<sup>49</sup> This coexistence, however, was short-lived as General Ne Win came to power in 1962.<sup>50</sup> As the government began to deny the Rohingya rights as citizens, around 200,000 Rohingya fled to Bangladesh but were eventually repatriated by a Bangladesh-Myanmar

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<sup>39</sup> See Hannah Ellis-Petersen, *From Peace Icon to Pariah: Aung San Suu Kyi's Fall from Grace*, GUARDIAN (Nov. 23, 2018, 7:19 AM), <https://www.theguardian.com/world/2018/nov/23/aung-san-su-kyi-fall-from-grace-myanmar>.

<sup>40</sup> See Karen McVeigh & Hannah Ellis-Petersen, *UN Official Likens Rohingya Living Conditions to Nazi Concentration Camps*, GUARDIAN (July 4, 2019, 6:15 AM), <https://www.theguardian.com/world/2019/jul/04/un-warns-of-possible-new-war-crimes-in-myanmar>.

<sup>41</sup> See MARTIN SMITH, *STATE OF STRIFE: THE DYNAMICS OF ETHNIC CONFLICT IN BURMA* 1 (2007).

<sup>42</sup> *Id.*

<sup>43</sup> RICHARD COCKETT, *BLOOD, DREAMS AND GOLD: THE CHANGING FACE OF BURMA* 9–10 (2015).

<sup>44</sup> *See id.* at 38.

<sup>45</sup> *Id.* at 38–39.

<sup>46</sup> *See id.* at 37.

<sup>47</sup> *Id.* at 38–39.

<sup>48</sup> *Id.* at 39.

<sup>49</sup> Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683, 695, 698 (2014).

<sup>50</sup> *Id.* at 697.

bilateral treaty in 1978.<sup>51</sup> Also during this time, “[a]nti-Rohingya and anti-Muslim policy advisers and intellectuals from nationalist Rakhine groups successfully sought to eliminate the Rohingya from the demographic map of citizenship through the 1982 Citizenship Act.”<sup>52</sup> Discrimination against the Rohingya escalated in the 1990’s and 2000’s as cycles of severe violence, flight of the Rohingya to Bangladesh, and repatriation continued.<sup>53</sup> Enduring to the present day, the Muslim Rohingya from the Rakhine State region of Myanmar face human rights abuses such as severe travel and work restrictions, denial of citizenship, and ethnic violence.<sup>54</sup>

A renewed wave of violence against the Rohingya began in 2012 but intensified on August 25, 2017, following a Rohingya backlash against the Tatmadaw.<sup>55</sup> According to the HRC, “[t]he response of [the Tatmadaw] security forces, launched within hours, was immediate, brutal and grossly disproportionate.”<sup>56</sup> In what were called “clearance operations,” the Tatmadaw razed Rohingya villages with intense and indiscriminate weapon fire, gang raped and murdered Rohingya women and girls, and locked Rohingya houses before setting them on fire.<sup>57</sup> These actions by one ethnic population against another are reminiscent of those committed during the Rwandan Genocide and other genocides of the past.

Rohingya women and girls especially face shocking atrocities at the hands of the Tatmadaw.<sup>58</sup> A recent HRC report states:

Rape and other forms of sexual violence were perpetrated on a massive scale. Large-scale gang rape was perpetrated by Tatmadaw soldiers in at least 10 village tracts of northern Rakhine State. Sometimes up to 40 women and girls were raped or gang-raped together. One survivor stated, “I was lucky, I was only raped by three men[.]” . . . Rapes were often in public spaces and in front of families and the community, maximizing humiliation and trauma. Mothers were gang raped in front of young children, who were severely injured and in some instances killed. Women and girls 13 to 25 years of age were targeted, including pregnant women. Rapes were

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<sup>51</sup> *Id.* at 702.

<sup>52</sup> *Id.* at 697.

<sup>53</sup> *See id.* at 710–14.

<sup>54</sup> Syed S. Mahmood et al., *The Rohingya People of Myanmar: Health, Human Rights, and Identity*, 389 *THE LANCET* 1841, 1842–47 (2017).

<sup>55</sup> *Report on Myanmar*, *supra* note 2, at ¶¶ 31–32. This HRC report cites the murder and alleged rape of a Rakhine woman, along with the murder of ten Muslim pilgrims as likely catalysts for the renewed violence. *Id.* ¶ 24.

<sup>56</sup> *Id.* at ¶ 33; *see also* Zarni & Cowley, *supra* note 50, at 715 (“The 2012 violence saw a mixture of state authorities, civilian mobs, and local populations killing and engaging in the mass physical destruction of Rohingya (and other Muslim people, properties, and communities)—effectively enacting pogroms against the Rohingya.”).

<sup>57</sup> *Report on Myanmar*, *supra* note 2, at ¶ 36.

<sup>58</sup> *Report on Myanmar*, *supra* note 2, at ¶ 38.

accompanied by derogatory language and threats to life, such as, “We are going to kill you this way, by raping you.” Women and girls were systematically abducted, detained and raped in military and police compounds, often amounting to sexual slavery. Victims were severely injured before and during rape, often marked by deep bites. They suffered serious injuries to reproductive organs, including from rape with knives and sticks. Many victims were killed or died from injuries. Survivors displayed signs of deep trauma and face immense stigma in their community.<sup>59</sup>

The description of the actions taken against the Rohingya speaks for itself, and the need for transitional justice mechanisms that will promote healing and the prevention of future conflict is apparent.

## 2. The Current Judicial System in Myanmar

Myanmar’s current judiciary system is comprised of a Supreme Court, 67 District and Self-Administered Area Courts, and 324 Township Courts.<sup>60</sup> Village chiefs are also given considerable “quasi-judicial” power in investigating and punishing crime.<sup>61</sup> Further, Myanmar houses a Constitutional Court devoted entirely to constitutional issues.<sup>62</sup> On its face, Myanmar’s judiciary is well-developed and prevalent in society.

However, according to a 2012 report by the International Bar Association’s Human Rights Institute, Myanmar’s judicial system is weighed down by corruption, over-reaching control by the executive branch, and the ever-present influence of the state military.<sup>63</sup> The report cites a journalist stating that “the government could always rely on support from the judiciary, which was inactive and subordinate to the military.”<sup>64</sup> Therefore, the Myanmar judiciary does not conform to the rule of law norms and expectations of the international community.

That being said, the citizens of Myanmar do not necessarily support *liberal* democratic values.<sup>65</sup> One writer suggests that Myanmar more closely follows the idea that “the power of the executive and the judiciary are designed to work in concert and collaboratively, rather than in opposition to

<sup>59</sup> *Id.*

<sup>60</sup> INTERNATIONAL BAR ASSOCIATION’S HUMAN RIGHTS INSTITUTE, THE RULE OF LAW IN MYANMAR: CHALLENGES AND PROSPECTS 56 (2012), <https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjO6YKw4fblAhVMuZ4KHbE7AaQQFjAAegQIAXAC&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUId%3DDDE0EE11D-9878-4685-A20F-9A0AAF6C3F3E&usg=AOvVaw1-bkSyjVbNYNgn6NBqS-dr> [hereinafter IBAHRI REPORT].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 21, 56.

<sup>63</sup> *See id.* at 57–58.

<sup>64</sup> *Id.* at 58.

<sup>65</sup> Epling, *supra* note 1, at 130.

counterbalance one another.”<sup>66</sup> Through this discrepancy, the dialectic which sits as the theme of this Comment comes to light in Myanmar: the international community prioritizes an independent judiciary as a touchstone of the rule of law, and the local approach to the judiciary in Myanmar places lesser emphasis on this independence.

The lack of an impartial and independent judiciary poses a potential problem for a sustainable rule of law in a country fraught with deep-rooted discrimination.<sup>67</sup> A Myanmar judiciary that takes into account both the internationally accepted norm of non-discrimination and the domestic approach to the judiciary will be needed once the conflict between the Buddhists and the Rohingya comes to an end. To foster such a judiciary in Myanmar, the international community will need to hold some level of influence over the justice process which occurs post-conflict. This level of influence, as discussed below, may arise through the Rule 11 *bis* mechanism while also maintaining and respecting the domestic Myanmar approach to justice.

### C. *Genocide, the Gacaca Courts, and Rule 11 bis in Rwanda*

#### 1. The Rwandan Genocide

In the search for a transitional justice framework for Myanmar, the history of Rwanda provides a valuable case example. Following the decolonization and independence of much of the African continent, few events could parallel the disastrous Rwandan Genocide of 1994.<sup>68</sup> The genocide and ethnic warfare between the Hutu and Tutsi populations shattered an already delicate political, economic, and social system in Rwanda and left the shell of a country continuing to recover to this day.<sup>69</sup> Following the atrocities, Rwanda, in concert with the international community, implemented an international tribunal, national court reform, and grassroots courts, hoping to foster both justice and healing.<sup>70</sup> This Comment utilizes the approaches to criminal justice in Rwanda due to the similarity between the conflicts in Rwanda and Myanmar: both involve seemingly unhealable ethnic divides and truly atrocious crimes between ethnic groups.<sup>71</sup> Further, both conflicts involve decades-enduring violence.<sup>72</sup> These similarities allow the analysis of the successes and failures of the Rwanda approach to inform the possible implementation of a similar approach in future post-conflict Myanmar.

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<sup>66</sup> *Id.* at 131.

<sup>67</sup> See IBAHRI REPORT, *supra* note 62, at 60.

<sup>68</sup> Sosnov, *supra* note 35, at 125.

<sup>69</sup> See generally Phil Clark, *Rwanda's Recovery: When Remembrance is Official Policy*, FOREIGN AFF., <https://www.foreignaffairs.com/articles/rwanda/2017-12-12/rwandas-recovery>.

<sup>70</sup> Sosnov, *supra* note 35, at 125, 128–36.

<sup>71</sup> See *id.* at 125; see generally *Report on Myanmar*, *supra* note 2.

<sup>72</sup> See Sosnov, *supra* note 35, at 125; see generally *Report on Myanmar*, *supra* note 2.

Although the Rwandan Genocide occurred more than twenty years ago, the genocide is still fresh in the minds of Rwandan citizens, and societal and cultural healing has been sluggish.<sup>73</sup> To fully appreciate this impact, it is important to understand the foundation and specific effects of the genocide. Violence between the Hutu and Tutsi ethnic groups burned for decades before the beginning of genocide, as these groups vied for political power following decolonization.<sup>74</sup> The Hutu party first rose to social power in 1959 and initiated the murder of 20,000 Tutsi civilians and the exodus of many others.<sup>75</sup> After dramatically rising ethnic tensions and decades of repressive Hutu rule, the murder of Hutu President Habyarimana by Tutsi rebels in 1994 sparked the mass killings of the Tutsi people by the Hutu.<sup>76</sup> According to the U.N., it is estimated that more than one million people were killed and 150,000 to 250,000 women were raped; unsurprisingly, the long-standing effects of this genocidal atrocity remain obvious in Rwandan society as the country struggles to move on from the all-consuming tragedy.<sup>77</sup>

## 2. Post-Conflict Courts and Judicial Mechanisms in Rwanda

The post-conflict judicial environment in Rwanda involved several levels of courts, including grassroots courts, national courts, and an international tribunal.<sup>78</sup> This section will briefly introduce each level in turn.

To encourage post-genocide healing, the Rwandan gacaca courts were established.<sup>79</sup> These courts involved local judges chosen by the community publicly trying the accused according to the community's own standards.<sup>80</sup> "*Gacaca* is a traditional, community-based restorative justice institution . . . that requires the members of Rwandese society to communicate with the State and with one another about the sensitive subject of the genocide."<sup>81</sup> These courts could be rightly categorized as a mixture of the strict criminal prosecution and the cathartic truth commission; the *gacaca* courts encouraged civic participation while holding the government accountable, an important rule of law ideal.<sup>82</sup> That being said, the system was not without its problems, which will be discussed below.

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<sup>73</sup> See generally Clark, *supra* note 71.

<sup>74</sup> Max Rettig, *Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?*, 51 AFR. STUD. REV. 25, 29 (2008).

<sup>75</sup> *Id.*

<sup>76</sup> *Rwanda: A Brief History of the Country*, U.N., <https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml> (last visited May 16, 2021); see also George S. Yacoubian, Jr., *The Efficacy of International Criminal Justice: Evaluating the Aftermath of the Rwandan Genocide*, 4 WORLD AFFS. 186, 187 (1999).

<sup>77</sup> See *Rwanda: A Brief History of the Country*, *supra* note 78.

<sup>78</sup> Sosnov, *supra* note 35, at 125, 128–36.

<sup>79</sup> Rettig, *supra* note 76, at 30.

<sup>80</sup> *Id.* at 31.

<sup>81</sup> Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y.U. L. REV. 1934, 1939 (2004) (emphasis added).

<sup>82</sup> *Id.*

Functioning at the state-level, national courts in Rwanda struggled to handle the sheer volume of cases which resulted from the genocide.<sup>83</sup> Even further, no legislation existed concerning crimes against humanity and genocide, and the national courts therefore had no law to apply.<sup>84</sup> In an attempt to reform the justice system to address these defects, the Rwandan government passed the Organic Law on the Organization of Prosecutions for Offences Constituting the Crimes of Genocide or Crimes Against Humanity Committed since 1 October 1990 and formed special chambers for genocide and crimes against humanity cases.<sup>85</sup> Although backed by theoretically-equipped substantive law, these chambers suffered from a lack of prosecutors, defense attorneys, and judges, resulting in few truly fair trials.<sup>86</sup> For example, “[s]ome of the first trials involved multiple defendants, were openly biased against the defendants, and lasted only a few hours.”<sup>87</sup> These serious due process and rule of law transgressions supported the international community’s push for an international tribunal to judge the perpetrators.<sup>88</sup>

In November 1994, the United Nations Security Council established the ICTR.<sup>89</sup> The tribunal was established “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations.”<sup>90</sup> Although the tribunal did achieve its mandate to some extent, an arguably more crucial contribution to the international order was the development of international criminal jurisprudence and case law.<sup>91</sup> Part of this jurisprudence involved the establishment of a relationship between the international tribunal and Rwandan national courts.<sup>92</sup> Importantly, the ICTR held concurrent jurisdiction with Rwandan national courts, meaning that both could prosecute genocide and crimes against humanity.<sup>93</sup> But, the ICTR held “primacy over the national courts of all States.”<sup>94</sup> The dynamics of this jurisdictional

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<sup>83</sup> Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B. U. INT’L L. J. 163, 187 (2000); Carla J. Ferstman, *Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda*, 9 AFR. J. INT’L & COMP. L. 857, 862 (1997).

<sup>84</sup> Carroll, *supra* note 85, at 187.

<sup>85</sup> *Id.*; Ferstman, *supra* note 85, at 863.

<sup>86</sup> Carroll, *supra* note 85, at 188.

<sup>87</sup> *Id.* at 189.

<sup>88</sup> *Id.* at 193 (“[O]ne of the reasons the ICTR was created was to compensate for the inability of the Rwandan courts to fairly try those responsible for serious human rights violations without delay.”).

<sup>89</sup> Amelia S. Canter, Note, “*For These Reasons, the Chamber: Denies the Prosecutor’s Request for Referral*”: *The False Hope of Rule 11 BIS*, 32 FORDHAM INT’L L.J. 1614, 1620 (2009); *see generally* S.C. Res. 955 (Nov. 8, 1994). The tribunal was established despite several concerns by the Rwandan government, including that the tribunal would be underfunded and understaffed and that the tribunal could only try crimes which occurred during the year of 1994. Canter, *supra* note 91, at 1619.

<sup>90</sup> S.C. Res. 955, *supra* note 91, ¶ 1.

<sup>91</sup> Palmer, *supra* note 17, at 5–6.

<sup>92</sup> *See id.* at 9 (discussing Rule 11 *bis* and corresponding case law).

<sup>93</sup> S.C. Res. 955, *supra* note 91, art. 8, ¶ 1; *see generally* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349 (1997).

<sup>94</sup> S.C. Res. 955, *supra* note 91, art. 8, ¶ 2.

relationship are mirrored in a procedural rule for the ICTR—Rule 11 *bis*.<sup>95</sup>

Rule 11 *bis* was used in concert with the gacaca courts and other domestic national courts in Rwanda in an attempt to reconcile the international and the domestic.<sup>96</sup> Rule 11 *bis*, found in the Rules of Procedure and Evidence for the ICTR, holds the title “Referral of the Indictment to another Court.”<sup>97</sup> Its text reads as follows:

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

(D) Where an order is issued pursuant to this Rule:

- (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
- (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
- (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to

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<sup>95</sup> See Palmer, *supra* note 17, at 8.

<sup>96</sup> *Id.* at 13.

<sup>97</sup> ICTR R. P. & EVID. 11 *bis* (last amended May 13, 2015), <https://unictr.irmct.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf> [hereinafter ICTR RULE 11 *bis*].

the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may proprio motu or at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.

(H) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Trial Chamber whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.<sup>98</sup>

Not unique to the Rwanda context, Rule 11 *bis* was a mechanism also used in Yugoslavia for ending drawn-out international criminal tribunals.<sup>99</sup> As the ICTR and ICTY neared the end of their limited terms of operation, the tribunals similarly needed to complete more cases.<sup>100</sup> Thus, the primary function of Rule 11 *bis* generally was “freeing up precious Tribunal time,”

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<sup>98</sup> *Id.*

<sup>99</sup> ICTY R. P. & EVID. 11 *bis* (last amended July 8, 2015), [https://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf) [hereinafter ICTY RULE 11 *bis*].

<sup>100</sup> See, e.g., Palmer, *supra* note 17, at 8; Bekou *supra* note 16, at 726.

not emphasizing the “involvement of the national courts in prosecuting and trying persons responsible for blatant violations of humanitarian and human rights law.”<sup>101</sup> That being said, an important effect of the implementation of Rule 11 *bis* was “enhancing the national capacity to prosecute the most serious international crimes.”<sup>102</sup> In other words, although a mutualistic relationship between the international tribunal and the domestic court was not the primarily-intended consequence of Rule 11 *bis*, such a relationship arose and allowed for some progress toward a balance between international and domestic approaches to justice.

Several sections of this Rule warrant special attention in the context of the international-domestic/ethnocentric-cultural relativist dialectic.<sup>103</sup> First, Section (B) “provides that referral may be initiated . . . by the Referral Bench, or at the request of the Prosecutor.”<sup>104</sup> Importantly, the defendant and the state which might want jurisdiction over the case do not have standing to request the case be referred to that state.<sup>105</sup> Therefore, the international tribunal solely holds the discretionary power to refer a case to a national court.<sup>106</sup> Next, Section (C) requires the Tribunal Trial Chamber to determine whether a fair trial will be carried out in the national court and to ensure the death penalty will not be enforced there.<sup>107</sup> This section appears to ensure that fair trials and the prohibition of the death penalty are upheld even if a case is removed from international jurisdiction.<sup>108</sup> Finally, Section (D) prescribes additional measures for the Tribunal, Referral Bench, and Prosecutor of the ICTR to monitor national judicial proceedings so that under the authority provided by Sections (F) and (G) the Trial Court may revoke the referral order and return the case to proceedings before the ICTR on the international level.<sup>109</sup> These sections allow international oversight such that “[s]tates wishing to avoid having the case removed from their national courts . . . are more likely to abide by international standards.”<sup>110</sup> Through the sections mentioned, Rule 11 *bis* bridged the gap between international and national courts involved in post-conflict justice.

In the Rwandan context specifically, Rule 11 *bis* allowed the transfer

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<sup>101</sup> Bekou, *supra* note 16, at 726.

<sup>102</sup> *Id.* at 728.

<sup>103</sup> Although the texts of Rule 11 *bis* in the Rules of Procedure and Evidence of the ICTR and that of the ICTY are not identical, the language of Sections (A)-(B) and (D)-(E) are substantially similar. See ICTR RULE 11 *bis*, *supra* note 99; ICTY RULE 11 *bis*, *supra* note 101. Rather than addressing fair trials and the death penalty, Section (C) of the Rules of Procedure and Evidence of the ICTY states that the Referral Bench shall “consider the gravity of the crimes charged and the level of responsibility of the accused.” See ICTR RULE 11 *bis*, *supra* note 99; ICTY RULE 11 *bis*, *supra* note 101.

<sup>104</sup> Susan Somers, *Rule 11 of bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 B.C. INT’L & COMP. L. REV. 175, 178 (2007).

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> ICTR RULE 11 *bis*, *supra* note 99.

<sup>108</sup> *See id.*

<sup>109</sup> *Id.*

<sup>110</sup> Bekou, *supra* note 16, at 787.

of “intermediate and lower-ranking accused already indicted by the Tribunal ‘to competent national jurisdictions, as appropriate, including Rwanda.’”<sup>111</sup> Although the *gacaca* courts were an important local part of transitional justice in Rwanda, these courts were often spurned in the Rule 11 *bis* context in favor of the more established national courts.<sup>112</sup> Thus, transfers between the ICTR and Rwandan courts perhaps aided in establishing the legitimacy of the Rwandan national courts in the international gaze but did little to uphold the expectations of the local people in terms of the justice they expected to receive.<sup>113</sup> These issues, and others, will be more fully developed in the analysis portion of this Comment.

### III. ANALYSIS

This Comment will now expand upon the information portrayed in Part II to synthesize a suggested transitional justice framework for Myanmar. The analysis will address the successes and failures of both the *gacaca* courts and the Rule 11 *bis* mechanism in Rwanda and ultimately illustrate how an understanding of these successes and failures may be applied to a future post-conflict Myanmar.

#### A. *The Successes and Failures of the Gacaca Courts in Rwanda*

The *gacaca* courts contributed to transitional justice of Rwanda in that they attempted to expose the truth of the atrocities that occurred, gave victims a healing platform on which to speak, and promoted community restoration as justice was pursued through speaking and understanding.<sup>114</sup> Further, the *gacaca* courts were centers for the Rwandan local sense of justice; they elevated the importance of exposing the tragedies that occurred over the issuance of objectively just consequences.<sup>115</sup> Through this elevation of local justice, the *gacaca* courts are an example of a culturally relativist approach to transitional justice.

Despite, and perhaps as a result of, their therapeutic ends, the *gacaca* courts did little to promote a sustainable rule of law.<sup>116</sup> Few rights were given to the accused, as the “courts” were primarily a place for victims to speak.<sup>117</sup>

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<sup>111</sup> Palmer, *supra* note 17, at 8.

<sup>112</sup> *Id.* at 17–18.

<sup>113</sup> *See id.* at 16, 19 (noting that, while the ICTR was theoretically willing to transfer cases to Rwandan national courts, it was not willing to transfer cases to the *gacaca* courts—the courts with which local people most often engaged).

<sup>114</sup> *See* Sosnov, *supra* note 35, at 136–40, 142–45.

<sup>115</sup> *See* Rettig, *supra* note 76, at 39. “[*Gacaca* confessions] were meant to give solace to survivors and heal the community by exposing how loved ones died and encouraging perpetrators to apologize.” *Id.* That being said, “nearly 40 percent of the time judges deem confessions incomplete and impose prison terms at or near the maximum—on average, twenty-five years.” *Id.*

<sup>116</sup> *See* Timothy Longman, *An Assessment of Rwanda’s Gacaca Courts*, 21 PEACE REV. 304, 309 (2009).

<sup>117</sup> Robert Theiring, *The Policy of Truth: A Comparative Study of Transitional Justice Between the Rwandan Gacaca Court and the Extraordinary Chambers in the Courts of Cambodia*, 48 CAL. W. INT’L

Due to the lack of an ascertainable standard of justice, witnesses would sometimes fear retaliatory physical harm if they spoke in support of a defendant.<sup>118</sup> As a result, the *gacaca* courts were looked down upon by those involved in the international courts as a significant factor *undermining* international justice.<sup>119</sup> Although not comprehensive of *all* successes and failures of the *gacaca* courts, this section will expand upon those most relevant to the future processes at issue in Myanmar.

Invaluable to Rwandan history through their role in post-conflict community restoration, the *gacaca* courts were unique and ambitious in many ways, and their successes and failures contribute to a greater understanding of the role of local courts in transitional justice.<sup>120</sup> The Rwandan government conceived the *gacaca* courts in 1999 and articulated the following five objectives for them:

- (1) “to reveal the truth about what has happened;”
- (2) “to speed up the genocide trials;”
- (3) “to eradicate the culture of impunity;”
- (4) “to reconcile the Rwandans and reinforce their unity;”
- and (5) “to prove that Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom.”<sup>121</sup>

These five goals were somewhat met by the *gacaca* courts, although the glaring flaws of the process admittedly came to light as the courts progressed.<sup>122</sup>

First and foremost, the *gacaca* courts focused on the exposition of truth and a full understanding of the actions which led to the need for the trial.<sup>123</sup> This emphasis on garnering the full impact of a defendant’s actions shifted the proceedings away from those of a typical trial—“[u]nlike traditional criminal trials, in which the goal is to prosecute an individual for the crimes he committed . . . *gacaca* focuses on the effect of the suspect’s actions on the community and invites testimony from every person affected by the crime.”<sup>124</sup> Defendants in *gacaca* proceedings were “given shorter sentences in exchange for confessing and [were] encouraged to seek forgiveness from the victim’s family. Survivors, in return, [could] finally

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L.J. 159, 168 (2017); *see also* Rettig, *supra* note 76, at 26 (“Lack of defense counsel and other protections for the accused raise doubts about *gacaca*’s compliance with international norms.”); Sosnov, *supra* note 35, at 136.

<sup>118</sup> Sosnov, *supra* note 35, at 138.

<sup>119</sup> *See* Palmer, *supra* note 17, at 17.

<sup>120</sup> *See* Rettig, *supra* note 76, at 25.

<sup>121</sup> Sosnov, *supra* note 35, at 134, 136 (quoting *The Objectives of the Gacaca Courts*, NAT’L SERV. OF GACACA JURISDICTIONS, <http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm> (last visited Apr. 20, 2008)).

<sup>122</sup> *See id.* at 136–47.

<sup>123</sup> *Id.* at 136.

<sup>124</sup> *Id.*

discover the fate of their loved ones.”<sup>125</sup> These tactics did not only expose the truth of the atrocities but also promoted healing and unity in some Rwandan communities—a major feat.<sup>126</sup> According to a study conducted in 2006 and 2007, the Sovu community embraced the *gacaca* courts and experienced some positive social trends as a result.<sup>127</sup> For example, “[a] cabaret (bar) in Sovu is likely to be packed—on any given day, at any given time—by both Hutus and Tutsis.”<sup>128</sup> Thus, it would seem as though ethnic divides that had once spawned genocide were, in some circumstances, repaired through truth-seeking and reconciliation *gacaca* processes.<sup>129</sup>

Moreover, the *gacaca* courts encouraged the development of democracy and the rule of law in Rwanda, despite the courts’ atypical approach to a trial.<sup>130</sup> One scholar argues that “[g]acaca’s procedural dependence on public participation has made it a forum in which speech is relatively free and protected.”<sup>131</sup> Further, she notes that *gacaca* created a “critical communication bridge between the people and the State that did not exist before.”<sup>132</sup> Importantly, the World Justice Project lists two of the Four Universal Principles of the rule of law as “Open Government” and “Accessible and Impartial Dispute Resolution.”<sup>133</sup> Free speech in judicial forums and communication between the Rwandan government and its people advance these two universal principles of the rule of law, assisting in the creation of a *sustainable* rule of law.<sup>134</sup>

Notwithstanding the successes in community restoration and democracy development, the *gacaca* courts were clouded by what many in the Rwandan community and the international community considered fatal flaws.<sup>135</sup> Obvious flaws included the lack of an accused’s right to counsel and the right to confront their accusers.<sup>136</sup> Another major flaw was the view that the *gacaca* courts were heavily biased against the Hutus—labelled in a blanket fashion as the “perpetrators”—while the Tutsis were portrayed as “faultless victims.”<sup>137</sup> Several factors contributed to this view, such as the

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<sup>125</sup> *Gacaca Courts*, N.Y. TIMES: SCHOTT’S VOCAB (Jan. 20, 2010, 4:34 AM), <https://schott.blogs.nytimes.com/2010/01/20/gacaca-courts/>.

<sup>126</sup> Rettig, *supra* note 76, at 39.

<sup>127</sup> *Id.* at 27, 29.

<sup>128</sup> *Id.* at 36. Further, “[m]ore than 95 percent of Sovu residents report having shared a drink with a member of another ethnic group within the month prior to the interview; two-thirds of the 95 percent say that they did so out of friendship.” *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See* Wierzynska, *supra* note 83, at 1947.

<sup>131</sup> *Id.* at 1958.

<sup>132</sup> *Id.*

<sup>133</sup> *What is the Rule of Law?*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited May 16, 2021).

<sup>134</sup> *See* Wierzynska, *supra* note 83, at 1958 (“[O]pen discussion of differences is apt to promote public autonomy[.] These characteristics fall squarely within civic culture.”).

<sup>135</sup> *See generally* Sosnov, *supra* note 35, at 138–53.

<sup>136</sup> Theiring, *supra* note 119, at 168.

<sup>137</sup> Sosnov, *supra* note 35, at 139.

governmental practice of trying only Hutu crimes in *gacaca* courts and the acceptance of false or insufficient evidence as the basis for a conviction.<sup>138</sup> At the same time, crimes committed by the Tutsi Rwandan Patriotic Front (“RPF”) government, the group which ultimately ended the genocide, went unaddressed.<sup>139</sup> This blatant bias inherent to the *gacaca* process resulted in a diminishment of public trust in the RPF government and in the reconciliation process as a whole.<sup>140</sup>

Finally, the *gacaca* courts were overshadowed by a cloud of fear felt by many parties: by defendants who did not want to participate in required accusations of their friends and family; by witnesses who feared reprisals by the past perpetrators; by non-victims who believed they would be accused of a crime themselves if they testified in favor of someone accused; and by rape victims who believed that they would be ostracized and become “ineligible to marry” if they testified.<sup>141</sup> This fear to speak the truth does not characterize a tribunal as successful in the endeavors of reconciliation and rule of law development, and herein lie the major problems with the *gacaca* court system. Although the *gacaca* courts’ emphases on legitimizing the voice of the victim and shedding light on past crimes pursued community healing and forgiveness in theory, the government did not execute the trials in a way which fostered healing beneath the surface-level.<sup>142</sup> As discussed below, the implementation of non-invasive international monitoring may mitigate the failures of the Rwandan *gacaca*-style courts in the context of Myanmar.

#### *B. The Successes and Failures of the Implementation of Rule 11 bis in Rwanda*

In many circumstances in which an international court tries cases involving domestic crimes, especially contentious crimes involving trauma and violence, the victims and other citizens of the nations at issue feel a sense of disconnect between the crimes they experienced and the actual process of justice.<sup>143</sup> The Rule 11 *bis* system of interaction between international and domestic courts was considered a theoretically effective way to bridge the gap and send medium to low-level criminals back to national courts to be tried.<sup>144</sup> Further, the Rule contained a provision that allowed the international tribunal to “recall” the case should it not progress in a satisfactory way in the national

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<sup>138</sup> Wierzynska, *supra* note 83, at 1963–64.

<sup>139</sup> Sosnov, *supra* note 35, at 133.

<sup>140</sup> Rettig, *supra* note 76, at 40.

<sup>141</sup> Theiring, *supra* note 119, at 169; Rettig, *supra* note 76, at 26, 41; Palmer, *supra* note 17, at 16; Sosnov, *supra* note 35, at 138.

<sup>142</sup> Rettig, *supra* note 76, at 43 (“Indeed, in Sovu a façade of reconciliation disguises a troubling reality. . . . Distrust between nonsurvivors and survivors is [] evident.”).

<sup>143</sup> See Canter, *supra* note 91, at 1623–24. “We are the victims, but we know nothing about what is happening there.” *Id.* at 1618 (internal quotations omitted).

<sup>144</sup> Palmer, *supra* note 17, at 1, 8.

court.<sup>145</sup> The Rule also required that the ICTR chamber consider the laws governing the domestic trials before the case was transferred to assure the protection of rights throughout the proceedings.<sup>146</sup>

Theoretically, the Rule provided for the balance of the dialectic which this Comment pursues. For the most serious cases of crimes against humanity, prevailing international norms of justice could be applied by the ICTR.<sup>147</sup> For lesser cases, Rwandan cultural norms and local ideas of justice could be upheld should the Rwandan laws provide a base-level fair trial.<sup>148</sup> And should the national court fail, the case could be recalled to the international level.<sup>149</sup> In practice, though, this balance weighed much more heavily on the primacy of international norms.<sup>150</sup> This section will outline the realistic application of Rule 11 *bis* to Rwanda.

Following the inclusion of Rule 11 *bis* in the ICTR Rules of Evidence, the ICTR considered two seminal cases regarding Rule 11 *bis* referrals: *Prosecutor v. Munyakazi* (“*Munyakazi*”) and *Prosecutor v. Kanyarukiga* (“*Kanyarukiga*”).<sup>151</sup> These cases generally represented the concerns of the ICTR and why the ICTR ultimately pursued a trend of denying Rule 11 *bis* transfers, undercutting the original purpose of the Rule.<sup>152</sup> Scholars have generally identified these concerns as revolving around Rwandan laws, penalties for crimes, and the occurrence of fair trials.<sup>153</sup>

Regarding national laws, Rule 11 *bis* required that the state in question have competent jurisdiction over the defendant before the consideration of other transfer decision factors; a large component of jurisdiction is a system of laws which actually criminalizes the defendant’s behavior.<sup>154</sup> Generally, both the *Munyakazi* and the *Kanyarukiga* Chambers decided that “there existed a sufficient legal framework [in Rwanda] to try the defendant for genocide and crimes against humanity” because they progressed into discussions of Rwanda’s capacity to conduct fair trials and

<sup>145</sup> Canter, *supra* note 91, at 1625–26; *see supra* notes 111–12 and accompanying text.

<sup>146</sup> Palmer, *supra* note 17, at 11.

<sup>147</sup> *See supra* note 113 and accompanying text (only intermediate and lower-ranking accused transferred).

<sup>148</sup> *See supra* notes 109–10 and accompanying text.

<sup>149</sup> *See supra* notes 111–12 and accompanying text.

<sup>150</sup> Palmer, *supra* note 17, at 12; Canter, *supra* note 91, at 1626–27.

Through the various facets of the transfer process, including “monitoring, sanctioning and socializing,” the international tribunals push “states toward greater compliance with the legal regime the tribunal enforces by making the costs of noncompliance greater than they would have been absent the tribunal or by acculturating states into the acceptance of new sets of norms and values.”

*Id.*

<sup>151</sup> *See generally* *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis* (Int’l Crim. Trib. for Rwanda Oct. 8, 2008); *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11*bis* (Int’l Crim. Trib. for Rwanda Oct. 30, 2008).

<sup>152</sup> *See* Canter, *supra* note 91, at 1616–17.

<sup>153</sup> *Id.* at 1633; Palmer, *supra* note 17, at 8.

<sup>154</sup> Canter, *supra* note 91, at 1633–34.

the relevant penalties that would be imposed.<sup>155</sup> A “sufficient” legal framework, though, was not necessarily enough to pass muster in front of the Chambers, as both international standards for punishment and fair trials needed to be met.<sup>156</sup>

Problematic to Rule 11 *bis* Section (C), which states that the death penalty should not be carried out in the national jurisdiction, Rwanda passed the Death Penalty Law in 2007, which substituted the death penalty with “life imprisonment or life imprisonment with special provisions.”<sup>157</sup> Article 4 of the Death Penalty Law provides that the “special provisions” could include solitary confinement for life, a sentence found inconsistent with international human rights standards by the Chambers for both *Munyakazi* and *Kanyarukiga*.<sup>158</sup> When this argument was presented by the defendants in opposition to the Rule 11 *bis* transfer to Rwanda, Rwanda argued in return that they had recently instituted the Transfer Law; in an effort to facilitate more Rule 11 *bis* transfers to Rwanda, the Transfer Law provided that the maximum possible sentence for transfer cases was life imprisonment with no special provisions.<sup>159</sup> Rwanda further offered for their legislature to officially interpret the Transfer Law as stipulating such.<sup>160</sup> Despite these assurances, the *Munyakazi* and *Kanyarukiga* Appeals Chambers both held:

Since there is genuine ambiguity about which punishment provision would apply to transfer cases, and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases . . . the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* . . . .<sup>161</sup>

Thus, the ICTR rejected the transfers due to Rwanda’s penalty system and refused to give Rwanda the benefit of the doubt regarding their efforts to conform to international standards.<sup>162</sup>

Issues involving the dialectic between international norms and national practice arose upon the ICTR evaluation of the Rwandan criminal law system. For example, in deciding whether to transfer cases, the ICTR looked to briefs presented by international organizations assessing the Rwandan procedural justice laws, rather than just to the laws themselves.<sup>163</sup>

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<sup>155</sup> *Id.* at 1634; see generally *Munyakazi*, Case No. ICTR-97-36-R11*bis*; *Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*.

<sup>156</sup> Canter, *supra* note 91, at 1633–35; Palmer, *supra* note 17, at 9–10.

<sup>157</sup> Canter, *supra* note 91, at 1634.

<sup>158</sup> *Munyakazi*, Case No. ICTR-97-36-R11*bis*, at ¶ 10–11; *Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, at ¶ 683; Canter, *supra* note 91, at 1634.

<sup>159</sup> See Canter, *supra* note 91, at 1634–37.

<sup>160</sup> *Id.* at 1635.

<sup>161</sup> *Munyakazi*, Case No. ICTR-97-36-R11*bis*, at ¶ 20; *Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, at ¶ 16.

<sup>162</sup> Canter, *supra* note 91, at 1638.

<sup>163</sup> See Palmer, *supra* note 17, at 10.

The decision to look at materials outside of Rwandan written legislation shifted away from ICTY jurisprudence, which required courts to only look at the “State’s relevant legislation when determining whether an accused would receive a fair trial in that State.”<sup>164</sup> Rather than follow this jurisprudence, the ICTR chose to look to the experience of the ICTR defense counsel and two briefs submitted by Human Rights Watch and the International Criminal Defence Attorneys Association.<sup>165</sup> These groups uphold international standards for criminal law and judicial development, and they concluded in their briefs that these standards would not be upheld if the cases were transferred to Rwandan national courts.<sup>166</sup> By giving preferential treatment to the reports of international groups over the efforts of Rwanda itself, the ICTR elevated the international perspective over the Rwandan local perspective and arguably undermined the development and practice of transitional justice in Rwanda, which Rwanda seemed eager to accomplish.<sup>167</sup>

Moreover, regarding Rwanda’s capacity to ensure a fair trial, the ICTR considered whether the Rwandan judicial system proffered sufficient judicial independence and the right to call witnesses for the defense.<sup>168</sup> In *Munyakazi*, the Court considered whether Rwanda’s judicial practice of adjudicating serious violations in a High Court with a *single* judge and the government’s known influence over the judiciary indicated Rwanda’s lack of an independent judiciary.<sup>169</sup> Despite these concerns, the Appellate Chambers noted that the numerical composition of the Rwandan High Court could not be a dispositive reason not to transfer a case and that the evidence of executive interference with the judiciary did not outweigh the safeguards Rwanda put in place to guarantee judicial independence.<sup>170</sup> As a result, the Appellate Chambers opined that “no reasonable Trial Chamber would have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying the Prosecution’s request to transfer *Munyakazi* to Rwanda.”<sup>171</sup> Therefore, this factor weighed in favor of transfer.<sup>172</sup>

Finally, perhaps the most damning factor regarding potential transfers to Rwanda was Rwandan defense counsel’s de facto inability to call witnesses at trial in Rwandan courts.<sup>173</sup> As discussed previously, potential witnesses in trials regarding the genocide were reluctant to testify due to fear.<sup>174</sup>

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Canter, *supra* note 91, at 1649 (“In the face of this good faith effort, it is important that the ICTR adopt a more reasoned and liberal attitude towards Rwanda.”).

<sup>168</sup> *Munyakazi*, Case No. ICTR-97-36-R11bis, at ¶ 32; *Kanyarukiga*, Case No. ICTR-2002-78-R11bis, at ¶ 19–34.

<sup>169</sup> *Munyakazi*, Case No. ICTR-97-36-R11bis, at ¶ 23.

<sup>170</sup> *Id.* ¶ 25, 29.

<sup>171</sup> *Id.* ¶ 29.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* ¶ 38; *Kanyarukiga*, Case No. ICTR-2002-78-R11bis, at ¶ 19–24.

<sup>174</sup> See *supra* note 143 and accompanying text.

Recognizing this fear, the Appellate Chambers for both *Munyakazi* and *Kanyarukiga* discussed the “harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence . . . experienced threats, torture, arrests and detentions, and, in some instances, were killed.”<sup>175</sup> In concluding that evidence of this harassment was credible and indicative of a defendant’s ability to call witnesses, the Chambers again relied upon the briefs submitted by international organizations.<sup>176</sup> Attempting to mitigate this issue, Rwanda incorporated a strengthening of its witness protection program into the Transfer Law.<sup>177</sup> Again, the ICTR considered the assurances by Rwanda to be merely “theoretical” and the program to be insufficient.<sup>178</sup>

Further addressing Rwandan issues with witness fear, the ICTR undermined the *gacaca* system in Rwanda, using the local courts as a factor “that lead the ICTR to refuse transfer on the grounds of the accused’s inability to raise an effective defen[s]e.”<sup>179</sup> The ICTR based this assessment on the fact that *gacaca* was understood to spawn arbitrary arrest and harassment due to the biased nature of the courts.<sup>180</sup> In reaching this conclusion, the ICTR refused to engage with the potential successes of the localized and more informal court system.<sup>181</sup> This refusal illustrates the tension that exists between international and local conceptions of justice and, as scholars argue, may have negatively impacted the ICTR’s ability to fairly and knowledgeably adjudicate requests for Rule 11 *bis* transfers.<sup>182</sup>

Overall, the reality of Rule 11 *bis* in the context of the ICTR did not align with the process in theory. Rather than creating balance and mutual understanding between the international and local approaches to justice, the ICTR Rule 11 *bis* proceedings arguably exacerbated the disconnect in that the ICTR gave little leeway to Rwanda in implementing international norms and failed to promote the development of the rule of law and justice in post-conflict Rwanda.

### C. Application of Lessons Learned to the Unique Situation in Myanmar

Taking into account the successes and failures of the *gacaca* courts and of Rule 11 *bis* in Rwanda, a better combination of these two concepts must be implemented in Myanmar when the time for post-conflict transitional justice mechanisms approaches. This better implementation would include

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<sup>175</sup> *Munyakazi*, Case No. ICTR-97-36-R11*bis*, at ¶ 37.

<sup>176</sup> *Id.* ¶ 37 n.102; *Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, at ¶ 24 (referencing the amici curiae briefs).

<sup>177</sup> Canter, *supra* note 91, at 1644.

<sup>178</sup> *Id.*; *Munyakazi*, Case No. ICTR-97-36-R11*bis*, at ¶ 38.

<sup>179</sup> Palmer, *supra* note 17, at 16.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 17. A Senior Trial attorney for the ICTR noted, “[gacaca] is a failed process . . . [It] has undermined the integrity of international justice.” *Id.*

<sup>182</sup> See Palmer, *supra* note 17, at 16.

institutional reform in the judiciary so that *gacaca*-type courts could effectively pursue truth and the rule of law in tandem; a more culturally sensitive approach to Rule 11 *bis* so that an international tribunal is willing to work more closely with the national courts of Myanmar; and a system of international monitoring to ensure that Myanmar protects the most basic rights, such as those ensuring fair trials for the accused.

As mentioned previously, Rwanda is a valuable case example through which to view the situation in Myanmar due to the similar nature of the conflicts.<sup>183</sup> The *gacaca* approach in Rwanda could help to heal the ethnic divides that Myanmar is facing by allowing more truth-telling, if the process is implemented more successfully than it was in Rwanda. Many more cases were heard in the Rwanda *gacaca* courts than in their national courts because the *gacaca* process was more informal.<sup>184</sup> In Myanmar both the Tatmadaw and the Rohingya military forces, known as the Arakan Rohingya Salvation Army (“ARSA”), have committed large-scale human rights abuses.<sup>185</sup> Thus, international and national courts for Myanmar would need to hold many trials to process the many grievances. Given the widespread nature of the atrocities in Myanmar, an informal process like the *gacaca* courts could allow for expedited ethnic and religious healing.

Of course, Myanmar would need to address the issues that arose in the implementation of *gacaca* in Rwanda. For example, future truth-telling courts in Myanmar must ensure the components of a fair trial: a lack of bias toward one side or the other (Buddhist v. Muslim), a defendant’s right to counsel, and a defendant’s right to face their accusers.<sup>186</sup> Fortunately, the Myanmar Constitution provides for an independent and lawful judiciary, justice in an open court, and a guarantee of the rights of defense and appeal.<sup>187</sup> Myanmar, therefore, already has the guarantees structurally in its laws.<sup>188</sup> Granted, the implementation of these guarantees must occur, but the outlook has improved in recent years, as procedural abuses, like secret trials and punitive transfers to remote facilities, “are currently rare or non-existent.”<sup>189</sup> Moreover, the international community could implement non-invasive monitoring procedures to ensure that, in the *gacaca*-like courts, the issuance of a sentence conforms with formal requirements of fairness and defense

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<sup>183</sup> See *supra* notes 73–75 and accompanying text.

<sup>184</sup> *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, HUM. RTS. WATCH (May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> (1.2 million cases tried by *gacaca* courts); *The ICTR in Brief*, U.N. INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/tribunal> (last visited May 16, 2021) (stating that 93 individuals were indicted by the ICTR).

<sup>185</sup> *Report on Myanmar*, *supra* note 2, at ¶ 10, 53–54.

<sup>186</sup> See *supra* notes 137–39 and accompanying text.

<sup>187</sup> IBAHRI REPORT, *supra* note 62, at 60.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 29.

witnesses do not fear testifying.<sup>190</sup> These monitoring procedures could result in reports and encourage institutional reform in Myanmar's judiciary, as well as monitor cases which may be transferred from an international tribunal through Rule 11 *bis*.<sup>191</sup>

As stated already, Myanmar has a large judicial system, and some "judicial" proceedings are operated by tribal leaders.<sup>192</sup> These tribal leaders are regulated by the government through the Ward or Village Tract Administration Act of 2012, which requires the election of these tribal village officials by secret ballot.<sup>193</sup> This system is well-suited for the *gacaca*-type trials because each village community already has an elected official that could serve as the adjudicator and facilitator of a *gacaca*-type hearing.<sup>194</sup> As a caveat, lustration of officials is often needed in post-conflict transitional societies to effectuate true institutional reform.<sup>195</sup> The international community, through the United Nations, could aid Myanmar in implementing a lustration program to ensure that judges in *gacaca*-type courts are unbiased and effective, removing those who were largely complicit in the conflict.<sup>196</sup> In this way, Myanmar could progress in the transitional justice areas of criminal proceedings and institutional reform through *gacaca*-like proceedings.

Further learning from Rwanda, Myanmar could utilize the Rule 11 *bis* mechanism in an international tribunal setting. The ICC would likely serve as the international tribunal by which the atrocities committed by individuals are addressed; as discussed previously, the ICC was created in response to the ICTR and ICTY but faces many potential pitfalls as an arguably ethnocentric body.<sup>197</sup> Moreover, the ICC must learn from the lessons

<sup>190</sup> See Canter, *supra* note 91, at 1647–48 (noting that, although the *Kanyarukiga* Chamber seemed more willing to rely on monitoring mechanisms and give Rwanda the benefit of the doubt, they ultimately do not confer this benefit on Rwanda).

<sup>191</sup> See *supra* note 38 and accompanying text.

<sup>192</sup> See *supra* notes 62–64 and accompanying text.

<sup>193</sup> IBAHRI REPORT, *supra* note 62, at 56.

<sup>194</sup> See *id.*

<sup>195</sup> Holliday, *supra* note 9, at 190. A lustration program is "designed to vet state employees to determine whether they were complicit in major abuse, and whether they merit an ongoing career in public service." *Id.* at 187.

<sup>196</sup> Ian Holliday notes a potential pitfall of such a program: "that state capacity will be gravely damaged if entire cohorts of key officials are dismissed from public agencies." *Id.* at 190. Myanmar could address this issue by granting selective amnesty to officials with only minor concerns while applying the lustration program only to those officials who are certainly not able to carry out unbiased proceedings. See *id.*

<sup>197</sup> See *International Criminal Court*, HUM. RTS. WATCH, <https://www.hrw.org/topic/international-justice/international-criminal-court> (last visited Mar. 17, 2021) (noting that the creation of the ICC was an answer to the ICTY and ICTR); see also Bottini, *supra* note 32, at 504. Myanmar as a nation may also face accountability before the International Court of Justice ("ICJ"). See D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?*, AM. SOC'Y OF INT'L L. (Feb. 27, 2020), <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean>. The ICJ adjudicates state-state claims, while the ICC addresses individual criminal responsibility. *Id.* The Gambia sued Myanmar in the ICJ, for, among other claims, Myanmar's violations of the Genocide Convention. *Id.* In January 23, 2020, the ICJ determined that "there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia" under the Genocide Convention. *Id.* (quoting Order, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The

of implementing Rule 11 *bis* in Rwanda and commit itself to diligently working with the Myanmar government to facilitate successful transfers. Generally, this commitment would look like the following: (1) a greater willingness by the international community to engage with Myanmar's local judicial norms and traditions; (2) a strict resolution to adjudicate the most serious offenders at the international level to affirm international rebuke of genocidal crimes; and (3) a commitment to refer lesser crimes to local courts.

Addressing the first component of the ICC's commitment to facilitating a Rule 11 *bis*-like transfer mechanism, the international community must be willing to bridge the dialectical gap between international norms and local conceptions of justice to facilitate a rule of law practice that will be *sustainable* in the Myanmar social and political climate. In the ICTR transfer decisions, the Appeals Chambers refused to grant Rule 11 *bis* referrals because they did not believe Rwanda would be able to implement the high international standards for penalties and fair trials.<sup>198</sup> Rather than granting the benefit of the doubt to a country struggling to recover from atrocity, the ICTR expected Rwanda to have international norms and guarantees firmly in place.<sup>199</sup> Moreover, because the ICTR refused to grant these transfers, Rwanda was unable to use these cases to build their rule of law capacities and reputation.<sup>200</sup> When Myanmar approaches a post-conflict environment, the ICC should take a different approach and put a higher degree of trust in the Myanmar government's efforts—mitigated, of course, by international monitoring.

In Myanmar, the judiciary and the executive are more closely connected than deemed acceptable by the international community; although the people of Myanmar support the idea of an independent judiciary and democracy in theory, they also show a lowered appreciation for more liberal democratic values.<sup>201</sup> Therefore, while a truly independent judiciary is arguably possible in Myanmar, the present “societal value of order” and the Myanmar citizens’ “support [of] highly authoritarian ideals with regards to other social and political dynamics” makes a concerted movement by Myanmar toward a truly independent judiciary unlikely.<sup>202</sup> Rather than

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Gambia v. Myanmar) (Jan. 23, 2020). It then required Myanmar to take provisional measures to preserve evidence of genocidal wrongdoing as the case progresses. *Id.* The case will progress in the coming year, as The Gambia must submit a written memorial by July 3, 2020, and Myanmar must respond by January 23, 2021. *Id.* Unfortunately, there is no way to ensure that Myanmar complies with the provisional order. *Id.*

<sup>198</sup> See *supra* notes 163, 175–80 and accompanying text.

<sup>199</sup> See *supra* notes 179–80, 184 and accompanying text.

<sup>200</sup> See *supra* notes 169, 183–84 and accompanying text.

<sup>201</sup> See *supra* note 67 and accompanying text. In her statement to the ICJ, Aung San Suu Kyi indicated that military tribunals would be used to prosecute military officers and soldiers, as opposed to civilians. *Myanmar's Aung San Suu Kyi Takes the Stand*, FOREIGN POL'Y (Dec. 12, 2019, 3:25 PM), <https://foreignpolicy.com/2019/12/12/myanmars-aung-san-suu-kyi-takes-the-stand/>. These military tribunals would also benefit from a Rule 11 *bis*-like mechanism and the strengthening of the rule of law.

<sup>202</sup> Epling, *supra* note 1, at 135.

endeavor to force Myanmar into a large cultural shift, the international community should recognize that the judiciary may be influenced by the ideals put forth by the powerful executive. The judiciary and the executive in Myanmar may work closely together; however, the international community need not balk at this “rule of law” transgression unless there is evidence that fair trials are not occurring.<sup>203</sup> Thus, the international community can feel secure in their implementation of a supervision system to warrant the occurrence of fair trials.

Turning to the second and third components of the ICC’s commitment to facilitating Rule 11 *bis*-like transfers, the ICC must evaluate which cases are severe enough that they must be tried at the international level, facilitate the transfer of less serious cases to the larger national courts and military tribunals in Myanmar, and provide guidance and support for the *gacaca*-type courts. The trial of large players involved in the Myanmar atrocities would likely be kept in the jurisdiction of the ICC following the rationale of Rule 11 *bis* Section (A)(iii) because these trials would be important opportunities for the international community to strongly articulate international law concerning genocide and crimes against humanity.<sup>204</sup> Indeed, the ICTR served largely “as a means of establishing an international system of criminal justice for violations of humanitarian law.”<sup>205</sup>

Despite the benefits of developing a robust collection of international criminal law regarding these types of crimes, the ICC for Myanmar must successfully transfer cases to the Myanmar national courts through a Rule 11 *bis*-like mechanism. This transfer would be encouraged by the fact that Rule 11 *bis* provides for international monitoring procedures and the possibility for revocation of the transfer should the national adjudications proceed in blatant opposition to the notion of a fair trial.<sup>206</sup> Admittedly, the international community would need to be heavily involved through supervision to ensure that the Myanmar military is not exerting undue discriminatory influence over the judicial proceedings.<sup>207</sup> But, this sort of supervision need not place international norms in superiority over the local.

Lastly, the ICC and the international community as a whole must not dismiss *gacaca*-type proceedings in Myanmar as they did, on the whole, in Rwanda.<sup>208</sup> This dismissal demoralized the success of these grassroots courts and characterized the Rwandan approach to justice as “undermin[ing] international justice.”<sup>209</sup> In contrast, as argued by one scholar, the ICC, national-level courts, and *gacaca*-type proceedings “could complement one

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<sup>203</sup> See *supra* notes 68–69 and accompanying text.

<sup>204</sup> See ICTR RULE 11 *bis*, *supra* note 99; Palmer, *supra* note 17, at 7–8.

<sup>205</sup> Palmer, *supra* note 17, at 6.

<sup>206</sup> See *supra* notes 111–12 and accompanying text.

<sup>207</sup> *Report on Myanmar*, *supra* note 2, at ¶ 104.

<sup>208</sup> See *supra* notes 181–84 and accompanying text.

<sup>209</sup> Palmer, *supra* note 17, at 17.

another, with the [international tribunal] contributing to a global legal order, the national courts to developing domestic professional capacity and *gacaca* to providing a locali[z]ed mechanism of accountability.”<sup>210</sup> By using this approach, each court system could pursue common goals of transitional justice and sustainable rule of law development in Myanmar while also pursuing tailored objectives.<sup>211</sup> Moreover, Myanmar could utilize the ethnocentrism-cultural relativism dialectic to its advantage by *equally* prioritizing international human rights norms and domestic cultural values in the *gacaca*, national, and international court levels. Myanmar may thus create a more sustainable post-conflict rule of law framework by avoiding the problems which arise from favoring one side of the dialectic over the other.

#### IV. CONCLUSION

Notwithstanding this Comment’s discussion, there will certainly be limitations to the application of the transitional justice framework to Myanmar. For example, the ethnic and religious divides between the minority Muslims and the majority Buddhists are deeply and historically rooted.<sup>212</sup> It is highly probable that the government and institutions in Myanmar are inherently discriminatory toward Muslims.<sup>213</sup> Further, the extremely anti-Muslim Myanmar military holds a great amount of power and influence in the country—to the point at which some argue the current government in Myanmar is simply a puppet regime for the military.<sup>214</sup> These factors hinder the likelihood of success for transitional justice mechanisms like *gacaca*-style courts and Rule 11 *bis*. Until the time arrives when Myanmar is truly post-conflict regarding the atrocities against the Rohingya, it will be impossible to tell exactly how these processes should be implemented. Still, understanding the dialectic between ethnocentric and culturally relativist approaches to the rule of law and transitional justice will be paramount to the healing of post-conflict Myanmar, and the lessons learned from the experiences of post-conflict countries like Rwanda are invaluable to this process.

In an effort to propose a sustainable rule of law framework for a post-conflict judiciary in Myanmar, this Comment illustrated the similarities between the genocide which occurred in Rwanda in the 1990’s and the current violence perpetrated by the Rakhine Buddhists against the Rohingya Muslims in Myanmar.<sup>215</sup> Both conflicts involve deep-rooted divides and hatred, whether ethnic or religious, and were the result of many decades of violence

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<sup>210</sup> *Id.* at 20.

<sup>211</sup> *See id.*

<sup>212</sup> *See supra* notes 45–50 and accompanying text.

<sup>213</sup> Nehginpao Kipgen, *Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum*, 22 J. OF MUSLIM MINORITY AFF. 298, 304 (2013).

<sup>214</sup> *See* Christina Fink, *Myanmar in 2018: The Rohingya Crisis Continues*, 59 ASIAN SURV. 177, 178 (2019) (“State Councilor Aung San Suu Kyi’s defense of the military’s actions [has] diminished her international credibility.”)

<sup>215</sup> *See supra* notes 73–74 and accompanying text.

and repression of one party.<sup>216</sup> Further, in post-conflict Rwanda, the country experienced local grassroots courts, national courts, and an international tribunal.<sup>217</sup> The similarities between the conflicts and the use of a wide range of post-conflict judiciaries in Rwanda allow the Rwanda example to serve as a valuable tool in the eventual post-conflict Myanmar context.

An example of culturally relativist justice, the *gacaca* courts in Rwanda were a setting for truth-telling and healing according to the customs of the Rwandan local sense of justice.<sup>218</sup> Often absent from these courts, though, was a *sustainable* rule of law in that crucial elements of due process were lacking: right to counsel, right to confront one's accusers, and non-biased adjudicators.<sup>219</sup> Further, witnesses often feared becoming a social pariah in their communities if they testified.<sup>220</sup> In the Myanmar context, these issues must be prevented, but the potential for this prevention in Myanmar is promising. Myanmar already has a judicial system in place, incorporating local tribal leaders, which would be well-suited for *gacaca*-style proceedings.<sup>221</sup> The international community could also aid in the observance of these proceedings to ensure fairness and due process.

On the "ethnocentric" side of the dialectic in the Rwandan context lies the ICTR, which exerted primary control over genocide and crimes against humanity prosecutions.<sup>222</sup> The ICTR attempted to bridge the gap between the international and the domestic in Rwanda through the Rule 11 *bis* mechanism, but this mechanism did not manifest itself in *reality* as it might have *theoretically*; namely, although the ICTR had the potential to help foster a rule of law practice in Rwanda by transferring cases to its national courts, the ICTR undermined the potential for judicial and rule of law growth in Rwanda by distrusting Rwandan capabilities to try lower-level genocide and crimes against humanity cases.<sup>223</sup> These concerns of the ICTR were illustrated in *Prosecutor v. Munyakazi* and *Prosecutor v. Kanyarukiga*.<sup>224</sup> In the future, if the ICC prosecutes cases from Myanmar, it should utilize a Rule 11 *bis*-like mechanism to bolster rather than undercut the national-level courts in Myanmar, even if the national courts do not align with all international understandings of the rule of law (e.g., not having a completely independent judiciary). Further, like the ICTR under Rule 11 *bis*, the ICC would have supervisory authority over the national-level courts, and if the national courts

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<sup>216</sup> *See id.*

<sup>217</sup> *See supra* note 80 and accompanying text.

<sup>218</sup> *See supra* notes 81–83 and accompanying text.

<sup>219</sup> *See supra* notes 137–39 and accompanying text.

<sup>220</sup> *See supra* note 143 and accompanying text.

<sup>221</sup> *See supra* notes 62–64 and accompanying text.

<sup>222</sup> *See supra* note 96 and accompanying text.

<sup>223</sup> *See supra* notes 169, 183–84 and accompanying text.

<sup>224</sup> *See generally* *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (Int'l Crim Trib. for Rwanda Oct. 8, 2008); *Prosecutor v. Kanyarukiga*, Case no. ICTR-2002-78-R11*bis*, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11*bis* (Int'l Crim Trib. for Rwanda Oct. 30, 2008).

implemented any severe rule of law transgressions in a proceeding, the tribunal could recall the case.<sup>225</sup> Through this proposed framework, Myanmar could successfully implement grassroots, national, and international courts in its efforts to sustain the rule of law and peace within its borders.

Lastly, this Comment emphasizes that the international community must address the atrocities occurring in Myanmar. As stated by the deputy director of Human Rights Watch's Asia division, "[i]t's like apartheid . . . [i]t's a horrific situation that has gone unnoticed by the world."<sup>226</sup> Before the implementation of the framework discussed here, the violence must stop, and this may require international intervention. Once this occurs, Myanmar can begin the process of transitional justice. The international community learns from its past, fraught as it is with regrettable crimes against humanity. Although there will never be a perfect post-conflict solution, the likelihood of future atrocities to human dignity necessitates an ongoing search for post-conflict justice. This Comment ultimately suggests that this search must look to past transitional justice attempts as intellectual resources for preemptive solutions—even before a conflict has ended.

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<sup>225</sup> See *supra* notes 108–12 and accompanying text.

<sup>226</sup> Vidhi Doshi, *Five-Year-Old Boy Among 30 Rohingya Arrested for Travelling in Myanmar*, GUARDIAN (Oct. 10, 2019, 1:00 AM), <https://www.theguardian.com/global-development/2019/oct/10/five-year-old-boy-among-30-rohingya-arrested-for-travelling-in-myanmar>.