

[A Preliminary and Holistic] Examination and Assessment of the Impacts on Justice and Accountability of the Mechanisms Addressing the Rohingya Issue in Myanmar

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Abstract

The tension and violence against the Rohingya in Rakhine State, Myanmar has been escalating to the extent that it could be called ethnic cleansing or crime against humanity. The international community has insufficiently done in preventing and protecting the Rohingya that are facing persecution in Myanmar. The national mechanism in Myanmar which consists of the Rakhine Conflict Investigation Commission, the Myanmar National Human Rights Commission, and the Central Committee for Rakhine State Peace, Stability, and Development Implementation intends to address the truth and solution to the crisis. Moreover, due to the latest incident in Muangtau where nine policemen were killed, the Myanmar government also establishes another commission to investigate such an incident. The international community also calls for the independent truth commission to address the Rohingya issue. It is high time to examine and assess those mechanisms to what extent they help mete justice and accountability for atrocities in Myanmar. This paper will also compare and contrast the works of human rights and investigation commissions established by Myanmar and the others in order to suggest the best practices to enhance the mechanisms in Myanmar.

Keywords: Myanmar, Rohingya, Transitional Justice, Accountability, Atrocities, International Crime, Human Rights

TABLE OF CONTENTS

INTRODUCTION

- I. BACKGROUND OF THE ROHINGYA CRISIS**
 - A. Historical Context**
 - B. The Present Ongoing Conflict**
 - C. Transitional Justice in Myanmar**
- II. TRANSITIONAL JUSTICE MECHANISM IN MYANMAR**
 - A. Domestic Mechanisms**
 - 1. The Inquiry Commission on Sectarian Violence in Rakhine State
 - 2. The Myanmar National Human Rights Commission
 - 3. The Central Committee for Rakhine State Peace, Stability, and Development Implementation
 - 4. The Investigation Commission on Muangtau
 - B. Hybrid and International Mechanisms**
 - 1. Special Rapporteur on Myanmar
 - 2. United Nations High Commissioner for Human Rights
 - 3. Universal Periodic Review under the UN Human Rights Council
 - 4. Multi-Sector Advisory commission on Myanmar's Rakhine State
- III. ASSESSMENTS OF THE IMPACTS OF EXISTING TRANSITIONAL JUSTICE MECHANISMS**
 - A. Methodology of the Assessment**
 - B. Impacts of the Domestic Mechanism**
 - 1. Impacts of the Inquiry Commission on Sectarian Violence in Rakhine State
 - 2. Impacts of the Myanmar National Human Rights Commission
 - 3. Impacts of the Central Committee for Rakhine State Peace, Stability, and Development Implementation
 - 4. Impacts of the Investigation Commission on Muangtau
 - C. Impacts of the United Nations Mechanisms**
 - D. Impacts of the Advisory Commission**
 - E. Reactions of the International Community**
 - F. Holistic Analysis of the Mechanisms**
- IV. MOVING TOWARD JUSTICE AND ACCOUNTABILITY IN MYANMAR**
 - A. Comparisons of Mechanisms for Better Solutions**
 - B. Paradox of Justice and Peace Synergy**

CONCLUSION

INTRODUCTION

Atrocity crimes are pervasive in many areas of the world. They are gross human rights violations which the international community must not tolerate because they are crimes of international concern which pose a threat to peace and international security.¹ However, some atrocity crimes happen in the areas out of sight of the world. Little is known about what has been happening in those areas, such as in Myanmar. Myanmar seems to be a peaceful Buddhist country in Southeast Asia; however, it has been facing internal armed conflicts for decades since the country has become independent from the United Kingdom in 1948.² The conflicts and human rights abuses have erupted in several states namely Kachin, Shan, Kayah, Kayin, and Rakhine.³ Particularly, in Rakhine State, Myanmar attempts to hide atrocities against the Muslim minority – the Rohingya – from the attention of the international community to avoid responsibility and accountability. This paper focuses on the problems in Rakhine State, in particular the Rohingya issue.

The Rohingya conflict is now not only a domestic concern but being treated as an international problem. Several reports from non-governmental organizations and international affairs literatures regarding the Rohingya issues have been published. Yet, only a few legal publications and the non-governmental organizations (NGOs)' reports have addressed or touched upon the Rohingya problem regarding the possibility of the crime of genocide and crime against humanity.⁴ None of the legal literature has examined the attempts of the government and the international community to bring justice and accountability to the Rohingya. Therefore, this will be the very first preliminary study on the transitional justice mechanisms of the contemporary conflicts.

This paper will explore, examine, analyze, and assess the legal implications of the mechanisms to resolve the Rohingya issue established by both Myanmar in the domestic level and the international community at the international level. This paper argues that despite the number of mechanisms, they are fragmented, overlapping, and have not served sufficient justice and accountability for the violence against the Rohingya. Therefore, the government of Myanmar should push more effort to address this issue.

The first part of the paper will explore the background of the Rohingya story in terms of both historical and contemporary contexts to address the root causes and figure how conflict evolves through time. The second part will describe both domestic, hybrid, and international mechanisms dealing with the atrocity against the Rohingya in Myanmar. This will explain how

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¹ *UN report details 'devastating cruelty' against Rohingya population in Myanmar's Rakhine province*, Feb. 3, 2017, available at <http://www.un.org/apps/news/story.asp?NewsID=56103#.WPwO11Pyub8> (last visited Apr. 25, 2017).

² Human Rights Watch, *Burma: Event of 2016*, available at <https://www.hrw.org/world-report/2017/country-chapters/burma#f3ec3e> (last visited Apr. 25, 2017).

³ Gustaaf Houtman, *MENTAL CULTURE IN BURMESE CRISIS POLITICS: AUNG SAN SUU KYI AND THE NATIONAL LEAGUE FOR DEMOCRACY*, Tokyo University of Foreign Studies, Institute for the Study of Languages and Cultures of Asia and Africa (1999), 72.

⁴ Penny Green, Thomas MacManus, and Alicia de la Cour Venning, *COUNTDOWN TO ANNIHILATION: GENOCIDE IN MYANMAR*, available at <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf> (last visited April 13, 2017); Allard K. Lowenstein International Human Rights Clinic, Yale Law School, *PERSECUTION OF THE ROHINGYA MUSLIMS: IS GENOCIDE OCCURRING IN MYANMAR'S RAKHINE STATE? A LEGAL ANALYSIS*, available at http://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf (last visited April 13, 2017).

those mechanisms emerge and function. The third part will assess and analyze the impacts of each mechanisms based on their progress, procedures, and outcomes. This part will also compare and contrast the work of those mechanisms to evaluate the capabilities to probe the ongoing conflict. The fourth part will juxtapose the existing mechanisms to the other types of mechanisms used elsewhere and will also look at the way forward to bring justice and accountability to Myanmar. This part will also provide a critical review of the paradox of justice and peace in the Myanmar context and the introduction of the anticipated mechanisms. Lastly, this paper will conclude with some preliminary observations of the works and studies of those transitional justice mechanisms and will provide some recommendations to enhance the capacity of the mechanisms.

I. BACKGROUND OF THE ROHINGYA CRISIS

A. Historical Context of the Conflict

The Rohingya are a Muslim minority, approximately 800,000 people, living in Rakhine State (formerly Arakan), the West area of Myanmar near Bangladesh, long before the Anglo-Burmese war. They are even the minority in Rakhine state since they are only one thirds of the total population.⁵ In the colonization period, the Rohingya, along with the Bangladesh were encouraged to help the British colonial government fight Myanmar in the Anglo-Burmese war.⁶ Later, the Rohingya, therefore, were denied the Burmese citizenship by means of the 1982 Citizenship act which cuts off the citizenship for those who migrated after 1832.⁷ Even though the Rohingya had lived in Arakan before that year, the government still applied the law to reject citizenship for the Rohingya until today. This citizenship law cuts off access to health care, education, freedom of movement, and other facilities that would sustain adequate standard of living.⁸ After independence, the resentment, irritation and suppression toward the Rohingya has remained. Until the recent military regime in early 1900s, more than 250,000 Rohingyas fled from Myanmar because of the fear of persecution by forced labor, religion, and rape.⁹ However, most of them later returned to Rakhine State in the mid-1990s. Both Myanmar and Bangladesh refuse to grant citizenship to the Rohingya and leave them stateless.¹⁰ In addition, being minority Muslims in a majority Buddhist country, the Rohingya in Rakhine State have been treated unequally as other Burmese. They are deprived of civil liberties and therefore are prone to flee from their homeland causing the irregular migrant and refugee crisis in the Southeast Asian region.¹¹

B. The Present Ongoing Conflict

The violence against Rohingya has been commenced since the period of the military junta in Myanmar, and is still ongoing in the age of a democratic government. In the military dictatorship period, human rights perpetrators had never been charged and prosecuted. The contemporary conflict has violently erupted in 2012 when there was a clash between extreme Buddhists and the

⁵ *Supra* note 4

⁶ International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Dec. 15, 2016, available at <https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state> (last visited Apr. 20, 2017).

⁷ *Supra* note 2.

⁸ *Supra* note 1.

⁹ *Supra* note 6.

¹⁰ *Id.*

¹¹ *Id.*, see also Soe Zeya Tun, *Myanmar's 'Rohingya issue' is a regional refugee crisis – ASEAN must intervene*, The Conversation, Mar. 17, 2017, available at http://theconversation.com/myanmars-rohingya-issue-is-a-regional-refugee-crisis-asean-must-intervene-70849?utm_source=facebook&utm_medium=facebookbutton (last visited Apr. 20, 2017).

Rohingya. It resulted in killing of at least 88 people. In addition, approximately 10,000 people fled to Bangladesh and an estimated 120,000-150,000 people were displaced in the camp in Rakhine.¹² Series of violence and riots against Muslim minority in other cities including Meiktila, Okkan, Lashio, Kantbalu, Thandwe in Myanmar during 2013-2015 caused the irregular migration crisis in the Indian Ocean.¹³ Recently in October 2016, the Rohingya were accused of attacking and killing police officers at Muangtau, the border between Myanmar and Bangladesh.¹⁴ In addition, more than 430 buildings in three Muangtau villages were destroyed.¹⁵ The tension is increasing and likely to be ethnic cleansing and crime against humanity.¹⁶ It is a challenge for Myanmar to respect the human rights obligations and treat every individual on its territory equally. The process of a transitional justice, therefore, is in need to deal with atrocity and human rights violations in order to bring the truth on the table for reconciling and resolving the long-standing conflict.

C. Transitional Justice in Myanmar

As Myanmar is moving toward democracy, the process of transitional justice to settle the conflicts is inevitable. Transitional justice is a process responding to widespread and systematic human rights violations to achieve peace, justice, and accountability.¹⁷ Aung San Suu Kyi, State Counsellor of the Republic of the Union of Myanmar stated at the General Debate of the 71st session of the United National General Assembly that achievement of lasting peace and national reconciliation is the top priority of the government of Myanmar after the country had been facing the internal armed conflicts for more than six decades, including the conflict and violence in Rakhine State.¹⁸ She also emphasized the mechanisms that would cope with challenges in Rakhine namely: the Advisory Commission led by Kofi Annan, and the Central Committee for the Implementation of Peace, Stability and Development in Rakhine State (CCISD).¹⁹

II. TRANSITIONAL JUSTICE MECHANISMS IN MYANMAR

As Myanmar is moving toward democracy, it needs to settle internal conflicts that have been challenges for Myanmar for decades. Myanmar has established several mechanisms in order to ensure the application of law and human rights commitment which is the fundamental principles in a democratic society. In settling conflicts, Myanmar has both domestic mechanisms, hybrid, and international mechanisms assisting in addressing problems and human rights violations against the Rohingya.

A. Domestic Mechanisms

¹² Syed Zain Al-Mahmood, Timeline: A Short History of Myanmar's Rohingya Minority, Wall Street Journal, Dec. 23, 2016, available at <http://blogs.wsj.com/indiarealtime/2016/12/23/timeline-a-short-history-of-myanmars-rohingya-minority/> (last visited April 14, 2017)

¹³ UNHCR, South-East Asia Irregular Maritime Movements, January - November 2015; UNHCR, South-East Asia Mixed Maritime Movements, April - June 2015 available at <http://www.unhcr.org/53f1c5fc9.html>. (last visited April 14, 2017)

¹⁴ *Supra* note 12.

¹⁵ Human Rights Watch, Burma: Country Report 2017, available at <https://www.hrw.org/world-report/2017/country-chapters/burma> (last visited Apr. 20, 2017).

¹⁶ *Id.*

¹⁷ International Center for Transitional Justice, *What is Transitional Justice?*, (2008), available at http://www.ictj.org/static/TJApproaches/WhatIsTJ/ICTJ_WhatIsTJ_pa2008_.pdf. (last visited Apr. 20, 2017); See also <https://www.ictj.org/news/category/25> for Myanmar posts.

¹⁸ Statement by H.E. Daw Aung San Suu Kyi, State Counsellor of the Republic of the Union of Myanmar at the General Debate of the 71st session of the United National General Assembly New York, 21 September 2016, available at <http://yangon.sites.unicnetwork.org/files/2016/09/Statement-by-H.E.-Daw-Aung-San-Suu-Kyi-State-Counsellor-of-the-Republic-of-the-Union-of-Myanmar-at-the-General-Debate-of-the-71st-session-of-the-United-National-General-Assembly.pdf> (last visited Mar. 20, 2017).

¹⁹ *Id.*

For the domestic mechanisms, Myanmar government has established several commissions to find the root causes and solutions of the Rakhine conflict. It started with the establishment of general Human Rights Commission in 2011 and the Inquiry Commission on Sectarian Violence in Rakhine State in 2012. Later, it has formed the Central Committee for the Implementation of Peace, Stability and Development in Rakhine State for implementing the recommendations and help develop Rakhine State. Recently, the Investigation Commission on Maungdaw is specifically formed to investigate the incident in Maungdaw in the late 2016. This section will give informative overviews of these mechanisms.

1. The Inquiry Commission on Sectarian Violence in Rakhine State

The Inquiry Commission on Sectarian Violence in Rakhine State (hereinafter “the Rakhine Inquiry Commission”) was established on August 17, 2012 by the Presidential Executive Order. It is the first attempt for Myanmar to reform and open the country. It is mandated to prevent further violence in Rakhine State and to promote harmony in the society. The mission of the Rakhine Inquiry Commission are to: (i) investigate the root causes which deteriorate peace and security; (ii) verify the loss of life, property and other collateral damage; (iii) examine the effort to restore peace and public order; (iv) outline means to provide relief and implement resettlement programs; (v) develop a short- and long-term strategies to reconcile the conflicts; (vi) establish mutual understanding and promote peaceful coexistence between various religious and ethnic groups; (vii) advise on the promotion of the rule of law; (viii) advise on the promotion of social and economic development.²⁰ The Inquiry Commission consisted of 27 members who are the experts, scholars, and practitioners in various fields, e.g. law, business, history, politics. However, there is no representative from the Rohingya in the Commission.

The Inquiry Commission has visited 11 affected villages in Rakhine State and conducted interviews of approximately 1,200 Buddhists Rakhine and 800 Rohingyas.²¹ The final report was already submitted to the President on April 8, 2013 and published later on. The impacts of the outcome of the Inquiry Commission will be discussed in Part III of this paper.

2. The Myanmar National Human Rights Commission

The Myanmar National Human Rights Commission (hereinafter “the MNHRC”) was established by Sections 4 and 9 of the new Myanmar National Human Rights Commission Law and it supersedes the former Human Rights Commission which was established in September 2011 by virtue of the Notification by the former Union government.²² Its seven members consists of experts and practitioners in human rights and development fields which include former high-ranking government officers.²³

The MNHRC is meant to be an independent entity from the government.²⁴ It has broad and various mandates on human rights issues ranging from ensuring compliance of international

²⁰ Final Report of Inquiry Commission on Sectarian Violence in Rakhine State, Jul. 8, 2013, available at http://www.burmalibrary.org/docs15/Rakhine_Commission_Report-en-red.pdf (last visited Apr. 10, 2017).

²¹ Swisspeace/KOFF, Critical Reflection Following the Myanmar Roundtable jointly organized by Swisspeace/KOFF and the Federal Department of Foreign Affairs of June 17, 2013 on Presentation of the Report of the Inquiry Commission on the Sectarian Violence in Rakhine State, available at http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Critical_Reflection_ab_2013/Critical_Reflection_on_August_2013.pdf (last visited Apr. 10, 2017).

²² Myanmar National Human Rights Commission, available at <http://www.mnhrc.org.mm/en/> (last visited Mar. 10, 2017).

²³ About the Myanmar National Human Rights Commission, available at <http://www.mnhrc.org.mm/en/about/commissioners/> (last visited Mar. 10, 2017).

²⁴ Mandate: Duties and Powers of the Commission, available at <http://www.mnhrc.org.mm/en/about/mandate/> (last visited Mar. 10, 2017); 3. The Commission shall:

human rights obligations, review the existing laws, responding to human rights issues, visiting and conducting inquiries in human rights violations scenes, assisting and providing recommendations to the government.²⁵ In addition, the MNHRC has to submit the annual report and special report when appropriate to the President.²⁶

Its activities are divided into three parts: human rights promotion; complaint activities; and human rights protection. In terms of human rights promotion, the MNHRC has relation to other national institutions, civil society as well as with international organizations. In the branch of human rights protection, the MNHRC has played the role in visiting the area of conflicts including Rakhine State.

3. The Central Committee for the Implementation of Peace, Stability and Development in Rakhine State

The Central Committee for Implementation of Peace, Stability and Development in Rakhine State (CCISD) was established by President Thein Sein on March 23, 2013, after he had welcomed the report concluded by the Inquiry Commission on Sectarian Violence in Rakhine State.²⁷ The CCISD was led by Vice-President Sai Mauk Kham and has been tasked to implement the Commission's report's recommendations.

After the newly elected government had come into power in March 2016, the CCISD is led by the State Counsellor, along with Rakhine State Chief Minister; Union Ministers for: Border Affairs, Home Affairs, Defense, the Office of State Counsellor, Information, and Religious Affairs and Culture as members.²⁸

The CCISD consists of four sub-working committees which are: (i) Security, Peace and Stability and the Rule of Law Working Committee; (ii) Immigration and Citizenship Scrutinizing Working Committee; (iii) Settlement and Socio-economic Development Working Committee; and (iv) Working Committee on Cooperation with UN Agencies and International Organizations.²⁹

4. The Investigation Commission on Maungta

Muangta is a city in Northern Rakhine state where the violent attack occurred in which nine policemen were killed on October 9 and November 12-13, 2016. To investigate the incident, the government of Myanmar, by Presidential Order No.89/2016, established the Investigation Commission on Maungta (hereinafter "Maungta Commission") on December 1, 2016. It is a separate body distinct from the Rakhine Inquiry Commission that was established on August 17, 2012.

The Muangta Commission is composed of 13 Myanmar central and local government officials led by Vice President U Myint Swe, following by retired Union Minister, retired UN Assistant Secretary-General, Chair of the Women Affairs Federation, retired UN Senior Advisor, a member of Myanmar National Human Rights Commission, Pyithu Hluttaw Representative, Amyotha Hluttaw Representative, Chief of Myanmar Police Force, Director General of the Union

(a) have the right to act independently on matters that fall within its powers;

(b) have the right to act independently in respect of financial management and administrative matters in conformity with the provisions of this Law.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Supra* note 21

²⁸ Formation of Central Committee on Implementation of Peace, Stability and Development of Rakhine State (Notification No. 23/2016), available at

<https://myanmar-law-library.org/the-website/president-office/notifications/notifications-2016/formation-of-central-committee-on-implementation-of-peace-stability-and.html> (last visited April 1, 2017).

²⁹ *Id.*

Attorney General Office, retired Ambassador, General Secretary of Young Men's Christian Association, and a member of Pyidaungsu Hluttaw Legal Affairs and Special Cases Assessment Commission.³⁰

The Muanglaw Commission is mandated to investigate the incident in Muanglaw and provide recommendations to the government to prevent further violence according to the Criminal Procedure and the Evidence Act of Myanmar.³¹ It can question individuals, summon documents, and visit places that it deems necessary for the fact-finding.³² Until now (April 2017,) it has finished its investigation and has been concluding the final report which will be submitted to the President and publicly available.³³

B. Hybrid and International Mechanisms

This section will explore the hybrid and international mechanisms addressing the Rohingya issue. For the international ones, the UN creates the mechanisms under the Human Rights Council which are the special rapporteur, the high commissioner on human rights, and the universal periodic review. In addition, this part will introduce the Advisory Commission on Rakhine State which is the newest mechanism.

1. Special Rapporteur on Myanmar

Special Rapporteur is a special procedure under the United Nations Human Rights Council. It receives the mandates from the Human Rights Council to deal with thematic issues or situations in specific countries.³⁴ The situation in Myanmar has become a concern of the international community to the extent that the UN Human Rights Council has appointed the Special Rapporteur on the Situation of Human Rights in Myanmar to observe, document, visit the country, and report the human rights situation to the UN since 1992 under the Commission on Human Rights Resolution 58.³⁵ Ms. Yanghee Lee, a Korean national, is the present and the fifth special rapporteur on this issue.³⁶

2. United Nations High Commissioner for Human Rights

The UN Office of High Commissioner for Human Rights (OHCHR) also takes part in addressing and solving the conflict in Rakhine State. It issued a report on the situation of Rohingya

³⁰ Republic of the Union of Myanmar President's Office, Formation of Investigation Commission (Notification 89/2016), available at <http://www.president-office.gov.mm/en/?q=briefing-room/news/2016/12/05/id-6883> (last visited April 1, 2017).

³¹ *Id.*

³² Republic of the Union of Myanmar President's Office, Formation of Investigation Commission (Notification 89/2016) Dec. 1, 2016, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Formation%20of%20Investigation%20Commission.pdf> (last visited Mar. 20, 2017).

³³ *Id.*

³⁴ Special Procedures of the Human Rights Council, available at <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last visited Mar. 21, 2017).

³⁵ Myanmar, available at <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/MMIndex.aspx> (last visited Mar. 21, 2017).

³⁶ Special Rapporteur on the situation of human rights in Myanmar, available at <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx> (last visited Mar. 21, 2017).

Muslims and other minorities in Myanmar.³⁷ This report was mandated by the UN Human Rights Council.³⁸

In addition, the OHCHR has delegated the Mission to Bangladesh to conduct interviews of the victims and the Rohingya who sought refuge in Bangladesh who were affected by the violence since October 2016. It concluded the Flash Report which was publicly available on February 3, 2017.³⁹ The analysis of the impacts and contributions of the report will be further elaborated in Part III.

3. Universal Periodic Review under the UN Human Rights Council

The Universal Periodic Review (UPR) is the special procedure under the UN Human Rights Council in which member states need to submit the national report for the peer-reviews and questionnaires by other states every four years.⁴⁰ It has been two cycles of the reviews since its establishment in 2006. The purpose of this mechanism is to address the human rights violation and improve the situations and implementation of human rights obligation, including encouraging every country to comply with the international human rights law.

4. Advisory Commission on Myanmar's Rakhine State

The Advisory Commission on Rakhine State (hereinafter “the Advisory Commission”) is the most recently introduced mechanisms for Rakhine state. It was established by the agreement between the Ministry of Office of the State Counsellor of the Republic of the Union of Myanmar and the Kofi Annan Foundation on September 5, 2016.⁴¹

The Advisory Commission consists of nine members; three international and six national members namely: Kofi Annan (Chair); U Win Mra, Chair of the Myanmar National Human Rights Commission; Thar Hla Shwe, President of the Myanmar Red Cross Society; Ghassan Salamé, former Lebanese Minister of Culture and the former UN Special Advisor to Secretary General; Laetitia van den Assum, former Special Advisor to the UNAIDS and the former Netherlands’ Ambassador to the United Kingdom; U Aye Lwin, Core Member and Founder of Religions for Peace, Myanmar; Mya Thida, President of Obstetrical and Gynecological Society of Myanmar Medical Association and member of the Myanmar Academy of Medical Science; U Khin Maung Lay, member of the Myanmar National Human Rights Commission; and Daw Saw Khin Tint, Chairperson of the Rakhine Literature and Culture Association, Yangon and Vice-Chairperson of the Rakhine Women Association.⁴² None of the members is from the current Myanmar government. This might be a guarantee that the Advisory Commission is impartial and independent from the government. However, none of them is the Rohingya.

³⁷ Situation of human rights of Rohingya Muslims and other minorities in Myanmar - Report of the United Nations High Commissioner for Human Rights, A/HRC/32/18, Jun. 29, 2016, 32nd Sess. HRC, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/18 (last visited Mar. 21, 2017).

³⁸ *Devastating cruelty against Rohingya children, women and men detailed in UN human rights report*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21142&LangID=E>; <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Pages/ListReports.aspx>

³⁹ United Nations Human Rights Office of the High Commissioner, *Report of OHCHR mission to Bangladesh Interviews with Rohingyas fleeing from Myanmar since 9 October 2016: Flash Report*, Feb. 3, 2017 available at <http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf> (last visited Apr. 30, 2017).

⁴⁰ Universal Periodic Review, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Apr. 1, 2017).

⁴¹ Advisory Commission on Rakhine State, About the Commission, available at <http://www.rakhinecommission.org/> (last visited Apr. 10, 2017).

⁴² Ministry of the Office of the State Counsellor, Establishment of the Advisory Commission on Rakhine State, Aug. 23, 2016, available at <http://www.statecounsellor.gov.mm/en/node/228> (last visited Apr. 10, 2017).

The main objective of the Advisory Commission is to improve living standard of the people in Rakhine state.⁴³ In addition, it is mandated to provide the sustainable solutions to complex issues and give advice and recommendations on guarantee of basic rights, reconciliation, and further development in Rakhine state by means of consultations and constructive dialogues.⁴⁴ The report of the Commission will be jointly concluded with the government of Myanmar and is promised to be implemented by the government.⁴⁵

III. ASSESSMENTS OF THE IMPACTS OF EXISTING TRANSITIONAL JUSTICE MECHANISMS

A. Methodology of the Assessment

This paper is limited to focus on the qualitative method to assess impacts of the transitional justice mechanisms. The quantitative method is left for further studies regarding the effects and impacts of the mechanisms in terms of the numbers of reached-out victims, the geographical scope, and the economic value for justice and accountability. The methodology of the assessment and evaluation of the existing mechanisms used in this paper begins with collecting the works, statements, and reports of the mechanisms and updated news and press releases relating to the Rohingya. It also, not exhaustively, includes: (i) the effect on the government; (ii) the implications and implementations of the recommendations and works of the mechanisms; (iii) potential contribution to the solutions or means to the solutions; and (iv) reactions and criticisms of the international community and the international organizations. The assessment tries to look at the impacts of each mechanism in three folds: (i) the impact on the Myanmar justice system; (ii) Impact on the victims; and (iii) impact on a local community and solidarity.

B. Impacts of the Domestic Mechanisms

1. Impacts of the Inquiry Commission on Sectarian Violence in Rakhine State

After the investigation, the Rakhine Inquiry Commission issued the report on July 8, 2013 addressing causes of violence and recommendations.⁴⁶ The report mainly narrates the history of the conflict between the majority Rakhine and the minority Rohingya.⁴⁷ The report seemed to analyze and criticize the Rohingya which might polarize the society rather than finding solutions by saying that it is not yet ready for the peaceful coexistence of Rakhine and Bengali communities.⁴⁸ It is also worth noting here that the term “Rohingya” is not recognized in Myanmar despite the popular international use.⁴⁹

Since most of the part in the report relates to history, the report did not address the root cause of the persecution against the Rohingya and follow the ongoing conflict as expected.⁵⁰ The military government has already implemented the report in 2013 by establishing the CCISD.⁵¹ The CCISD is still performing until today.

2. Impacts of the Myanmar National Human Rights Commission

⁴³ Advisory Commission on Rakhine State, Mandate of the Commission, available at <http://www.rakhinecommission.org/mandate-of-the-commission/> (last visited Apr. 10, 2017).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Supra* note 20.

⁴⁷ *Id.*, at 63.

⁴⁸ *Id.*, at 61.

⁴⁹ *Id.*, at 54, see also Feliz Solomon, *Why Burma Is Trying to Stop People From Using the Name of Its Persecuted Muslim Minority*, TIME, May 9, 2016, available at <http://time.com/4322396/burma-myanmar-rohingya-us-embassy-suu-kyi/> (last visited Apr. 29, 2017).

⁵⁰ *Supra* note 21.

⁵¹ *Id.*

Myanmar National Human Rights Commission visited places where violence had occurred in the Rakhine State in June of 2012 and released a press statement No. (4/2012).⁵² In the press statement, the MHHRC called for: (i) just and effective actions to be taken in accordance with law against the perpetrators of the acts of violence that had occurred; (ii) steps to be taken to build mutual trust for the physical and mental rehabilitation of the victims; (iii) a special program to be undertaken to enhance the basis education of the children in the affected areas for the building of mutual trust and enrichment of intelligence and knowledge.⁵³ However, the MNHRC has a “credibility problem”⁵⁴ since it is considered as a government authority. Moreover, the “MNHRC has made itself complicit in the persecution of the Rohingya by acting as a tool to cover up atrocities committed by the police force and reinforcing perceptions that Rohingya are illegal immigrants...”⁵⁵ Therefore, the MNHRC has not done much to stop the persecution against the Rohingya. It seems that the MNHRC is merely an insincere entity.

3. Impacts of the Central Committee for Implementation of Peace, Stability and Development in Rakhine State

Since the CCISD is led by the government, it has been criticized that the Arakan National Party has been left out of the committee and the whole process. Therefore, it is skeptical whether the CCISD is an inclusive process. Its press statement only emphasized on the technical support and development aid that would contribute to Rakhine state.⁵⁶ After the Advisory Commission led by Kofi Annan issued the interim report, the CCISD promptly had a meeting to discuss the way to implement the recommendations therein.⁵⁷

4. Impacts of the Investigation Commission

This Investigation Commission has limited scope of mandate to investigate only the recent incident occurred on October 9 and November 12 -13, 2016.

The Investigation Commission has conducted the investigation on the filed by visiting the area of dispute. The goal of the Investigation Commission in the second visit in February 2017 is to investigate into the real causes of violent attacks in Maungdaw, to find the means to prevent further attacks and to find out whether measures taken there during the incidents were in accordance with the law to report its findings and recommendations to the President on time.⁵⁸ The interim findings have shown that a group of the extremist Rohingya called “Aqa Mul Mujahidin” killed the police officers, but the Commission is silent on how the security forces randomly attacked villagers.⁵⁹ This might also infuses a resentment in the society toward the Rohingya. The

⁵² Myanmar National Human Rights Commission, Visit to Rakhine state, available at <http://mnhrc.org.mm/en/visit-to-the-rakhine-state/> (last visited Mar. 31, 2017).

⁵³ *Id.*

⁵⁴ Hein Ko Soe, *The Fight for Your Rights*, Frontier Myanmar, Sep. 13, 2016, available at <http://frontiermyanmar.net/en/the-fight-for-your-rights>; <http://www.burmalibrary.org/show.php?cat=3231> (last visited Mar. 13, 2017).

⁵⁵ Burma: All the President’s Men, available at http://www.burmalibrary.org/docs19/Equality&Burma_Partnership-2014-09-All-the-Presidents-Men-en.pdf (last visited Mar. 31, 2017).

⁵⁶ Press conference of Central Committee for Rakhine State Peace, Stability and Development Implementation <http://www.embassyofmyanmar.be/Press%20Conference%20-%20Rakhine%20State%209-7-13.pdf> (last visited Mar. 23, 2017).

⁵⁷ Myanmar News Agency, *Rakhine committee discusses recommendations*, Apr. 6, 2017, available at <http://www.globalnewlightofmyanmar.com/rakhine-committee-discusses-recommendations/> (last visited Apr. 23, 2017).

⁵⁸ *Supra* note 30.

⁵⁹ *Rohingya Villagers Bear Witness to a Brutal Crackdown in Myanmar*, TIME, available at <http://time.com/4716189/myanmar-maungdaw-rohingya-burma-eyewitness/> (last visited Apr. 23, 2017).

Investigation Commission also earlier concluded that there was insufficient evidence to take any legal actions for rape, genocide or any religious persecution.⁶⁰

The Investigate Commission also took the action in response of the Flash report by the UNOHCHR as it visited the villages mentioned in the report to double-check the accusation and truth.⁶¹ It seems that The Investigation Commission is created to defend the position of the military of Myanmar and protect the image of Myanmar to the international community. One can cast doubt on the productivity of the Investigation Commission as it delays submitting the report since the report is due on January 31, 2017.

C. Impacts of the United Nations Mechanisms

Human rights mechanisms under the UN system that directly address the problem of the Rohingya in Myanmar are the Special Rapporteur on Human Rights Violation in Myanmar, the Office of the High Commissioner on Human Rights, and the UPR process under the Human Rights Council. This section will draw the impacts of these three mechanisms.

1. Special Rapporteur on Myanmar

The current Special Rapporteur has played the active role in identifying the issue as she has concluded several reports. She also called for independent investigations for violence in Myanmar. Since there has been no independent investigation or inquiry panel, it is essential for the government of Myanmar to take steps in establishing the independent investigation commission to bring justice and peace to the country. Recently, Ms. Langlee called for the establishment of the commission of inquiry to facilitate justice and accountability during the session at the UN Human Rights Council.⁶²

In terms of the identification of the crime, she indicates the situation in Rakhine as “crime against humanity by the Burmese, Myanmar military, the border guards or the police or security forces.”⁶³ The Rohingya are subjected to “torture”⁶⁴ and such abuses are “systematic”⁶⁵ to the extent that they could be expelled from the society.⁶⁶

Another contribution of the Special Rapporteur is that she also encourages reform of the Bar Council Act (1989) to be consistent with the Basic Principles on the Role of Lawyers.⁶⁷ This suggestion could cause an impact to the justice administration in Myanmar in order to strengthen the rule of law and justice system.

2. The OHCHR

The UNOHCHR has a great contribution to justice and accountability in terms of identification of the crime. The Flash report by the Mission to Bangladesh is a primary

⁶⁰ *Myanmar Commission Finds no Cases of Genocide, Religious Persecution of Rohingya in Rakhine*, Radio Free Asia, Jan. 4, 2017, available at <http://www.rfa.org/english/news/myanmar/myanmar-commission-finds-no-cases-of-genocide-religious-persecution-of-rohingya-in-rakhine-01042017160643.html>

⁶¹ Ministry of Information, *Investigation Commission writing full report on Maungtau*, available at <http://www.moi.gov.mm/moi:eng/?q=news/20/02/2017/id-9967> (last visited Apr. 23, 2017).

⁶² *UN expert calls for independent investigations into killings and violations in Myanmar*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21358&LangID=E> (last visited Apr. 29, 2017).

⁶³ *Supra* note 1

⁶⁴ Jonah Fisher, *Myanmar Muslim minority subject to horrific torture, UN says*, BBC News, Mar. 10, 2017, available at <http://www.bbc.com/news/world-39218105> (last visited Apr. 19, 2017).

⁶⁵ *Id.*

⁶⁶ <http://www.sbs.com.au/news/article/2017/03/14/myanmar-may-be-trying-expel-all-rohingya-un-special-rapporteur-says>

⁶⁷ Report of the Special Rapporteur on the situation of human rights in Myanmar available at http://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_34_67_AUVFinal.pdf

documentation which collects the interviews of the victims of violence who fled to the camps in Bangladesh. Its flash report by the Mission to Bangladesh indicates that the Rohingya is facing “devastating cruelty.”⁶⁸ Zeid Ra'ad Al Hussein, High Commissioner, urged the UN Human Rights Council to establish the commission of inquiry to investigate the long-standing violence against the Rohingya and the International Criminal Court to review the situation.⁶⁹ The idea of the commission of inquiry is later transformed to the resolution calling for the international fact finding commission which will be elaborated later in this paper. The recent resolutions of the UN Human Rights Council in March 2017 also called for statelessness reduction and elimination of ethnic and religious minorities discrimination.⁷⁰

3. The UPR Process

The Rohingya issue has been raised since the first cycle of the UPR in 2012. At that time, Myanmar was governed by the military government; therefore, it did not welcome recommendations from other countries and open for criticism. Only Algeria, Ireland, Belgium, and the United States directly mentioned the term “Rohingya.”⁷¹ Only the latter two states gave recommendations on the Rohingya issues; however, both recommendations are rejected by Myanmar.⁷² Bangladesh and Switzerland have mentioned “Rakhine state” in their recommendations.⁷³ Only Bangladesh’s recommendation that it would “further strengthen the promotion and protection of the human rights of the Myanmar people and the ethnic groups in Northern Rakhine State” – was accepted.⁷⁴ The other recommendation by Jordan mentioned Muslim minority was also rejected.⁷⁵ It is well noted that in the first UPR process, no ASEAN Member States raised the issue about the Rohingya. As a consequence of the first cycle, Myanmar has failed to implement the recommendation and fulfill its commitment in the domestic level.⁷⁶

In the second cycle of the UPR in 2016, Myanmar has become more democratic since it has the first civilian government in 50 years. The Rohingya issue was more emphasized since several states have made recommendations and expressed concerns over the Rohingya issues responding to the report and statement by Myanmar. 21 countries, namely Saudi Arabia, Guatemala, Slovenia, Sudan, Luxembourg, Pakistan, Senegal, Costa Rica, Argentina, Libya, Oman, Belgium, Malaysia, Djibouti, Egypt, Iceland, Australia, the Netherlands, the UK, Sweden, and the US, have mentioned the discrimination against ‘the Rohingya.’⁷⁷ Five countries namely

⁶⁸ *Supra* note 39.

⁶⁹ Tom Miles, *U.N. expert fears Myanmar trying to depopulate Rohingya areas*, Reuters, Mar. 13, 2017, available at <http://www.reuters.com/article/us-myanmar-insurgency-un-idUSKBN16K209> (last visited Apr. 19, 2017).

⁷⁰ UN Human Rights Council, *Human Rights Council decides to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State*, Mar. 24, 2017, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E#sthash.fOuhcrfx.dpuf> (last visited Apr. 23, 2017).

⁷¹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Myanmar, 24 March 2011, A/HRC/17/9, available at <http://www.refworld.org/docid/50f3ea612.html> (Last visited April 14, 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ FIDH, “Burma: UPR commitments remain largely unaddressed” available at https://www.fidh.org/spip.php?page=spipdf&spipdf=spipdf_article&id_article=17269&nom_fichier=article_17269 (last visited April 13, 2017).

⁷⁷ UPR Info, Database of Recommendations, available at https://www.upr-info.org/database/index.php?limit=0&f_SUR=119&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=300&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly (last visited Mar. 31, 2017).

Kyrgyzstan, Ireland, Kuwait, Norway, and Thailand indirectly addressed the situation in Rakhine State.⁷⁸ It is worth noted that among all aforementioned countries, there are only two UN Security Council permanent members. More interestingly, there are only Malaysia and Thailand which are the members of ASEAN.⁷⁹ All of the recommendations regarding the Rohingya have only been noted but not received by Myanmar.⁸⁰ That is to say, it is highly likely that the government of Myanmar will disregard the voices of those countries in the UPR process and proceed its own way to deal with the Rohingya.

Overall, the UPR process is successful to some extent to raise the awareness among the members of the UN Human Rights Council and the international community as visualized in the second cycle in which more states have made straightforward comments on the discrimination and human rights abuses against the Rohingya. This could potentially accelerate the special procedure under the UN human rights system to solve the issue. However, the fact that more states have paid attentions could also be driven by the increasing evident violence in Rakhine state. Nevertheless, in the domestic level, Myanmar still rejects to implement the recommendations made by other states regarding the Rohingya issue. Therefore, the UPR process may not directly cause impacts on justice and accountability of the atrocity in this case.

D. Impacts of the Advisory Commission

The impact of the Advisory Commission led by Kofi Annan can be only primarily assessed since its full report will be published in the late 2017 according to the one-year framework of the commission.⁸¹ However, preliminary observation could be provided in this stage by examining the progress and press releases of the Commission.

The Advisory Commission was resisted in the first place by a group of local Rakhine and Buddhist monks due to the fear of foreign influence.⁸² Despite the resistance, the Advisory Commission plays an active role to on-site visit to find the truth in the field. On January 28, 2017, a three-member Myanmar's delegation of the Advisory Commission arrives in Dhaka, Bangladesh to hold discussions with Bangladesh authorities on the Rohingya issue. They visit the shelters where the Rohingya seek safety from the counter-insurgency operation by the military in Myanmar.⁸³ In this regard, the Advisory Commission could bring the truth told by the Rohingya on the ground. However, it has not sufficiently actively observed the situation and it could be more transparent and could keep more updates on progress.

The Advisory Commission launched the interim report on March 16, 2017. It provides primary recommendations to the government of Myanmar.⁸⁴ The CCISD led by Aung San Suu Kyi discussed how to implement the recommendations enshrined in the interim report.⁸⁵ To this analysis, Aung San Suu Kyi, State Counsellor, has been reluctant to directly address the objective of establishing the Advisory Commission due to domestic political context. Taking into account that Myanmar is a Buddhist majority state, in order to gain popular vote in the time of new and

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Amnesty International, *Myanmar: Kofi Annan to head Commission on Rakhine state*, Aug. 24, 2016, available at <https://www.amnesty.org/en/latest/news/2016/08/kofi-annan-to-head-commission-on-rakhine-state/> (last visited Mar. 20, 2017).

⁸² Simon Lewis and Wa Lone, *Hundreds protest in Myanmar over Suu Kyi's panel on Rohingya Muslims*, Reuters, available at <http://www.reuters.com/article/us-myanmar-rohingya-idUSKCN11C0AC> (last visited April 15, 2017).

⁸³ <http://www.rohingyablogger.com/2017/01/myanmar-delegation-of-advisory.html>

⁸⁴ <http://www.rakhinecommission.org/app/uploads/2017/03/Advisory-Commission-Interim-Report.pdf>

⁸⁵ www.moi.gov.mm/npe/nlm/?q=download/file/fid/3471

fragile democratic state, the leader could not take a strong position against the previous regime which still maintains power and authority in the new political order.

In the interview with BBC in April 2017, Aung San Suu Kyi, however, said that she would not condemn any group but focus on reconciliation as she also repeatedly denied the ‘ethnic cleansing’ against the Rohingya.⁸⁶ This is consistent with the statement by Kofi Annan earlier that ‘genocide’ would be too strong in this case.⁸⁷ By these two interviews of the co-leaders of the Advisory Commission, it is predictable that the Advisory Commission would not contribute to the identification of the crime. In addition, Special Rapporteur stated that the alleged human rights violation in Rakhine state would be outside the scope of the Advisory Commission’s mandates.⁸⁸

Nevertheless, the Rohingya issue is uniquely a sensitive issue which would need a period of time and a stealth mechanism to strategically sending message to the perpetrators before using the hard measure. In this regard, the Advisory Commission might be a suitable soft power for this deep-rooted conflict.

E. Reactions of the International Community

This section will analyze the reactions of the international community in order to assess whether those mechanisms have done enough to bring justice and accountability in Myanmar. This analysis includes the reactions and latest movements from the UN General Assembly, the UN Security Council, the ASEAN Community, and the European Union.

1. Reaction from the UN General Assembly

UN General Assembly in 2014 called on Myanmar to grant full citizenship to the Rohingya.⁸⁹ In 2015, the UN General Assembly under the Third Committee on Social, Humanitarian & Cultural issued the resolution stating a “serious concern” about the situation in Rakhine.⁹⁰ In the 71st Session of the UN General Assembly in 2016, it is the first time for Aung San Suu Kyi to make a statement on behalf of Myanmar explaining the situation and domestic efforts to resolve the Rohingya issue. This may break the UN General Assembly to issue the resolution regarding the situation in Myanmar.

2. Reaction from the UN Security Council

The UN Security Council has been recently aware of the Rohingya issue after the Human Rights Council has been increasing. However, the mechanism of the Security Council itself is problematic since two of the permanent members – China and Russia – have vetoed the statement expressing concern over the Rohingya.⁹¹

3. Reaction from the ASEAN Community

⁸⁶ Myanmar: Aung San Suu Kyi exclusive interview, BBC News, available at <https://www.youtube.com/watch?v=MFEEmdKbqBE&t=186s> (last visited April 25, 2017).

⁸⁷ *Kofi Annan downplays claims of Myanmar genocide*, BBC News, Dec. 6, 2016, available at <http://www.bbc.com/news/world-asia-38223055> (last visited Mar. 25, 2017).

⁸⁸ Statement by Ms. Yanghee LEE, Special Rapporteur on the Situation of Human Rights in Myanmar at the 34th session of the Human Rights Council available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21355&LangID=E> (last visited April 17, 2017).

⁸⁹ *UN calls for ‘full Rohingya citizenship’*, Aljazeera, Dec. 30, 2014, available at <http://www.aljazeera.com/news/americas/2014/12/un-calls-full-rohingya-citizenship-myanmar-monks-rakhin-2014123044246726211.html> (last visited Apr. 19, 2017).

⁹⁰ GA/SHC/4156 Nov. 18, 2015, available at <https://www.un.org/press/en/2015/gashc4156.doc.htm> (last visited Apr. 29, 2017).

⁹¹ *China, Russia block U.N. council concern about Myanmar violence*, Reuters, Mar. 17, 2017, <http://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6> (last visited Apr. 19, 2017).

Since the member states of the Association of the Southeast Asian Nations (ASEAN) adhere to the principle of non-interference of the domestic affairs of the member states embedded in Article 2 (e) of the ASEAN Charter,⁹² it has been difficult for the ASEAN member states to criticize the internal situation of other member states. However, Malaysia called for the ASEAN Foreign Ministers Meeting in December 2016 to discuss the situation in Rakhine state.⁹³ This is the first time that the principle of non-interference has been derogated. This may be because the Rohingya crisis is not only an internal issue anymore but the transboundary issue since it has caused the irregular migration across the region. The outcome of the conference was that Myanmar welcomed humanitarian assistance from other states and the international community.⁹⁴ The humanitarian aid for development in Rakhine state is not novel in this context as several states and the International Organization of Migration agreed to provide humanitarian and development assistance to Rakhine state to deter the irregular migration in 2014.⁹⁵ Malaysia has made statement that they believe that sooner or later the Myanmar government will finally be able to solve the Rohingya problem.⁹⁶ However, it is too soon for the new government that has been in the office for only 1 year (March 2016 - March 2017) to swiftly solve this complex issue. However, Myanmar expressed dissatisfaction when Malaysia called the Organization of Islamic Cooperation for the extraordinary meeting to pursue the Rohingya matter.⁹⁷

During the 30th ASEAN Summit in the Philippines in April 2017, Indonesian President expressed concern that Myanmar should bring peace and stability to Rakhine state and eliminate discrimination.⁹⁸ It is suggested by the international community that the ASEAN should play more role in addressing the Rohingya issue since the human rights violations in Myanmar violates the ASEAN Charter.⁹⁹

4. Reaction from the European Union

The European Union (EU) has its external relations mandate to promote EU values, particularly democracy, rule of law, and human rights.¹⁰⁰ In the 71st Session of the UN General Assembly in 2016, for the first time in 25 years, the EU, however, did not push forward the resolution regarding the human rights situation. This is because the EU started to believe and hope that the new democratic government led by Aung San Suu Kyi will end the violations against the Rohingya.¹⁰¹ In the UN Human Rights Council in early March 2017, the EU also did not support

⁹² ASEAN Charter, art. 2 (e).

⁹³ Simon Lewis, Malaysia calls for ASEAN to coordinate aid for Myanmar's Rohingya, Reuters, Dec. 19, 2016, available at <http://www.reuters.com/article/us-myanmar-rohingya-asean-malaysia-idUSKBN1480E1> (last visited Apr. 4, 2017).

⁹⁴ *Id.*

⁹⁵ Ministry of Foreign Affairs of the Kingdom of Thailand, *Summary of Special Meeting on Irregular Migration in the Indian Ocean* 29 May 2015, Bangkok, Thailand, available at <http://www.mfa.go.th/main/th/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html> (last visited April 14, 2017).

⁹⁶ *Supra* note 92.

⁹⁷ Press Release, Ministry of Foreign Affairs of the Republic of the Union of Myanmar, Jan. 20, 2017, available at <http://mewashingtondc.com/pdf/news/pr-oic-e-20jan2017.pdf> (last visited Apr. 29, 2017).

⁹⁸ Haeril Halim, *Rohingya crisis could affect ASEAN stability: Jokowi*, The Jakarta Post, Apr. 29, 2017, available at <http://www.thejakartapost.com/news/2017/04/29/rohingya-crisis-could-affect-asean-stability-jokowi.html> (last visited Apr. 29, 2017).

⁹⁹ John Arendshorst, The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter, 8 NW. J. INT'L HUM. RTS. 102 (2009), 110.

¹⁰⁰ Treaty on European Union (TEU), 2010 O.J. (C83), art. 2.

¹⁰¹ Andrew D Kaspar, *Dropping UNGA resolution on Myanmar, EU to break 25-year rights precedent*, Myanmar Times, Sep. 16, 2016, available at <http://www.mmmtimes.com/index.php/national-news/22565-renewed-rights-resolution-urged-as-unga-convenes.html> (last visited April 29, 2017).

the establishment of a new mechanism. In contrary, it supports and give more time to the existing mechanisms conducting at the domestic level.¹⁰² Nevertheless, at the end, the resolution to establish the international fact finding commission is also agreed by the EU.

5. Reactions from NGOs

In January 2017, 40 NGOs based in Myanmar called for an independent commission of inquiry to investigate and assess the situation in Rakhine state to provide recommendations for the government to address the current problems.¹⁰³ Human Rights Now also stated that Myanmar had failed to carry out a credible investigation and support an international, independent, and impartial mechanism of the UN.¹⁰⁴ It can be assumed from these facts that the existing mechanisms, including the newest Advisory Commission, have not done enough to protect the rights and prevent atrocities in Myanmar. In consequence, in the eyes of the NGOs, more independent and impartial body is needed to probe this situation.

F. Holistic Analysis of the Existing Mechanisms

This sub-part would analyze the efficiency and impacts of the existing mechanisms by collectively taking latest updates, latest reports, reactions of the international community and international organizations which is previously abovementioned in this paper into account. It, therefore, could be concluded that: (i) the number of mechanisms are too excessive leading to fragmentation problems; (ii) Myanmar tries to move away the international community pressure by using those mechanisms which this paper would call the “theory of reverse-complementarity of the domestic transitional justice mechanisms;” (iii) the mechanisms lack impartiality since most of the commissioners are government officers; (iv) the mechanisms still cannot provide the complete truth; (v) the existing mechanisms yet lack a process to bring justice and accountability for the victims.

1. Undue and Unnecessary Numbers of Mechanisms

Until now, there are five transitional mechanisms established and co-established by Myanmar. Some argues that more mechanisms will help the government to overcome the situation more easily.¹⁰⁵ In other words, the more mechanisms, the more efficient that the government could solve the problem. However, in this case, this paper argues the opposite. More mechanisms do not necessarily produce the effective and substantive outcomes since they have overlapping mandates. Why do they have overlapping mandates? This is because of two reasons. First, each mechanism does not work continuously; there is a certain period of time that each mechanism work which is only a short term and would be terminated once it completes the mission.

Secondly, all mechanisms have a low level of coordination and collaboration. Only two links between mechanisms that can be found. First, one of the members of the MHRC also takes part in the Muangtau Investigation Commission. The second one is when the CCISD reviewed the recommendations of the Advisory Commission. However, this does not necessarily mean that the whole mechanisms collaborate in the entire process. Would it be more effective if every mechanism cooperates more? Or would it be the most effective if there is only one big mechanism dealing with all aspects of the Rohingya. To this assessment, several mechanisms with different mandates and a high level of coordination would be an optimal choice because this is a complex

¹⁰² Myanmar 'unlikely' to face UN probe on Rohingya abuses, <http://www.aljazeera.com/news/2017/03/myanmar-face-probe-rohingya-abuses-170309050732369.html> (last visited Apr. 10, 2017).

¹⁰³ Fortify Rights, Myanmar: *Civil Society Calls for International Investigation in Rakhine State*, available at <http://www.fortifyrights.org/publication-20170118.html> (last visited Apr. 11, 2017).

¹⁰⁴ Human Rights Watch, *US: Call on Burma to Cease Persecution of Rohingya*, Mar. 17, 2017, available at <https://www.hrw.org/news/2017/03/17/us-call-burma-cease-persecution-rohingya> (last visited Apr. 11, 2017).

¹⁰⁵ Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *TRANSITIONAL JUSTICE IN BALANCE*, Chapter 9, 153.

issue. In other words, if there are several mechanisms, there should be a certain level of coordination; otherwise, more mechanisms will be undue and unnecessary for the situation.

2. Theory of Reverse-Complementarity of the Domestic Mechanisms

Principle of Complementarity is used in the context of international criminal justice. This principle appears in Articles 1, 17 and 53 of the Rome Statute to ensure that the International Criminal Court (ICC) would not prevail over the unexhausted domestic justice system.¹⁰⁶ In other words, the ICC is the court of the last resort where the local remedies are exhausted. This principle also aims to enhance the capability of the domestic justice mechanism in order to reduce the international justice problems. In this circumstance, it, however, seems that Myanmar attempts to create domestic mechanisms and the hybrid one to push off the international mechanisms or to avoid the pressure from the international community. That is to say, the complementarity principle is reversely applied. To what extent the mechanisms endorsed by Myanmar will satisfy the expectation of the international community. At the end of the day, if the domestic mechanisms do not function effectively, Myanmar could not escape the international community's mechanisms since the Rohingya is an international urgent issue.

3. Lack of Impartiality

Most of the mechanisms do not include the local populists in their committees. In contrary, their members mostly consist of the government or ex-government officials who are also related to the military and the previous regime. This lack of impartiality undermines the credibility of the mechanisms. Therefore, to achieve pure justice, the mechanism should be impartial.

4. Lack of Complete Truth

Fragmentation of the mechanisms leads to the fragmentation of truth. Due to the poor documentation in the early period of human rights abuses after independence, it is difficult to gather complete evidence and fresh information. The lack of complete truth highly undermine the capability of the mechanisms to bring about justice and accountability because truth is a precondition for the contentious case to be settled. If the truth is debatable, the outcome is not likely satisfied and acceptable for the entire society.

5. Lack of Justice and Accountability for the Victims

The existing mechanisms are unlikely to provide justice and accountability for the victims since all existing mechanisms do not have the proceedings and process for the victim reparation and retributive justice. In addition, those mechanisms *per se* lack the venue to call for the accountability of the perpetrator. It is also unclear how the domestic courts are willing to prosecute the perpetrators if they are accused by those mechanisms. The possibilities to establish the future justice mechanisms or recommendations to enhance the effectiveness of the existing mechanism will be further discussed in Part IV.

IV. MOVING TOWARD JUSTICE AND ACCOUNTABILITY IN MYANMAR

This section attempts to reevaluate the existing mechanisms by comparing, suggesting, and proposing the alternative solutions to address the problem beyond the current mechanisms to expect the better outcome for justice and accountability in Myanmar.

A. Comparative Alternative Mechanisms for the Better Solutions

1. Advisory Commission vs. Inquiry Commission

As the Advisory Commission seems to aim at providing the advice and recommendations to the government on sustainable development of living standard and infrastructure in general rather than documenting, finding, and collecting facts relating to violence and human rights abuses.

¹⁰⁶ Rome Statute of the International Criminal Court (Rome, Jul. 17, 1998) UN Doc. A/CONF.183/9 of July 17, 1998, entered into force July 1, 2002, art. 1, 17, 53.

Unlike the Independent International Commission of Inquiry in the Syrian Arab or Commission of Inquiry on Human Rights in the Republic Democratic People's Republic of Korea, those commissions have a direct mandate to investigate human rights violations¹⁰⁷ They produce extensive and detailed report which would help in documenting and collecting evidence during the conflicts. The commission of inquiry might cause more impact in terms of detail of the situations, human rights violations which could help bring justice and accountability more clearly after the conflicts.

However, the Advisory Commission also has its advantage since it engages and works more closely with the government. The government is readier to welcome the outcome of the Advisory Commission. However, the Advisory Commission is accused of having a strong partisan which is the drawback of this advantage. The Advisory Commission could turn this advantage into opportunities to assert insightful truth which will be beneficial for victims.

2. Investigation Commission vs. Truth and Reconciliation Commission

The Investigation Commission is formed to investigate the truth in a particular circumstance by not holding any public hearing, whereas a truth and reconciliation commission is generally formed to find the truth by conducting a public hearing of the victims and perpetrators.¹⁰⁸ It seems that the Investigation Commission only find the truth by having on-site visits and interviewing the villagers and witnesses rather than organizing a public hearing involving the people in entire area.¹⁰⁹ This might be because the scope of the Investigation Commission is limited to the incident during October-November 2016 in Muangtaw, not the entire Rakhine State. This is a significant flaw of this Investigation Commission as it is not a continuous mechanism. Moreover, considering the nature of the conflict that is still ongoing, it is difficult to gather all victims and perpetrators in a single forum. In this sense, a truth and reconciliation commission may not be suitable for this particular context but may be working when the conflict is already over. However, the Investigation Commission could be a better mechanism by broaden the scope of investigation and mandate to cover all violence in Rakhine state.

3. Special Rapporteur vs. Independent Experts Panel

Special Rapporteur on Myanmar has issued several reports and statements which much contributes in terms of awareness in the international community and identification of crimes against the Rohingya. Even though Special Rapporteur on Myanmar is directly responsible for this issue, the Rohingya issue is complex and intertwined with other thematic cores of human rights. Other special rapporteurs such as Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence could play more active role in promoting and providing recommendations to Myanmar on current issues regarding the Rohingya and justice reform in general since the issue of truth is a fundamental element to achieve justice and accountability for the Rohingya. The UN Special Adviser on the Prevention of Genocide could also push forward the preventive measures that could be implemented in Rakhine State to prevent genocide. More coordination between special rapporteurs would be an ideal to maximize the capacity of the special procedure under the UN Human Rights Council.

To this end, should the UN establish the Panel of Independent Experts? Would the Panel of Independent Experts be a better mechanism to address the problem or it is only a new whiskey

¹⁰⁷ Mandate of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx> (last visited Apr. 20, 2017).

¹⁰⁸ South Africa's Truth and Reconciliation Commission, available at <http://www.justice.gov.za/trc/> (last visited Apr. 20, 2017).

¹⁰⁹ *Supra* note 32.

in an old bottle for Myanmar? The good example of the Panel of Experts is Sri Lanka model. The government of Sri Lanka has agreed with the Secretary General to establish the Independent Experts Panel to bring justice and accountability for Sri Lanka. The Sri Lanka Panel has concluded the report urging to stop torture and take immediate measures to strengthen judicial independency.¹¹⁰ It also emphasized the way to achieve accountability in the society.¹¹¹ This will work where the government cooperates with the international organization, in which Myanmar is not a case. However, at this stage, it seems to be a good strategy to strengthen cooperation in the UN Special procedures that the panel of experts can consist of special rapporteurs in several relevant issues.

B. Paradox of Justice and Peace Synergy

1. Peace Negotiation in Myanmar?

This part will examine and analyze three important questions relating to a peace process: (a) the possibility to have peace negotiation in Myanmar between parties to conflicts; (b) whether a peace talk would be in a form of a national peace talk or only a regional peace talk; (c) whether the peace negotiation would be acceptable to bring justice and accountability in the Myanmar society.

a. The Possibility of the Peace Negotiation

The first question is whether a peace negotiation could ever occur in Myanmar. This part will provide the analysis to this question by putting lens into three dimensions: religious ideology, law, and politics. The first dimension is religion. Since Myanmar is a Buddhist state, all ways of living are intertwined with the Buddhist practices. The military also tends to prefer the Buddhist way namely *samatha* to solve political problems.¹¹² *Samatha* is the Buddhist practice aiming at obtaining *sati* (concentration in mind) to realize the reality and produce political awareness.¹¹³ It is important to emphasize the core of Buddhism in this particular context as this principle could be used in order to achieve the social reconciliation and peace. However, it is merely in principle. In reality, the majority extreme Buddhist does not tolerate and express sympathy to the Rohingya and any violence in their territory.¹¹⁴ In fact, the religious tolerance is one of the root causes of discrimination against the Rohingya.¹¹⁵ In this regard, the situation in Myanmar has shown the paradox of Buddhist notion not only in a political sector, but also in the entire society. As shown in the latest development, a number of extremist Buddhists still protest against the citizenship grant for the Rohingya.¹¹⁶ If the entire society really understand the core principles of Buddhism, it is likely for Myanmar to achieve a peace talk.

The second dimension is law in Myanmar, especially the Constitution. Since Myanmar turns toward democracy, it established the first constitution in fifty years. However, the constitution still implants the military power in the parliament to have 25% of veto vote. However,

¹¹⁰ REPORT OF THE SECRETARY-GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last visited Apr. 30, 2017).

¹¹¹ *Id.*

¹¹² *Supra* note 3, p. 308.

¹¹³ *Id.*

¹¹⁴ Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar, Report UN Doc: A/68/397, 23 September 2013, paras 58-61; and Amnesty International, Myanmar: Investigate violent destruction of mosque buildings, Jun. 24, 2016.

¹¹⁵ Amnesty International, "WE ARE AT BREAKING POINT" ROHINGYA: PERSECUTED IN MYANMAR, NEGLECTED IN BANGLADESH", 13.

¹¹⁶ *Burma: Hardline Buddhists protest citizenship for Rohingya*, Asian Correspondent, Mar. 20, 2017, available at <https://asiancorrespondent.com/2017/03/burma-hardline-buddhists-protest-citizenship-rohingya/#LuEUDzbt8RUcT3D.97> (last visited Mar. 30, 2017).

according to Section 436 of the Constitution, to amend the Constitution, it needs 75% of both houses. There were attempts to amend the constitution to lower the bar of the majority vote to 70% to amend the constitution easier. This is strategically to reduce the military participation in politics. Nevertheless, the failure to amend the Constitution is able to indicate the possibility of the success of the peace process. Since the military maintains its power, it may be reluctant to sincerely have a peace talk.

The third dimension concerns a political situation. The motivation of the political actors has shown since Aung San Suu Kji initiated the peace conference between parties in internal armed conflicts. However, this peace talk does not include the peace negotiation between the human rights violators and victims. Nevertheless, this also shows that peace is the paramount and priority for the government.

b. The Form of the Peace Negotiation

The second important question is whether the peace talk is regional or national. Who would be the parties in negotiation? Rohingya as a party to a conflict? This is not the case of internal armed conflict between two belligerent parties, but the case of human rights violators and victims of violence. However, the report by the Investigation Commission regarding the Muangtwaw incident indicates that the extremist Rohingya committed the crime against the security forces. This finding is still dubious as it is only one-sided information by the entire government led commission. Therefore, there could be two-way peace negotiation within the region since all incidents have happened in Rakhine state.

c. The Peace Negotiation for Justice?

Would a peace talk will be enough and satisfied the victims in Rakhine state? This question brings the dilemma of peace and justice. New democracy should firstly grant amnesties as it may contend with the previous authoritarian regime.¹¹⁷ The current democratic government sustains the ongoing conflicts and violence. Since this problem has been rooted for decades, it is quite difficult for the victims to accept the amnesty for serious crimes and violence.

2. Alternatives for Justice and Accountability?

If there is no peace without criminal justice, a mere peace negotiation might not be enough to serve as a transitional justice process and could not mete out justice and accountability. In this case, justice process would be necessary, but to what extent and how could the existing mechanisms contribute in the justice process. This part will observe the possibilities of the anticipated mechanisms to bring justice and accountability in Myanmar.

a. International Fact Finding Commission

In late March 2017, the UN Human Rights Council adopted the resolution calling for the establishment of an International Fact-Finding Commission to probe the Rohingya issue.¹¹⁸ This will be the first pure international mechanism to conduct an investigation in Myanmar. The international fact-finding commission is a different mechanism from the Commission of Inquiry which the OHCHR proposed after the flash report in February 2017 due to the objection by Myanmar.¹¹⁹ The mandate of the fact-finding commission is to “establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and

¹¹⁷ *Supra* note 105.

¹¹⁸ *UN Human Rights Council decides to urgently dispatch an international fact finding mission to Burma/Myanmar*, Mar. 24, 2017, available at <https://www.forum-asia.org/?p=23432>; See also *Burma/Myanmar: Human Rights Council should establish an independent, international investigation into gross human rights abuses*, Mar. 15, 2017, available at <https://www.forum-asia.org/?p=23381> (last visited Mar. 30, 2017).

¹¹⁹ *Id.*

abuses, in Myanmar, in particular in Rakhine State.”¹²⁰ The efficiency and impacts to justice and accountability of this anticipated mechanism needs to be further followed and assessed as it now (April 2017) does not yet reveal much detail. However, it hopes that this international mechanism will be independent and impartial.

b. Possibilities of Local, Hybrid, Regional, or International Justice Mechanisms?

After decades of the military regime, the domestic justice system has lost its independence as it needs to serve the authority.¹²¹ As Myanmar is democratizing, it reforms the new justice system under the 2010 Union Judiciary Law.¹²² This law has changed the judicial system in Myanmar in terms of efficiency of the system, independence and impartiality, and the rule of law itself. It is, therefore, important to develop sufficiently strong judicial institution before trying the perpetrators in the domestic system. However, it takes time to reach the level of the strong institution and the justice cannot be delayed with this timely issue.¹²³ The domestic judicial system may not be an appropriate venue to bring justice and accountability at this moment.

The hybrid tribunal could be an alternative for justice and accountability for the Rohingya. The establishment of the hybrid tribunal requires solid legal framework and resources. As compared to the Extraordinary Chambers in the Court of Cambodia (ECCC), the ECCC has faced the struggle with the local population as the citizens push off the international mechanism. Therefore, it is likely that it would face the same situation since there was a rejection toward the Advisory Commission even though such a mechanism is a hybrid between local and international authorities.¹²⁴ Moreover, the funding is a key concern to establish a hybrid court. It cannot function without support from both the international organizations and the government itself. The quantitative method is further needed to assess and weigh between economic development and justice concern.

The Southeast Asian region or even Asia as a whole has been criticized as it lacks a regional judicial body to prosecute international crimes and human rights violations occurring in each state. ASEAN does not plan any soon to establish the regional judicial body like the European Court of Human Rights. Therefore, it is unlikely that the regional judicial body will help bring justice for the Rohingya.

The international criminal justice mechanism available lies in the ICC. However, Myanmar is not a party to the Rome Statute. In addition, it is unlikely for the five permanent members of the UN Security Council would refer the case to the ICC since China and Russia disagreed on the statement to address the Rohingya problem.¹²⁵ Therefore, the possibility for the Myanmar to appear before the ICC is quite low at this moment. However, this assessment can be changed depending on changing circumstances.

¹²⁰ Human Rights Council, *Human Rights Council decides to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State*, Mar. 24, 2017, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E> (last visited Mar. 30, 2017).

¹²¹ Ei Cherry Aung, *Rape victims struggle to find justice in Myanmar*, Myanmar Now, Feb. 17, 2016, available at <http://www.myanmar-now.org/news/i/?id=aa0320cc-cb14-4750-ad79-25d085739969> (last visited Mar. 30, 2017).

¹²² Nang Yin KHAM, *An introduction to the Law and Judicial System of Myanmar*, NUS Centre for Asian Legal Studies Working Paper 14/02, available at <http://law.nus.edu.sg/cals/pdfs/wps/CALS-WPS-1402.pdf> (last visited Apr. 20, 2017).

¹²³ *Supra* note 105

¹²⁴ *Myanmar Buddhists Protest Against Advisory Commission on Troubled Rakhine State*, Radio Free Asia, Sep. 6, 2016. Available at <http://www.rfa.org/english/news/myanmar/myanmar-buddhists-protest-against-advisory-commission-on-troubled-rakhine-state-09062016165535.html> (last visited Apr. 10, 2017).

¹²⁵ *Supra* note 91.

How would the existing mechanisms supplement the anticipated justice process for the Rohingya? Will there be any contribution? If so, how would those mechanisms help bring justice and accountability? As most of existing mechanisms focus on investigations and field visits, they have a potential capacity to collect the current evidence and documentation. As the conflict is going on, the evidence gathered in this moment in time will be beneficial to the future justice mechanism.

3. Compromising, Balancing, or Moving Backward?

Can peace be achieved by a forceful justice and accountability mechanism in this case? To answer this question, it is vital to take the current political situation in Myanmar into account. As Myanmar is a democratic fragile regime: a new democracy with a strong implantation of the previous regime's power in the political system, it is still prone to move backward by means of coup d'état. Imprudently prosecuting the perpetrators might trigger the actors in the old authoritarian regime to take over the power of the pseudo-democratic government. If there is such a potential risk, would it be better to use psychological-influential or mixed mechanisms rather than pushing forward the more robust justice mechanisms or trials alone. Justice trading off with a non-democratic regime or a cracking regime would be undesirable. In this regard, there is no real justice without peace as well. Thus, what would be an appropriate model for peace and justice in Myanmar? Could 'balanced justice' be occurred by slow-prodding existing mechanisms in this case? These questions need further studies and further development of the situation to answer.

CONCLUSION

The conflict and violence in Rakhine state has made the Rohingya one of the most persecuted minorities in the world. As Myanmar is in the process of democratization, it is vital to probe such issue and unify the country. By doing so, transitional justice mechanisms are created and proliferated to investigate, analyze, and solve the long-standing problem. This paper analyzes and assesses the working of the mechanisms pertaining to the impact on justice and accountability in Rakhine state. The findings are concluded as follows:

For the domestic mechanisms: The mechanisms are rather tailored for specific events than for a long-term situation. They, therefore, do not fit with the nature of continuous conflicts. Consequently, the mechanisms are fragmented rather than harmonious since the level of coordination is very low. Moreover, the mechanisms are not quite impartial and inclusive since there is no local engagement in the process. It seems that the domestic mechanisms are created to avoid the check and monitor by the international community by focusing other issues in Rakhine state that are not directly related to the violence against the Rohingya, such as drug trafficking, development aid, and other felonies. In other words, the mechanisms try to push the international community away since there is resentment by the majority Buddhists. In addition, most importantly, the mechanisms have not addressed the root cause since they are affiliated with the government who would like to hide the root causes.

For the Advisory Commission: The Advisory Commission would merely give advice to the government. Recommendations could be promising if the government seriously implements. However, for now, it has not done much relating to justice and accountability. It does not strongly invoke or identify any specific violence and human rights abuses. Nevertheless, the full report is anticipating for the close analysis and assessment when it issues by the end of 2017.

For the International Mechanisms: It seems that international mechanisms attempt to keep tracking and monitoring the situation in Myanmar, and raise awareness in the international community by concluding several succinct reports.

Even though, the existing mechanisms are not perfect to completely resolve this complex issue, they can be improved by increasing independency, impartiality and sincerity. More challenging factors would be political and social climate which could constrain the works of mechanisms. This will take time for the new democratic government to eliminate the influence and legacy of the previous regime. Not only the help from the international community, at the end of the day, it is important for the government of Myanmar to realize the principle of Responsibility to Protect (R2P) embodied in the 2005 World Summit Outcome document. The responsibility lies in the Myanmar government to protect the people in its territory not to subject to human rights violations. Reform the citizenship law, reduce the military influence, and control the security force will be the first steps before getting to the harder measures. Sooner or later, justice and accountability would prevail and peace will be found in Rakhine state. At that time, Myanmar will be a true democratic country.