

# QUESTIONING THE 'NON-INTERFERENCE' CALCULUS

## EXPLORING JUSTIFICATIONS FOR INCLUDING JUSTICE AND ACCOUNTABILITY IN POLICY RESPONSES ON MYANMAR

### SCOPING PAPER

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## INTRODUCTION

In the Asia Justice Coalition's (AJC) closed-door convening on universal jurisdiction in Asia, participants (hereafter 'convening participants') noted that the principles of 'sovereignty and non-interference act as practical and manufactured hurdles to bringing' international justice matters to domestic courts. Convening participants pointed out that the geographical distance of international justice mechanisms from Asia also 'lends itself to States making stronger rhetorical arguments regarding violations of sovereignty and non-interference [when] the mechanisms were created not 'by the region, for the region'.<sup>i</sup>

However, it also was noted that 'neighbouring States are [currently] bearing the cost of crimes within Myanmar, with refugee movements and greater conflict at their borders'. This may change the 'non-interference calculus' so that *not* acting to address impunity amounts to 'interfering' with a State's domestic interests. On this, convening participants raised whether there could be a 'tipping point' at which engagement with international justice and accountability - particularly where a State's interests are significantly affected - would be preferable to non-engagement.

To identify where this 'tipping point' might be, participants recommended considering States' values and interests to address prioritisation and acquire political will. The two concepts intersect. 'Values' may relate to a State's identity and appeal to State preferences including 'consultation and cooperation' and 'adherence to the rule of law'. 'Interests', on the other hand, may relate to a State's external diplomacy and appeals to State preferences, including stability and trade opportunities. Re-framing the promotion of international justice as a value and/or an interest may provide greater opportunities to embed mechanisms for pursuing justice, such as exercising universal jurisdiction.

This scoping paper examines initial questions regarding interest and value-based political decision-making related to promoting domestic and international justice and accountability measures regarding atrocity crimes as a policy response to entrenched impunity.

To inform this scoping paper, AJC and the Centre for Peace and Justice, BRAC University (CPJ) held two, two-hour closed-door discussions in February 2023 with humanitarians, academics, and lawyers from across ASEAN Regional Forum members and South Asia whose work addresses the protracted refugee situation in Bangladesh and crisis in Myanmar or related issues. The research team is indebted to those who shared their thoughts and expertise.

In these discussions, participants (hereafter 'discussion participants') were asked:

- How they understood international justice and accountability is defined in the region;
- Whether and how justice and accountability for international crimes (which includes domestic court-led or other processes as opposed to 'international justice' as only in international courts) might be 'prioritised' by domestic governments;
- What State 'interests' in or 'values' related to preventing or addressing impunity concerning Myanmar and where this ranks in domestic priorities;
- Whether any historical case studies would be relevant to understanding State decision-making regarding impunity in relation to Myanmar; and
- How the research team might best identify relevant political actors to gauge political will.

This scoping paper builds on the discussions to prepare for a detailed study of the reasoning and language used in policy decisions related to impunity and Myanmar. Possibly a combination of desk research and qualitative interviews will follow, focusing on Bangladesh, Indonesia, and Malaysia. The scoping paper provides: (1) justification of the research topic and its parameters;

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(2) clarification of research variables for investigation; and (3) preparation of the documents needed to carry out further qualitative research.

## JUSTIFYING RESEARCH PARAMETERS

### Myanmar: A Crisis of Impunity?

In August 2017, the Myanmar military launched so-called ‘clearance operations’ leading to more than 730,000 Rohingya people fleeing from Rakhine State, Myanmar to Bangladesh.<sup>ii</sup> While the international community demanded accountability for the military’s actions, the demands largely neglected to recognise that the conditions for this violence were laid many years before. ‘Impunity,’ or the exemption from consequences or punishment for one’s harmful actions, existed for Myanmar State actors in relation to the Rohingya: throughout the 1970s and 1980s for administratively and legally excluding the Rohingya from accessing rights as citizens;<sup>iii</sup> throughout the 1990s in ‘cyclical’ forced displacement;<sup>iv</sup> and throughout the 2000s and 2010s for the escalating violence including the Buddhist-Muslim riots.<sup>v</sup>

Less than four years after the ‘clearance operations’, the Myanmar military seized power in February 2021, overthrowing democratically elected civilian leaders. As the protracted crisis continues, the military junta has credibly been accused of crimes against humanity and war crimes across the country,<sup>vi</sup> as well as genocide against the Rohingya.<sup>vii</sup>

**For the proposed study, ‘impunity’ is the hypothesised ‘policy problem’.** This framing is chosen because, while ‘impunity’ is not itself a factor in literature predicting and preventing atrocity crimes,<sup>viii</sup> the exemption from consequences or punishment for one’s harmful actions features in three of the eight common risk factors within the United Nations (UN) Framework of Analysis for Atrocity Crimes. These include: a record of previous serious violations of international human rights and humanitarian law; weak internal structures to hold individuals to account; and the absence of mitigating factors such as effective participation in international or regional organisations that impose mandatory obligations and interest by UN Member States to support or address the offending State.<sup>ix</sup> **If factors that suggest impunity indicate the likelihood of atrocity crimes, and these crimes contribute to the protracted crisis as seen today in Myanmar, this raises the question: what is the appropriate ‘policy response’?**

### METHODOLOGY NOTE:

‘Impunity’ is not defined further than above in order to allow the intended research to help shape its meaning.

### Are ‘Justice’ and ‘Accountability’ Responses to Impunity?

If impunity is the exemption from consequences or punishment for one’s harmful actions, this research presumes that responding to impunity requires measures that include ‘justice’ and ‘accountability’. Depending on the context, ‘justice’ may mean either the administration of the law, fairness, or legitimacy - amongst many other meanings. Ensuring ‘accountability’ has equally as many possible meanings: taking responsibility, being identified as liable or guilty, or requiring one to answer for their actions in other ways. Each of these theoretically ensures the missing ‘punishment’ or ‘consequences’ lacking in ‘impunity’.

However, as raised by discussion participants, **without further definition ‘justice and accountability’ are philosophical concepts.** It is necessary to first understand the content of ‘justice’ or ‘accountability’ before assuming either is an adequate response to impunity. In other

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words, this research must address 'justice for what', 'justice for whom', 'who is being held accountable' and 'accountable to whom'.

Discussion participants raised important critiques for examining 'justice' and 'accountability,' including the importance of understanding whether survivors of mass atrocities view 'practical justice' (such as ensuring the conditions to permit the return to one's homeland) over formal prosecutions. Participants also questioned the value of **a State-based, 'top-down' definition of justice which may overlook or ignore survivors' needs**. Finally, participants recommended cautiously framing research as 'responses to international [or atrocity] crimes' and not as research into 'international justice'. This is because **the phrase 'international justice' can carry imperial and colonial connotations. Instead, framing research into simply 'justice' better situates agency and autonomy in domestic jurisdictions.**

Applied specifically to 'justice' and 'accountability' *as responses to impunity for atrocity crimes*, these points raise the following for further consideration:

- If not taking into account the views of survivors, is it still a valid research point to limit the examination to whether and how States in the region might turn to formal, court-based processes? If so, why?
- If the research methodology limits the examination of 'justice' to only formal, court-based processes, how might this be complicated by the competing political histories and current priorities of entities that are required to oversee these processes?
- Is there a link between formal, court-based processes and broader social justice and accountability?

#### **METHODOLOGY NOTE:**

As noted by discussion participants, it is necessary to recognise the vital role that affected communities play in agitating for change. Moreover, no research agenda should presume how affected communities - or the many different individuals that make up affected communities - may define holistic and satisfying 'justice' or 'accountability'.

This study focuses on formal, court-based processes as one possible route to 'justice' or 'accountability'. This is because these processes (hereafter 'formal justice processes') exist already, including in judicial systems in each of the chosen domestic jurisdictions and in the international legal framework. The study centres research on domestic policymakers in order to highlight States' autonomy and agency in international criminal justice and to emphasise potential sites for formal justice for international crimes in the so-called Global South.<sup>x</sup> It accounts for the importance and influence of the international legal framework through States' foreign policy preferences. The study asks whether, how, and why policymakers might choose to use these existing mechanisms as tools in the 'policy toolbox' to respond to the protracted crisis in Myanmar.

The research design does not assume that pursuing formal justice processes is a solution to the crisis.<sup>xi</sup> Instead, its primary question is predicated on identifying all means available to States in the region to address the crisis.

#### **Is 'Formal' Justice for International Crimes Relevant in Asia?**

As noted by discussion participants, **addressing impunity throughout the region through formal justice appears at first to be of low priority**. No regional Asian human rights treaty exists,

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and there is no Asian-wide court or regional accountability mechanism for atrocity crimes. Moreover, Asia has the fewest States Parties per region to the Rome Statute of the International Criminal Court.

**However, discussion participants raised that our jurisdictions have a notable history of engaging with international criminal justice mechanisms.**<sup>xii</sup> Asia has been the site of war crimes tribunals regarding World War II, hybrid tribunals including the Extraordinary Chambers in the Courts of Cambodia and the Special Panels for Serious Crimes in Timor-Leste, and domestic mechanisms for addressing international crimes including the International Crimes Tribunals in Bangladesh and Indonesia's Human Rights Courts. While each mechanism has been perceived to deliver justice by many victims, like any judicial process, they have also received valid critiques for their operation, effectiveness, and adherence to the rule of law. Likewise, discussion participants cautioned that each mechanism, with the exception of World War II tribunals, only ever heard cases regarding their domestic nationals. For example, Bangladesh has not been able to try members of the Pakistani military and Timor-Leste did not try Indonesian generals. Nevertheless, together, their existence makes the case that there has been some interest in and capacity for formal justice processes to address impunity for international crimes in Asia.

Discussion participants also noted current examples of growing interest and capacity to address impunity in Asia through formal justice processes. These included greater involvement from the Bangladeshi legal community in grassroots justice efforts for the Rohingya people as well as cases filed—or being prepared to be filed—under universal jurisdiction in Singapore<sup>xiii</sup> and with efforts to use the Indonesian Human Rights Courts for non-Indonesian victims and accused.<sup>xiv</sup> Particularly related to Myanmar, Bangladesh continues to actively cooperate with the International Criminal Court.<sup>xv</sup>

In addition to this increased potential use of formal justice processes in relation to the crisis in Myanmar, ASEAN members have expressed publicly that ASEAN's current approach is not enough. In particular, Malaysia, Singapore, and ASEAN Chair Indonesia have indicated their frustration with the lack of progress regarding its 5-Point Consensus.<sup>xvi</sup> The proposed study posits that the longer the crisis continues—and the more States in the region are affected—the more likely formal justice processes will be prioritised as a part of the broader policy approach.

### Why Might Formal Justice Processes Not Be Prioritised as a Policy Response to Myanmar?

Nevertheless, even with more potential tools and interest, particular barriers make prioritising formal justice processes as a policy tool less likely, especially when a State has its own internal security, economic, or health concerns.

#### *Practical Barriers*

As raised by discussion participants, **some barriers are just 'facts' of any court proceedings or judicial systems. These will be referred to as 'practical' barriers to prioritising formal justice processes.**

In general, court proceedings can be lengthy and costly,<sup>xvii</sup> and their outcomes are difficult to predict. It was noted that depending on the proceedings, they can be held in venues far from affected parties prompting certain actors to be sceptical of the utility of such distant and formal proceedings and may perceive them to be politically motivated.

These barriers multiply when bringing formal justice proceedings regarding 'international crimes'.<sup>xviii</sup> **In the context of 'international crimes,' among other reasons, the cost and length of trials increase because of the crimes' complexity and the sheer number of victims or**

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**witnesses needed.** Victims can also see trials as ineffective when a conviction is not reached, or an order for reparations cannot be carried out.<sup>xix</sup> Likewise, even with the clearest of cases where the evidence points towards the criminal liability of the accused, it is difficult to link any justice processes with the deterrence or prevention of future crimes.

On prioritising processes in the domestic sphere, discussion participants noted that **domestic formal justice processes for international crimes are complicated by the ‘health’ of the domestic legal system.** It was posited that, where there is little legal accountability in domestic courts for domestic actors (especially government) in Country A, it is difficult to argue that those same courts can and should try international actors from Country B. Participants noted the existence of immunities for certain crimes in domestic law throughout Asia, levels of corruption, and a lack of particular competencies in international law as all further weakening the argument for prioritising domestic court processes as a response to impunity for international crimes. Understandably, one participant addressed this succinctly by asking: *‘If a particular State cannot render justice for its people, why would we expect that it would for others?’*

These critiques are valid and welcome. More broadly, it is noted that politicised processes within the law and court systems affect the utility of seeking formal court-based justice. This raises the question of whether using legal cases in particular domestic systems is the appropriate option for victims. However, **this research is not intended to identify in what jurisdiction it may be most fruitful to pursue formal justice processes, but rather what political will must exist to make pursuing formal justice an option.**

Instead, **it is posited that the weaknesses—as well as perceptions of weaknesses—of both international and domestic formal justice processes are likely dissuade policymakers from seeing such processes as part of the broad policy ‘toolbox’.** Then, because such processes are not seen as part of the ‘toolbox’, they are not prioritised for funding and support. Without being prioritised for funding and support, these weaknesses persist or increase over time.

### *Manufactured Barriers*

In addition to these ‘practical’ barriers, discussion participants noted that **formal justice processes may not be prioritised because of ‘manufactured’ barriers—that is, how the crisis itself is discussed and whom the crisis affects.** Such ‘manufactured’ barriers exist both in the domestic and foreign policy spheres.

### *Domestic Criminalisation, ‘Othering’ of Victims*

States have responded to increased refugee movements as a result of the protracted crisis in Myanmar with policies that have contributed to increased ‘othering’ of affected communities, particularly of the Rohingya people. The region has seen an increase in pushing away boats carrying refugees, stricter visa requirements, and raids on ‘illegal’ asylum seekers. This only serves, as noted by discussion participants, to further entrench the State-sanctioned ‘criminalisation’ of the Rohingya people and other minorities from Myanmar—which in turn increases xenophobia. In this light, xenophobia and othering of victims can be seen as an effect of continued impunity.

In fact, many discussion participants raised how **xenophobia toward the Rohingya people and other minority groups who have fled Myanmar has increased in the host countries,** especially in contexts where local communities feel that their resources are being depleted by the ‘others’. Participants noted **the ‘fatigue’ felt by host communities, host countries, and even international donors as the crisis in Myanmar continues,** and how actors in the region *‘don’t want to be responsible for taking care of victims indefinitely’.* Moreover, short-term responses to

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the protracted crisis may have caused long-term negative impacts. For example, as a participant noted, forests in Bangladesh have been cleared in huge numbers to make space for refugee camps and facilities. These forest clearances also compound Bangladesh's pre-existing vulnerability to climate change. The greater the vulnerability of host communities, the more ire is likely to be focused on the 'other' for the predicament.<sup>xx</sup>

It was noted that, while the anger and fear that underpins xenophobia is somewhat expected, **policy approaches that place blame or responsibility on victims of international crimes such as the Rohingya are misplaced.** Where victims are 'othered' or considered 'the problem', this detracts from the pressure that could otherwise be placed on the responsible regime.<sup>xxi</sup> Moreover, if victims' presence is instead 'the problem', policy responses are more likely to focus on physically reducing their numbers or preventing their migration in the near term, and not on seeking formal justice processes in the longer term.

### 'Sovereignty' and 'Non-Interference'

As noted above, convening participants suggested that **the international principles of 'sovereignty' and 'non-interference' may help to explain regional States' broader reluctance to respond more forcefully in relation to Myanmar.** State 'sovereignty' refers to the presumption within international relations that each State retains supreme decision-making and decision-enforcement authority within its territory. If each State retains control of its internal affairs, the related norm of 'non-intervention' therefore requires that other States must *refrain* from interfering in the first State's ability to retain internal control.<sup>xxii</sup> Indeed, both sovereignty and non-interference are enshrined in both the United Nations<sup>xxiii</sup> and ASEAN<sup>xxiv</sup> Charters.<sup>xxv</sup>

If we assume 'sovereignty' is absolute, then 'impunity' for international crimes prevails within Myanmar's borders because actions inside Myanmar are simply not the business of other States. Therefore, formal justice processes are undesirable unless *crimes*—not just the effects of these crimes—are committed within a particular State's territorial jurisdiction (for instance, Bangladesh).

Moreover, participants noted that **external actors demanding formal justice processes—particularly former colonial powers demanding action of their former colonies—may emphasise power imbalances in the international system.** This can trigger language that emphasises 'sovereignty' and 'non-interference' so as to deflect neo-colonial forms of control, particularly when it is a so-called Global North State advocating for processes of 'international justice' in, or regarding, a so-called Global South State. Discussion participants raised that triggers may only serve to deter the prioritisation of formal justice.

However, **while 'absolute sovereignty' was presumed in traditional international relations, discussion participants noted that the meaning and content of 'State sovereignty' is neither fixed nor unlimited.**<sup>xxvi</sup> Rather than a State 'right', maintaining 'sovereignty' may now also entail particular responsibilities under contemporary international relations,<sup>xxvii</sup> if not currently under international law.<sup>xxviii</sup> Likewise, where Myanmar's *internal* actions impact *other* States as profoundly as they presently do, it is apt to question whether and how the norm of non-interference applies in this case.

Discussion participants noted that **although they are both legitimate international legal principles, referencing sovereignty and non-interference may be useful for regional States to avoid taking further action regarding Myanmar. Doing so on the international stage may also help legitimise this policy choice.** If *not* 'intervening' is the legitimate policy approach, it is likely *not* legitimate to initiate formal justice processes that relate to the internal affairs of Myanmar.

### METHODOLOGY NOTE:

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This study will focus on the language used to justify the domestic and foreign policy choices pursued by the chosen jurisdictions in relation to Myanmar and the Rohingya. It accepts that the above-listed 'practical' barriers to prioritising formal justice processes would influence any argument for *increasing the use* of formal justice as a policy tool; however, the research only seeks to understand whether and how using such processes could feature in a broader policy approach.

It is assumed that by examining the language used – and actions that accompany such language – it is possible to better understand policymakers' priorities at particular points in time. Understanding these priorities also helps to understand who policymakers are considering responsible for the effects of the crisis and why. It is hypothesised that formal justice processes will only be a viable policy response to protracted impunity where 'responsibility' is apportioned to Myanmar State agents.

## CLARIFYING RESEARCH VARIABLES

### Identifying Relevant Research Actors

Discussion participants identified a myriad of relevant actors who could influence the choice to prioritise formal domestic justice as a response to protracted impunity: the United Nations, ASEAN, individual State Ministries of Foreign Affairs, Trade, or Defence, bureaucrats in each of those Ministries, State diplomatic corps, media, domestic professionals including legal practitioners, civil society more broadly, affected communities, and the general public. The number of actors to examine is also multiplied because the broader study will examine three States: Bangladesh, Indonesia, and Malaysia.

Discussion participants noted that **identifying long-term solutions will require a 'whole society approach' which demands the integration of all actors including the general public.** While it will focus on 'policymakers', this research does not presume that a 'top-down' approach alone will provide a full picture of the necessary pressures for policy change. Instead, it is hoped that this research will help better understand State decision-making rationale in relation to the crisis in Myanmar, which could, in turn, increase the effectiveness of 'bottom-up' advocacy.

The research focuses on 'policymakers'—including both politicians and bureaucrats—as actors who set priorities and can increase funding or support for formal justice processes. As noted by discussion participants, this focus still needs greater refinement.

### METHODOLOGY NOTE:

Discussion participants recommended undertaking a mapping exercise to better understand the differences in actor mandates, priorities, and influence. For example, it was noted that treaty negotiation—including treaties that place obligations to engage in formal justice processes regarding international crimes<sup>xxix</sup>—is generally done by State Ministries of Foreign Affairs. However, the policies that must be implemented to give effect to treaty obligations are generally overseen by Ministries of Home Affairs or Justice. Moreover, those who might be responsible for administering formal justice processes—law enforcement, Ministry of Justice bureaucrats, and members of the legal profession—are commonly not privy to (and may have little interest in) foreign policymaking.

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## Narrowing Elements of Political Will

This research uses 'political will' as the umbrella term for understanding whether and how policymakers prioritise formal justice processes within a range of other policy options to respond to the protracted crisis in Myanmar. For the purposes of this study, 'political will' is defined as the 'choices made by relevant actors to pursue particular conduct'.

Historical or longer-term choices that may evidence relevant 'political will' include: becoming a signatory to human rights charters and treaties against atrocity crimes, establishing a legal framework that both criminalises the conduct to be tried and that ensures the trial abides by the rule of law, developing prosecution policies that preference using the courts for addressing international crimes, and ensuring funding is available to investigate, bring, and finalise cases within the courts.<sup>xxx</sup> **This research takes these choices into account as part of the existing 'toolbox' from which policymakers may choose to prioritise formal justice processes. However, the primary research focus is why this prioritisation (or de-prioritisation) occurs.**

### METHODOLOGY NOTE:

The project team will undertake extensive desk research. Initially, this will be secondary research, reviewing available literature on: the relationship between politics and impunity,<sup>xxxi</sup> measuring political will,<sup>xxxii</sup> norms transference particularly in reference to ASEAN,<sup>xxxiii</sup> and comparable case studies of other issue areas or in other jurisdictions.<sup>xxxiv</sup>

Then, the team will undertake primary desk research. In relation to **domestic policy** analysis regarding political will for formal justice, this may include:

- Whether a State has other avenues in domestic law to address serious human rights abuses of which their own nationals may be victims and whether these avenues have been raised in reference to Myanmar;
- Whether there have been efforts to try extraterritorial or international crimes incorporated into domestic law in the past;
- What language is used in public statements regarding the Myanmar junta and the Rohingya people;
- What language, if any, used in public statements after developments occur in international courts or other domestic courts; and
- What justification is provided for domestic security or border measures, including push-backs and visa raids.

In relation to **foreign policy** analysis regarding political will for formal justice, this may include:

- Whether a State is a signatory to international human rights and humanitarian law treaties, and whether or how often the State refers publicly to obligations under those treaties;
- How a Ministry of Foreign Affairs or diplomatic corps refers to justice for international crimes in public statements on the international stage, including in treaty negotiations, the United Nations General Assembly, or the United Nations Sixth (Legal) Committee; and
- Whether and how a State engages with ongoing legal processes including at the International Court of Justice and the International Criminal Court.

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## Relevant (De-)Motivating Factors for Further Examination

As noted above, **convening participants recommended framing the examination of ‘political will’ in reference to States’ ‘interests’ and ‘values’.**<sup>xxxv</sup> No State—or individual policymaker—makes decisions wholly based on one interest or value. As discussion participants noted, interests and values ‘intersect and interact’ in policymaking. In reference to Bangladesh’s approach to the Rohingya people, it was stated: *‘[Sheltering refugees] invokes our history because in 1971 millions of people took shelter in India. We know the sufferings of people who are forcefully dispossessed and displaced. But there are also economic interests, political interests, and security interests’.* A combination of continued economic responsibility of hosting refugees, increased informal trade, and increased instability along the borders with Myanmar counterbalance a values-based humanitarian response.

To reflect this complicated decision-making environment but to reduce the variables for analysis, **this study adopts the convening framing and consolidates factors that weigh for or against prioritising formal justice processes into State ‘interests’ and ‘values’.** The study’s definition of these terms is informed by the elements of political will to which discussion participants referred most regularly. As such, the term ‘State interests’ refers to actions that promote its economy, improve its diplomatic status or political capital, or ensure its security. The term ‘State values’ captures the more nebulous concept of State identity, which is influenced by its history but also includes appeals to consensus building, respect of democratic processes, or protection of human rights.

### ‘State Interests’

Participants shed valuable insights on complex ‘State interests’ in addressing impunity, particularly those relating to economy and trade, diplomatic status or political capital, and security, and where these interests rank in domestic policy priorities.

### Economy and Trade

Intriguingly, despite Bangladesh’s strained relations with Myanmar, particularly since the mass displacement of the Rohingya people in 2017, bilateral trade has gradually increased between the two neighbouring countries. Another vital aspect of Bangladesh’s relationship with Myanmar is the ongoing bilateral negotiations to resolve the refugee situation through the safe and dignified repatriation of Rohingya refugees. The psyche of Bangladeshi policymakers is dominated by the belief that any steps taken towards domestically prosecuting Myanmar military personnel, for instance, *in absentia* under the International Crimes (Tribunals) Act, 1973 (ICTA 1973), **will not just hamper existing bilateral trade relations but also bring an end to ongoing bilateral negotiations and, in turn, derail the prospect of repatriation of Rohingya refugees.**<sup>xxxvi</sup>

In the case of ASEAN States, circumstances are not dissimilar from that of Bangladesh. To date, other ASEAN States have not held Myanmar accountable in any way for committing atrocities against the Rohingya people. **Participants noted that this has likely been the case due to ASEAN’s mandate relating to human rights being limited to ‘trade’ and ‘commerce’ matters and practices of disseminating humanitarian aid for natural disasters.** Adding further to the complexities of domestic ‘interests’, convening participants noted that migrant worker-sending States, including Sri Lanka, the Philippines, and Nepal, have pressured worker-receiving States to mitigate or rectify harm experienced by their nationals. This provides an example of how an economic interest such as ensuring remittances can also be seen through a human rights lens—providing worker protections—and may engender the necessary political will for reform.<sup>xxxvii</sup>

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Bangladesh's economic potential and rise have received global attention and praise in recent years. Irrespective of whether or not the belief is rationally grounded, there is a belief that a large Rohingya population in Bangladesh has already ushered certain economic benefits for the country. Donor money has, for instance, created many jobs in the NGO sector engaged in the refugee response across the Cox's Bazar region. Drawing from its experiences and with a view to addressing simmering tensions between the refugee and host communities, in 2019, the Bangladesh Government decided that roughly a third of the donor money allocated for the Rohingya refugee situation would have to be spent on the host community of the region. Participants argued that the Bangladesh Government, through its Ministry of Foreign Affairs, should use its position as a major refugee-hosting State from the Global South as a "bargaining chip" or a "trump card" to invite economic investment in its local economy. Similarly, prosecuting Myanmar military personnel under the ICTA 1973 can also potentially be used to demand greater financial support from the international community in support of Bangladesh as a major refugee-hosting State proactively combating impunity. **Participants noted, however, that such initiatives would likely not be welcomed by China, given the nature of its deep geopolitical and economic interests in Myanmar.** It is worth keeping in mind that Bangladesh recently abstained from voting on a UN General Assembly Resolution calling for an end to the ongoing war in Ukraine.<sup>xxxviii</sup>

### Diplomatic Status or Political Capital

Participants pointed out that **a country spearheading the cause for justice often depends on which countries and populations are affected, the nature of that country's stakes, and active and remote geo-strategic interests, in offering a principled response.** These multifaceted considerations, for instance, shaped the outcome of the US and its allies to stand against Myanmar in favour of Bangladesh. They further believed that Bangladesh, a developing country with a nominal GDP, had limited diplomatic tools, influence, and political capital to take on the cause for justice for Rohingya victims of international crimes. Some of these considerations came to the fore when Canadian State authorities, during a meeting with the Ministry of Foreign Affairs of the Bangladesh Government, offered to resettle a minimal number of Rohingya refugees. Essentially stuck between 'two big powerful levers', i.e. the US and China, Bangladesh had no choice but to prioritise matters that align with its national interests. Participants drew attention to the case of Belgium, when in 2003, its 'universal jurisdiction'<sup>xxxix</sup> law was amended, 'limiting its application to citizens and residents of Belgium' after US Defense Secretary Donald Rumsfeld threatened to freeze US funding for NATO's new headquarters in Brussels if the law in question 'was not revoked'.<sup>xl</sup>

### Security

Security interests impact a State's approach to fighting impunity. During discussions, participants emphasised that countries from south and south-east Asia could prioritise holding Myanmar—a country they identified as a "criminal State" responsible not just for genocide against the Rohingya people but also for human and drug trafficking—to account. That said, countries neighbouring Myanmar, namely India, China, Cambodia and Thailand, were described as less inclined to tackle impunity based on security interests due to a range of competing geostrategic interests and, on occasion, because of their alliances with powerful States which prevent them from taking an independent position. For instance, it was said that China is responsible for systematically targeting the Uyghur people. Conversely, India, which has hosted Rohingya refugees in the past—although in much smaller numbers—is in competition with China to access the Myanmar market. Like Bangladesh, Cambodia is still reeling from the weight and consequences of mass atrocities committed at the scale of international crimes. Finally, Thailand has relatively strong diplomatic ties with the military junta in Myanmar. In light of these realities, Bangladesh, having hosted a

million Rohingya people and faced security challenges that tend to originate from protracted refugee situations, was perceived to be best placed to pursue addressing impunity.

Importantly, participants discussed **the potential of States prosecuting those involved in trafficking from Myanmar to further restore security along and inside its national borders**. Arrangements facilitating regional cooperation and anti-human trafficking were interpreted as contributors to acquiring the much-needed political will to fight impunity. For example, the Treaty on Mutual Legal Assistance in Criminal Matters was identified by convening participants as a resource-sharing model that could be interpreted as analogous to the resource-sharing needed to activate universal jurisdiction.<sup>xii</sup> Similarly, the ASEAN Convention Against Trafficking in Persons, Especially Women and Children, was cited as an example where member States successfully aligned disparate interests constructively.<sup>xiii</sup> On the basis of these discussions, participants agreed that economic crimes and terrorism were more readily incorporated into domestic legislation, compared to international crimes, which is why there was a dearth of legislation framed to address the latter. Participants further pointed out that human trafficking, once considered a feminist or humanitarian issue, has been reframed as a security issue. Still, perceptively, participants **cautioned that taking such a path was vulnerable to securitisation leading to using ‘security’ as a weapon to exclude refugees instead of as a means to protect them from trafficking and mass atrocities**.

#### ‘State Values’

In contrast to the more concrete nature of a State’s ‘interests’, ‘State values’ capture a State’s outlook based on its history and its constructed identity.

Regarding a State’s history, it was noted that **a State’s past may inform policies both for and against measures to address impunity**. The fact that 10 percent or more of the Bangladeshi population had to take refuge in India and that the people of Bangladesh were victims of mass atrocities committed at the scale of international crimes during Bangladesh’s Liberation War of 1971, is reflected in Bangladesh’s humanitarian policy approach and its justification towards the hosting Rohingya people.<sup>xliii</sup> This sympathetic humanitarian<sup>xliii</sup> approach may sway policymakers towards efforts that ensure accountability for the humanitarian crisis, including formal justice processes. In contrast, discussion participants noted that **the history of colonialism consciously and subconsciously guides State decision-making**. When the Global North, particularly former colonial powers, urges action on impunity, States can perceive this as more powerful geopolitical actors eschewing responsibility and placing blame on those in the region. It was noted that **this can disincentivise policymakers away from pursuing formal justice processes to address the crisis—particularly when those processes may be costly to the States’ trade or diplomatic interests**.

**Beyond a State’s history, a State’s values may also be reflected in appeals to ‘the rule of law’, ‘respect for and protection of human rights and fundamental freedoms’, and ‘amity and cooperation’**—notably all found within the preamble of the ASEAN Charter.<sup>xliv</sup> These values may run counter to one another—‘the respect for and protection of human rights’ may weigh in favour of addressing impunity through formal justice processes while ‘amity and cooperation’ may weigh against trying members of the Myanmar regime and military for gross violations of those rights.<sup>xlvi</sup>

**While discussion participants agreed that policymaking can be based on ‘values’, it was queried whether policymakers only consider ‘values’ after a certain point of economic development**—until such time, economic and security interests must take precedence. This research hypothesises that ‘values’ play a role in policymaking at all times, but a potentially more

measurable metric for values-based policymaking is the extent to which policy also based on interests is *justified* with reference to values.

#### METHODOLOGY NOTE:

In addition to ‘State interests’ and ‘State values’ framing within the discussion questions, discussion participants raised the importance of considering the role of (1) international and domestic public opinion, (2) the ‘right’ timing, and (3) the availability of resources for prioritising justice. Each can be accounted for in the analysis of either interests or values.

For example, it was noted that because international law lacks centralised enforcement, **international and domestic public opinion** helps to fill an ‘accountability gap’. Discussion participants specifically referenced the importance of the Indonesian fishing community that rescued Rohingya refugees from the sea despite the active presence of security forces. The defiance of the fishing community of the authorities to show support for the Rohingya pushed the government to rethink its position.<sup>xlvii</sup> Rather than a separate element for examining political will, **this research posits that international and domestic public opinion affects policymaking because it either emphasises—or indicates a departure from—particular values or interests.**

Likewise, discussion participants noted that interests and values regularly change as international and domestic events take precedence. It was suggested that there may be a **‘right’ or ‘better’ moment** to agitate for the use of formal justice processes to address impunity. This research posits that a ‘moment’ is more or less ‘right’ when particular interests and values align. Thus, like public opinion, ‘timing’ is not itself its own element to examine but rather may be an indicator of what interests or values are prioritised.

Finally, discussion participants raised that **limited resources** likely influence the prioritisation of formal justice. This research posits a related but different point: how the use of finite resources is prioritised may help to identify the interests and/or values that underlie that decision.

#### NEXT RESEARCH PHASE

This scoping paper lays the groundwork for a more detailed study on the reasoning and language used in domestic and foreign policy decisions regarding justice and accountability for atrocity crimes, with particular reference to international crimes committed against the Rohingya people in Myanmar.

The longer research study focuses on Bangladesh, ASEAN-Chair Indonesia, and Malaysia. It will use desk research to inform approaches for centring justice and accountability in domestic and regional policy discussions.

The basis of the research will be the manufactured barriers—criminalisation of the ‘other’, sovereignty, and non-interference—to prioritising formal justice processes as a response to continued impunity in Myanmar. The research team will examine these barriers through the lens of elements that may influence *‘political will’* within each State: interests (such as the economy, diplomatic or political status, and State security) and *‘values’* (such as appeals to common history, support for humanitarian relief, and upholding particular ideals).

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An anticipated applied research outcome is the development of guidance for civil society advocating for justice for international crimes. As noted by convening participants, it may be that the strongest argument for prioritising formal justice processes will incorporate elements of both State's interests and values. By conceptually separating common factors *within* an understanding of 'State interests' or 'State values', it is hoped that this research will assist civil society to better adopt advocacy strategies to address these factors in any combination that they arise.

<sup>i</sup> The Convening Note on 'Avenues to Accountability: Universal Jurisdiction in Asia' can be found at: <https://www.asiajusticecoalition.org/universal-jurisdiction-convening-series/avenues-to-accountability%3A-universal-jurisdiction-and-asia>.

<sup>ii</sup> Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar' UN Doc A/HRC/39/64, [31]-[35].

<sup>iii</sup> See Nyi Nyi Kyaw (2017), 'Unpacking the Presumed Statelessness of Rohingyas', *Journal of Immigrant & Refugee Studies*, 15 (3), 269-86; and Peggy Brett and Kyaw Yin Hlaing (2020), 'Myanmar's 1982 Citizenship Law in Context' Torkel Opsahl Academic EPublisher Policy Brief, <https://www.toaep.org/pbs-pdf/122-brett-kyh/>.

<sup>iv</sup> Human Rights Watch (1996), 'Rohingya Muslims: Ending a Cycle of Exodus?' <https://www.hrw.org/legacy/summaries/s.burma969.html>.

<sup>v</sup> Md Mahbulul Haque (2017), 'Political Transition in Burma/Myanmar: Status of Rohingya Muslim Minority', *South Asian Journal of Policy and Governance* (41) 21-39.

<sup>vi</sup> International Investigative Mechanism for Myanmar (2023), 'Statement by Nicholas Koumjian, Head of the IIMM: Two More Years of Atrocities in Myanmar' <https://iimm.un.org/two-more-years-of-atrocities-in-myanmar/>.

<sup>vii</sup> See International Court of Justice, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)' <https://www.icj-cij.org/case/178>.

<sup>viii</sup> 'Atrocity crimes' include war crimes, crimes against humanity, and genocide. For a useful primer, see Bridget Conley-Zilkic, Saskia Brechenmacher and Aditya Sarkar (2016) 'Assessing the Anti-Atrocity Toolbox' *World Peace Foundation Occasional Paper*,

[https://sites.tufts.edu/wpf/files/2017/05/Atrocity-Toolbox\\_February-2016.pdf](https://sites.tufts.edu/wpf/files/2017/05/Atrocity-Toolbox_February-2016.pdf).

<sup>ix</sup> United Nations (2014) *Framework of Analysis for Atrocity Crimes*,

[https://www.un.org/en/genocideprevention/documents/about-us/Doc.3\\_Framework%20of%20Analysis%20for%20Atrocity%20Crimes\\_EN.pdf](https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf) 11-15.

<sup>x</sup> The principle of complementarity (Article 17 of the Rome Statute) expects that relevant domestic jurisdictions will take precedence in the larger system of international justice.

<sup>xi</sup> Although not a solution in itself, discussion participants noted that formal justice processes can support more 'practical' or 'social' justice efforts, including providing opportunities for truth-telling or signalling the importance of accountability.

<sup>xii</sup> See broadly Judge Sang-Hyun Song (2011), 'Role of Asian Lawyers in the Emerging System of International Criminal Justice' Speech delivered at the 24th Annual Conference of the Law Association for Asia and the Pacific, <https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/WU99/111010ICCPresidentkeynotespeech.pdf>.

<sup>xiii</sup> 'Singapore Urged to Arrest Sri Lanka's Gotabaya Rajapaksa by South Africa-Based Human Rights Group,' (24 July 2022), *South China Morning Post Online*,

<https://www.scmp.com/news/asia/south-asia/article/3186416/singapore-must-arrest-sri-lankas-gotabaya-rajapaksa-urges>.

<sup>xiv</sup> Samara Baboolal (8 September 2022), 'Indonesia Activists Ask Court to Allow Human Rights Case against Myanmar Junta' *Jurist Online*,

<https://www.jurist.org/news/2022/09/indonesia-activists-ask-court-to-allow-human-rights-case-against-myanmar-junta/>.

<sup>xv</sup> See for example Embassy of Bangladesh to the Netherlands (19 August 2020), 'Bangladeshi In ICC: In Brief' <http://bangladeshembassy.nl/bangladeshi-in-icc-in-brief/>; and International Criminal Court (1 March 2022), 'ICC Prosecutor, Karim A. A. Khan QC, concludes First Visit to Bangladesh' *Press Release*,

<https://reliefweb.int/report/myanmar/icc-prosecutor-karim-khan-qc-concludes-first-visit-bangladesh-underlines-commitment>.

<sup>xvi</sup> Ahmad Zaini Kamaruzzaman (24 September 2022), 'Ismail Sabri: Malaysia Disappointed by UN's Lack of Action on Myanmar Crisis' *New Straits Times*,

<https://www.nst.com.my/news/nation/2022/09/833994/ismail-sabri-malaysia-disappointed-uns-lack-action-myanmar-crisis-nsttv>; *Bloomberg* (10 February 2023), 'Malaysia Urges Thailand to Step Up and Resolve Myanmar Conflict, Must Share Burden' in *South China Morning Post*,

<https://www.scmp.com/news/asia/southeast-asia/article/3209781/malaysia-urges-thailand-step-and-resolve-myanmar-conflict-must-share-burden>; Ministry of Foreign Affairs Singapore (7 November 2022), 'Minister For

Foreign Affairs Dr Vivian Balakrishnan's Written Reply to Parliamentary Question on The Situation in Myanmar and ASEAN's Approach.'

<https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/11/221107aseanpg>; Philip Heijmans (11 November 2022), 'Indonesia Proposes Ban on Myanmar Junta Beyond ASEAN Summits' *Bloomberg* <https://www.bloomberg.com/news/articles/2022-11-11/indonesia-proposes-ban-on-myanmar-junta-beyond-asean-summits>; and Sebastian Strangio (12 January 2023), 'Indonesia to Establish Special Office to Handle Myanmar Crisis' *The Diplomat* <https://thediplomat.com/2023/01/indonesia-to-establish-special-office-to-handle-myanmar-crisis/>.

<sup>xvii</sup> One discussion participant particularly noted the delay and lengthy process for trials within the Extraordinary Chambers in the Courts of Cambodia. Even in this dedicated mechanism for international crimes, '[The length of time meant that] accused persons die as innocent persons because they are yet to be proven guilty. What happens to their victims? This system has perpetually deprived these people of their justice.'

<sup>xviii</sup> As noted earlier, 'international crimes' throughout means 'atrocities crimes'--war crimes, crimes against humanity, and genocide.

<sup>xix</sup> Discussion participants noted that these critiques are levelled even at specially-designed institutions such as the International Criminal Court.

<sup>xx</sup> See for example Justin Gest (2021), 'Majority Minority: A Comparative Historical Analysis of Political Responses To Demographic Transformation', *Journal of Ethnic & Migration Studies*, 47 (16), 3701-28; Fatima Khan, Siphokazi Mbatani, and Charlotte Marais (2021), 'Trusting Democracy: The Law Can Work For Refugees, But What the System Needs is an 'Injection of Humanity'', *Journal of Asian & African Studies*, 56 (1), 48-63; Anas Ansar (2020), 'The Unfolding of Belonging, Exclusion and Exile: A Reflection on the History of Rohingya Refugee Crisis in Southeast Asia', *Journal of Muslim Minority Affairs*, 40 (3), 441-56; and Jacqueline Bhabha et al (2019), 'Tolerance Deficits: The Perilous State of Refugee Protection Today', *Philosophy & Social Criticism*, 45 (4), 503-10.

<sup>xxi</sup> Discussion participants noted the particular importance of examining how States discuss the 'Rohingya' as a people. It was pointed out that even in recent years, Myanmar's delegates to gatherings on human rights did not talk about Rohingya. In this way, a form of 'mental blocking' occurs to isolate and neutralise the issue.

<sup>xxii</sup> Jennifer Keene-McCann and Aakash Chandran (2023) 'Identifying 'Other Argentinas': Variables in Considering Universal Jurisdiction Forum States,' in *The Rohingya Crisis: Humanitarian and Legal Approaches*, eds Manzoor Hasan, Syed Mansoob Murshed, and Priya Pillai (Routledge).

<sup>xxiii</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, arts 2(4) and 2(7).

<sup>xxiv</sup> *Charter of the Association of Southeast Asian Nations*, 20 November 2007, Preamble.

<sup>xxv</sup> For more on ASEAN, non-interference, and international law, see Tommy Koh (25 March 2021), 'Ten Conclusions of the CIL Roundtable on "ASEAN and Myanmar: Balancing the ASEAN Charter and Non-Interference in the Internal Affairs of Other States"' *CIL Dialogues* (National University Singapore) <https://cil.nus.edu.sg/blogs/ten-conclusions-of-the-cil-roundtable-on-asean-and-myanmar-balancing-the-asean-charter-and-non-interference-in-the-internal-affairs-of-other-states-by-tommy-koh/>.

<sup>xxvi</sup> Moreover, discussion participants noted that these concepts regularly change—especially when wielded by global powers.

<sup>xxvii</sup> Discussion participants particularly noted the developments regarding the 'Responsibility to Protect'.

<sup>xxviii</sup> With particular reference to Asia, see Alex J Bellamy and Sara E Davies (2009), 'The Responsibility To Protect in the Asia-Pacific Region' *Security Dialogue* 40(6), 547–574.

<sup>xxix</sup> See for example *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, art 7.

<sup>xxx</sup> See Asia Justice Coalition Secretariat (2022), 'Avenues to Accountability: Universal Jurisdiction in Asia' *Convening Note* <https://www.asiajusticecoalition.org/universal-jurisdiction-convening-series/avenues-to-accountability%3A-universal-jurisdiction-and-asia>.

<sup>xxxi</sup> See Gary J Bass (2016), 'Bargaining Away Justice: India, Pakistan, and the International Politics of Impunity For the Bangladesh Genocide', *International Security*, 41 (2), 140-87; Aloka Wanigasuriya (2021), 'Justice Delayed, Justice Denied? The Search For Accountability For Alleged Wartime Atrocities Committed in Sri Lanka', *Pace International Law Review*, 33 (2), 219-60; Syeda Rozana Rashid (2020), 'Finding a Durable Solution To Bangladesh's Rohingya Refugee Problem: Policies, Prospects and Politics', *Asian Journal of Comparative Politics*, 5 (2), 174-89; and Mohammad Zahidul Islam Khan (2019), 'Pathways To Justice For 'Atrocity Crimes' in Myanmar: Is There Political Will?', *Global Responsibility To Protect*, 11 (1), 3-41.

<sup>xxxii</sup> See Susan Mbula Kilonzo and Ayobami Ojebode (2023), 'Research Methods for Public Policy', in E. Remi Aiyede and Beatrice Muganda (eds.), *Public Policy and Research in Africa* (Springer International Publishing), 63-85; and Amber Raile, Eric Raile, and Lori Post (2018), 'Analysis and Action: The Political Will and Public Will Approach', *Action Research*, 19(2) 237-254.

<sup>xxxiii</sup> See Taku Yukawa (2018), 'The ASEAN Way as a Symbol: An Analysis of Discourses on the ASEAN Norms', *Pacific Review*, 31 (3), 298-314; Dylan M H Loh (2018), 'The Disturbance and Endurance of Norms in ASEAN: Peaceful But Stressful', *Australian Journal of International Affairs*, 72 (5), 385-402; and Shaun Narine (2012), 'Human Rights Norms and the Evolution of ASEAN: Moving Without Moving in a Changing Regional

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Environment', *Contemporary Southeast Asia*, 34 (3), 365-88. On approaches to international criminal justice other than through the Rome Statute regime, see also: Emma Palmer and Christoph Sperfeldt (2016), 'International Criminal Justice and Southeast Asia: Approaches To Ending Impunity for Mass Atrocities', *East-West Center: Asia Pacific Issues* (126)  
<https://www.eastwestcenter.org/publications/international-criminal-justice-and-southeast-asia-approaches-ending-impunity-mass>.

<sup>xxxiv</sup> See Guangyu Qiao and Nana Oishi (2019), 'Policy Transfer from the UN to ASEAN: The Case of Trafficking in Persons', *Policy Studies*, 40 (2), 131-149; Lorraine Elliott (2003), 'ASEAN and Environmental Cooperation: Norms, Interests and Identity', *Pacific Review*, 16 (1), 29; Marie Nodzenski et al (2016), 'Shaping Norms For Health Governance in the Association of Southeast Asian Nations (ASEAN)', *Global Health Governance*, 10 (2), 92-106; Xuechen Chen and Yifan Yang (2022), 'Different Shades of Norms: Comparing the Approaches of the EU and ASEAN To Cyber Governance', *International Spectator*, 57 (3), 48-65; Aarie Glas and Emmanuel Balogun (2020), 'Norms in Practice: People-Centric Governance in ASEAN and ECOWAS', *International Affairs*, 96 (4), 1015-1032; and Vinod K Aggarwal and Jonathan T Chow (2009), 'The Perils of Consensus How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation', (S. Rajaratnam School of International Studies)

[https://www.rsis.edu.sg/rsis-publication/cms/177-wp177-the-perils-of-consensu/?doing\\_wp\\_cron=1678445315.6623249053955078125000#.ZAsLBy8Rrs0](https://www.rsis.edu.sg/rsis-publication/cms/177-wp177-the-perils-of-consensu/?doing_wp_cron=1678445315.6623249053955078125000#.ZAsLBy8Rrs0).

<sup>xxxv</sup> In the convening, it was noted there that the 'values' and 'interests' framing could also be seen in how ASEAN members responded to the 2021 coup in Myanmar. As the coup was seen to be contrary to the ASEAN Charter, the principle of 'non-interference' did not prevent States from voicing condemnation.

<sup>xxxvi</sup> M Sanjeeb Hossain, 'The Principle of Legality and Genocide in the International Crimes (Tribunals) Act 1973' in Borhan Uddin Khan and Md. Jahid Hossain Bhuiyan (eds) *Human Rights and International Criminal Law* (Brill 2022) 281-301; M Sanjeeb Hossain, 'Crimes against humanity and the principle of legality' in Mohammad Shahabuddin (ed) *Bangladesh and International Law* (Routledge 2021) 241-251; M Sanjeeb Hossain, 'The Search for Justice in Bangladesh: An Assessment of the Legality and Legitimacy of the International Crimes Tribunals of Bangladesh through the prism of the principle of complementarity' (Phd Thesis, Warwick University, 2017) [http://wrap.warwick.ac.uk/103875/1/WRAP\\_Theses\\_Hossain\\_2017.pdf](http://wrap.warwick.ac.uk/103875/1/WRAP_Theses_Hossain_2017.pdf)

<sup>xxxvii</sup> See Asia Justice Coalition Secretariat (2022), 'Avenues to Accountability: Universal Jurisdiction in Asia' *Convening Note*

<https://www.asiajusticecoalition.org/universal-jurisdiction-convening-series/avenues-to-accountability%3A-universal-jurisdiction-and-asia>.

<sup>xxxviii</sup> 'Bangladesh Abstains from UN Vote Urging End to Russia-Ukraine War' (24 February 2023) *The Daily Star*, <https://www.thedailystar.net/news/bangladesh/diplomacy/news/bangladesh-abstains-un-vote-urging-end-russia-ukraine-war-3256046>.

<sup>xxxix</sup> 'Belgium: Universal Jurisdiction Law Repealed' (01 August 2003) *Human Rights Watch*  
<https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed>.

<sup>xl</sup> 'Belgium to Amend Controversial War Crimes Law' (23 June 2003) *DW* <https://www.dw.com/en/belgium-to-amend-controversial-war-crimes-law/a-899778>.

<sup>xli</sup> Association of Southeast Asian Nations, *Mutual Legal Assistance Treaty on Criminal Matters* (2004).

<sup>xlii</sup> It was noted in the convening that almost every country in Asia is affected either as a source or a destination country for human trafficking. Approximately 175 States, including all ASEAN members, have signed on to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (or Palermo Protocol). However, discussion participants observed that just because there is consensus in ASEAN to address trafficking, actual implementation has been lacking—and in some instances, harmful.

<sup>xliii</sup> However, it was also noted that sharing similar histories is not always enough to ensure policy approaches to address impunity whenever the opportunity to do so comes by. Bangladesh's experience in 1971 subsequently led to the establishment of the International Crimes Tribunals. Its civil society continues to campaign for the global recognition of genocide committed against the Bengali populace in 1971. Yet, to date, Bangladesh has shown little to no interest in domestically holding Myanmar military personnel to account for committing international crimes against the Rohingya people.

<sup>xliiv</sup> Convening participants noted that, within ASEAN, efforts to institutionalise 'accountability mechanisms' and recall the 'Responsibility to Protect'—a challenge to absolute sovereignty—fell politically flat. Instead, efforts to 'prevent[] atrocities' and 'improv[e] institutional capacity' were persuasive because States could view efforts to address international crimes as 'a humanitarian' response to be addressed within a State's territorial jurisdiction, rather than as a judgement on other States' failings or an infringement on their sovereignty'. It was noted that regional efforts on the protection of women and children provide an example of significant progress using this framing.

<sup>xliiv</sup> It was noted that in some circumstances, appealing to 'international justice' as a value itself may be motivational. Seeking formal justice processes for international crimes can show that the State is upholding internationally-recognised standards.

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<sup>xlvi</sup> Nevertheless, convening participants noted that some States have human rights protections embedded in their constitutions. Where this is the case, policymakers may be more easily persuaded to pursue formal justice processes as a response to impunity because the protection of human rights is integral to the State's identity. It was also noted by convening participants that public pressure that it should not be a 'safe haven for war criminals' compelled the Australian government to establish a special investigation unit on war crimes.

<sup>xlvii</sup> See Brian Barbour, Lilianne Fan, and Chris Lewa (2021) 'A Whole-of-Society Approach to the Rohingya Refugee Crisis: Strengthening Local Protection Capacity in South and South-East Asia' *Asia-Pacific Journal on Human Rights and the Law*, 22(1), 28-48.