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Recommended Citation
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Increasing the ICJ’s Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study

Lee J.F. Deppermann*

Abstract

Human rights violations continue today at an alarming pace. To appreciate the severity of these violations, and the seemingly ineffectual response by the international legal regime, one need look no further than the persecuted Muslim Rohingya. The Rohingya people, an ethnic and religious minority in Myanmar, have been the subject of state-sponsored violence for years, a trend that continues despite Myanmar’s recent moves towards democracy. Two of Myanmar’s neighbors, Thailand and Bangladesh, have contributed to the problem by violating the international legal principle of non-refoulement. This Comment argues that the International Court of Justice can play a larger role in policing and remedying human rights violations, using the Muslim Rohingya as a case study. The Court’s jurisdictional requirements to hear a contentious case are stringent, and participation in an ICJ case generally requires the consent of the states involved. However, several current human rights treaties provide a way to get the plight of the Rohingya into the Court. Moreover, the Rohingya’s plight can also be the subject of an ICJ advisory opinion, which would be more difficult than a contentious case to enforce, but which can be brought before the ICJ with relative ease, and which can be transformed from soft law to hard law by other international actors.

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I. Introduction

The continued persecutions of the Muslim Rohingya in Myanmar, Bangladesh, and Thailand illustrate perhaps the greatest challenge facing modern international law: the problem of human rights violations. Since the creation of the United Nations, countless committees, commissions, courts, economic groups, and non-governmental organizations have been established with the goal of stopping current violations and preventing future crimes.¹

For decades Myanmar (formerly Burma) has been among the world’s greatest violators of human rights. Ever since a military regime came to power in Myanmar in the 1960s people throughout the country have been subjected to mass detentions, arbitrary violence, and oppressive governance. The violence there continues today, and is directed mostly at the Muslim Rohingya, a religious and ethnic minority living in the Rakhine region. In addition to being denied citizenship and enduring persecutions from the government, many Rohingya have been forced to flee Myanmar. In a breach of international law, the nations of Bangladesh and Thailand have returned many Rohingya to Myanmar where they face continued persecution.

This Comment will argue that the International Court of Justice (ICJ) has the capacity under the current international legal regime to take a more active role in combating human rights violations, providing the persecuted Rohingya an international forum and remedy in a way that would be otherwise impossible through the contemporary global human rights regime. To obtain redress, the Rohingya could be a party, through another state, in an ICJ contentious case. Although the number of states the Rohingya could bring into such a suit would be small, and the jurisdictional hurdles would be steep, this would most likely represent the best chance for compensation and justice. In addition to a more conventional case, an ICJ advisory opinion would also be of great benefit to the Rohingya. The advantages here are the inverse of a contentious case: an easier path to jurisdiction, but more difficult to enforce. Each option brings distinct advantages and disadvantages, but both provide an opportunity for the ICJ to address one of the most serious contemporary human rights violations.

In order to establish how the ICJ’s strict jurisdictional requirements can be overcome in a way that provides a meaningful forum for the Rohingya, Section II will overview the history of human rights violations in Myanmar, and the atrocities committed most recently by Myanmar, Thailand, and Bangladesh. Section III will look briefly at the current human rights legal apparatus, highlighting some of the weaknesses of those systems. Section IV will then recount the normative reasons why the ICJ can be in a uniquely good position to address human rights violations.

Next, Section V will analyze several jurisdictional methods that have the potential to get more human rights cases in front of the ICJ. Although none of the proposed methods is seamless or without flaws, when taken as a whole, they broaden the forums available to the international community to address human rights violations. Section VI will look at the current situation in Myanmar, addressing how potential litigants could overcome the jurisdictional obstacles.

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2 See Section II.
3 Id.
inherent in contentious cases and advisory opinions and get the case of the Rohingya before the ICJ. Finally, Section VII will conclude with recommendations. Although the following analysis of how the Rohingya could receive a forum in an ICJ contentious case or be the subject of an ICJ advisory opinion does not absolutely ensure complete justice for the persecuted Rohingya, it does show how the ICJ can play a more involved role in a human rights system that is too often failing to address the world’s most serious human rights situations.

II. A BRIEF HISTORY OF HUMAN RIGHTS ABUSES IN MYANMAR

Since the 1960s, Myanmar has been isolated from the international community, having lost access to international trade and other social contacts, developments that have virtually destroyed its economy. The situation continued to worsen into the 1990s. After a series of democratic protests in 1988, the Myanmar Tatmadaw, a brutal military regime, seized control of political power and put down all dissidents. In addition to gaining control of Myanmar’s government, the military government resorted to “widespread use of forced labor,” “religious persecutions” of Muslims, and the “forcible relocation of civilians.” The World Bank responded by suspending economic aid to the region, hoping to leverage future assistance in order to improve human rights conditions in Myanmar.

In recent years, Myanmar has begun taking steps toward becoming a more democratic state, such as freeing a number of (but not all) political prisoners and loosening restrictions on the state-controlled economy. In response, at the beginning of August 2012, the World Bank took the significant step of reinstituting aid to Myanmar. Currently, the World Bank is taking steps to open a new lending office in Myanmar, and has just recently approved a multi-million dollar loan as part of a deal that forgives Myanmar’s previous debt to the World

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5 Id.
6 Id at 476.
7 Id at 477.
Increasing the ICJ's Influence: Bank and the Asian Development Bank. This recent action was made possible by the US modifying its policy to restrict World Bank lending contributions intended for Myanmar.

But even with these improvements, reports still surface showing that serious human rights violations continue in Myanmar. These recent persecutions were directed predominantly at the Rohingya, a Muslim minority living in the western region of Rakhine. Since 1982, the Rohingya have been denied citizenship by the government of Myanmar, and were subjected to numerous governmental abuses. Human Rights Watch has reported that the Rohingya have been subjected to forcible rape, murder, and unjustified mass detention. The government of Myanmar has done virtually nothing to stop these offenses. Myanmar is not the only state violating Rohingya human rights. Bangladesh, a natural stopover for the Rohingya refugees, has allowed some Rohingya to stay, but has returned many others to Myanmar, violating the international legal principle of non-refoulement, or assuring refugees protection from being returned to their former persecutors. Thailand has also refouled Rohingya refugees, often after the fleeing refugees have undertaken dangerous sea voyages to escape persecution.

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11 Id. The Obama administration has taken steps to warm relations with Myanmar, including a presidential visit, and rescinding a longstanding policy not to contribute humanitarian aid to Myanmar.
14 For a detailed report on the plight of the Rohingya refugees, see Danish Immigration Service, Rohingya Refugees in Bangladesh and Thailand: Factfinding Mission to Bangladesh and Thailand (Copenhagen May 2011), online at http://www.unhcr.org/refworld/country,DIS,BGD,4dd0d6f72,0.html (visited Apr 11, 2013).
III. THE CURRENT HUMAN RIGHTS LEGAL SYSTEM

A. Domestic Systems

Any discussion of the current human rights legal framework starts with domestic systems, as potential litigants have, at least in theory, the option of initiating court procedures in their own nation’s legal system. There are, however, drawbacks to the use of domestic courts. First, many of the most frequent human-rights violators will not have a legal system competent (or motivated) enough to hear human rights complaints. Myanmar’s legal system, for example, is in real need of reformation: the courts have been relatively untouched by recent reforms there, and they are not fully independent from the military regime. Even commentators who are less critical of the system still acknowledge that Myanmar would benefit from increased judicial professionalism and outside influence.

Second, the international legal principle of sovereign immunity is a large roadblock to domestic legal systems taking a more prominent role in human rights cases. The foundational principle behind sovereign immunity is that states are presumed equal in the eyes of international law. In the Jurisdictional

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16 For a discussion on these issues, see Office of the United Nations High Commissioner on Human Rights, Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems 5, online at http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringen.pdf (visited Apr 11, 2013) (arguing that in post-conflict societies, which are surely the location of many human rights abuses, legal systems are often “completely dysfunctional” to the extent that it is “unrealistic to expect immediate compliance by the institutions of justice or ... international standards); The Global Human Rights Regime (Council on Foreign Relations July 5, 2012), online at http://www.cfr.org/human-rights/global-human-rights-regime/p27450#p2 (visited Apr 11, 2013) (noting the connection between democratic governance and the systematic protection of human rights); and Nsonguru J. Udombana, Toward the African Court of Human and People’s Rights: Better Late Than Never, 3 Yale Hum Rts & Dev J 45, 50 (2000) (noting that even though many African nations pass laws to protect human rights their court systems often lack judicial independence and are unwilling to challenge government actions).

17 Burmese Courts Hand Down Hefty Sentences In Ethnic Clashes (Relief Web Nov 28, 2012), online at http://reliefweb.int/report/myanmar/burmese-courts-hand-down-hefty-sentences-ethnic-clashes (visited Apr 11, 2013) (noting that courts are ineffectual despite the fact that special administrators and overseers were promised to assist judicial involvement in stopping the violence in Rakhine).


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Immunities of the State case, the ICJ blocked Italian efforts to have civil claims against the German state brought in Italian courts. This case set a very recent and clear precedent that domestic court systems cannot be used as a forum for complaints against foreign states in cases of human rights abuses. This is significant because, as discussed in Section IV, there are distinct advantages to bringing human rights suits against states, as opposed to just individuals.

Third, it is often difficult to obtain adequate redress when trying individual violators of human rights in domestic legal systems. Although the US Alien Tort Statute does allow foreign claimants to bring suits in US district courts against human rights violators, claimants have to meet specific standards, and damage awards, which are often extremely large, are usually not efficacious. As some scholars have noted, the US is unusually generous in opening its courts to human rights cases of this kind, as virtually no other nation allows for similar domestic jurisdiction over foreign human rights cases.

B. Regional Human Rights Courts and Institutions

In addition to the legal systems of individual countries, several regional courts and institutions have claimed jurisdiction over human rights cases. These include the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR), and the African Court of Human and People’s Rights. Although some of these institutions, especially the ECtHR, have enjoyed some successes, they are all limited in their ability to cure human rights defects broadly, particularly in the case of Myanmar.

Their primary defect lies in their limited scope. The most effective of the courts, the ECtHR is limited to a set of nations that, with only a few exceptions,
are not among the world’s most consistent human rights violators.\textsuperscript{26} Furthermore, the Inter-American and African systems, which might include more human rights violators in their jurisdiction, are not as effective or as organized as the European system. For instance, the IACHR has heard relatively few cases,\textsuperscript{27} and seems to receive comparatively little political support from member nations. For example, the US and Canada have yet to ratify the Court’s charter document: the American Convention on Human Rights, decreasing the scope and legitimacy of the court.\textsuperscript{28}

C. The United Nations Human Rights System

Although a complete review of the UN human rights apparatus is unnecessary to the present analysis, it should be noted that since the creation of the United Nations, several organizations and offices have been created to monitor human rights issues around the world.\textsuperscript{29} In addition to the Security Council and General Assembly, which have the broad mandate to implement the UN Charter’s protection of human rights,\textsuperscript{30} other UN agencies, like the Economic and Social Council, have also been given the responsibility to make recommendations—in the case of the Economic and Social Council, recommendations dealing with international development—that further human rights.\textsuperscript{31} The Commission on Human Rights has, among many UN agencies and bodies that deal with human rights, perhaps the broadest mandate. The Commission has played a valuable role in both monitoring human rights situations, and advancing human rights treaties.\textsuperscript{32} Although the United Nations is undoubtedly committed to human rights, these UN bodies have little, if any, adjudicatory authority, leaving a vacuum in the human rights system to be filled by a strong international court, like the ICJ.

\textsuperscript{27} Christian Tomuschat, \textit{Human Rights: Between Idealism and Realism} 211-12 (Oxford 2d ed 2008).
\textsuperscript{29} See \textit{The United Nations Human Rights System} (cited in note 1).
\textsuperscript{30} United Nations Charter, Art 13, ¶ 1.
D. The International Criminal Court

A relative newcomer to the UN human rights system, the International Criminal Court (ICC), was established by the Rome Statute in 1998. The ICC has jurisdiction over a limited number of crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC is a forum for prosecuting individuals charged with the above crimes. Cases can be brought to the ICC only when the following jurisdictional requirement is met: 1) a state’s party accepts the ICC’s jurisdiction with respect to crimes committed in its jurisdiction; or 2) in the case of a referral from the ICC prosecutor or by a state, either the state in which the alleged crime occurred, or the state of which the accused criminal is a national must have accepted jurisdiction. The ICC’s prosecutor has immense discretion to initiate or not initiate criminal proceedings.

While, at least in theory, the ICC appears to provide a valid alternative to domestic and regional systems, several of the Court’s weaknesses have prevented it from significantly altering the international human rights legal framework. First, the United States has not signed the Rome Statute. This weakens the international legitimacy and efficacy of the court, perhaps disincentivizing other nations to consent to jurisdiction. Second, the ICC can only punish individuals, and it has no jurisdiction over states. As outlined below, the ability to bring a human rights case against a state brings distinct advantages that are not had when prosecuting individuals. Third, the Court’s procedures are long,

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34 Id at Art 5.
35 Id at Art 12–16.
36 For a discussion of the ICC prosecutor’s discretionary powers, and some suggestions for reform, see Margaret M. deGuzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court, 33 Mich J Int'l L 265 (2012).
37 Rome Statute of the International Criminal Court (cited in note 33).
38 Mark D. Kielsgard, War on the International Criminal Court, 8 NY City L Rev 1, 3 (2005).
40 One commentator has noted that “[t]he US could provide increased funding, international prestige, and widespread acceptance of the ICC’s jurisdictional authority, thereby legitimizing the fledgling Court in the international community, giving teeth to its mandate and facilitating effective enforcement.” Kielsgard, 8 NY City L Rev at 10 (cited in note 38).
41 Rome Statute of the International Criminal Court at Art 1 (cited in note 33) (declaring that it “shall have the power to exercise its jurisdiction over persons for [violations of] the most serious crimes of international concern”) (emphasis added).
42 See Section IV.
which may reduce the retributive effects and disincentives associated with prosecuting international criminals.43

IV. THE ICJ AS A COURT OF HUMAN RIGHTS: NORMATIVE ADVANTAGES

Many commentators have observed that the ICJ is not the ideal forum for human rights cases.44 Indeed, many of the Court's most prominent and useful cases have dealt with territorial disputes and similar questions that have little bearing on human rights law. One scholar has remarked that the “ICJ is not a specialized human rights institution, either in terms of its mandate, its jurisdiction, its procedures, or its personnel. Each of these elements may well limit the Court's future role in the human rights arena.”45 However, it is undeniable that the ICJ has played a role in the formation of international human rights law, through both contentious rulings and advisory opinions.46 Furthermore, as the centerpiece of the UN legal system, the ICJ can play an expanded role in international human rights norms and litigation. For the following reasons, one can argue that, normatively speaking, the ICJ has the capacity to be a powerful forum for future human rights issues.

A. Broad International Participation

The vast majority of the world's nations are part of the UN system, many more than any other regional or international human rights court or organization.47 This fact alone inevitably brings a larger number of nations into discussions about human rights violations. This is the case partially, if nothing

43 See, for example, Alison Cole and Kelly Askin, Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court, 16 Am Socy Intl L 12 (Mar 27, 2012), online at http://www.asil.org/insights120327.cfm (visited Apr 13, 2013) (noting the long gap between the initiation of the proceedings and the final resolution); Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo, 2012 ICC, ICC-01/04-01/06 (Mar 14, 2012).

44 See, for example, Stephen M. Schwebel, Human Rights in the World Court, 24 Vand J Transnatl L 945, 946 (1991) (stating that the ICJ “is not a human rights court in the contemporary sense of that term” and pointing out that the majority of cases and advisory opinions issued by the ICJ have not dealt with human rights); Natalia Lucak, Note, Georgia v Russian Federation: A Question of the Jurisdiction of the International Court of Justice, 27 Md J Intl L 323 (2012) (arguing that the ICJ has recently foreclosed another opportunity to take an expanded role in human rights litigation).


46 For a discussion of how the PCIJ and ICJ have contributed to human rights norms, see Schwebel, 24 Vand J Transnatl L at 946 (cited in note 44).

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else, because the UN General Assembly can refer legal matters to the ICJ for a legal opinion. Relatively, the US is a very prominent and influential member of the UN system, and because the UN Security Council has the ability to enforce ICJ judgments, the US’s involvement will be both needed and salutary, especially considering the leading role the US undertook in both of the Security Council’s authorizations of force: the Korean War and the first Iraq War.

B. Enforceability through the Security Council

The UN Security Council has a legal right and obligation to enforce ICJ rulings. This means that UN member states with an interest in stopping human rights violations will have a clear legal avenue if they choose to intercede militarily. Although this inquiry leans toward policy and away from the law, in some respects, it is worth noting. There is a credible argument that the UN Security Council could enforce an ICJ ruling without having to issue an authorization of force, the latter avenue being rare and politically difficult. Further, these rulings would allow nations to intervene militarily without having to illustrate that they are acting in collective self-defense, which is also often difficult politically.

C. Ability to Employ Preliminary Measures

The ICJ can issue provisional measures, a type of preliminary injunction. The court can grant a provisional measure at the request of either party or on its own initiative. Giving further weight to provisional measures, the ICJ statute requires that the Court notify the UN Security Council of its issuance of these preliminary measures. While there is little Permanent Court of International Justice (PCIJ) or ICJ precedent directly on point, provisional measures can be

48 See Section IV.B.2.
51 See id at Art 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); and id at Art 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense . . . “).
52 Id at Art 41
53 Id.
54 The Permanent Court of International Justice, operating from 1922 to 1948, was the predecessor court to the ICJ and was part of the League of Nations system. See Permanent Court of
seen as enough legal authority to authorize UN action to stop the abuses. Although some of the legal questions surrounding provisional measures are not completely settled, the ICJ has ruled that they are legally binding. In the *LaGrand Case (Germany v United States)*, the ICJ held that provisional measures are legally binding because if they were not binding, it would defeat the purpose of Article 41 of the ICJ statute.

Provisional measures are, however, still subject to the jurisdictional procedures required for the court to hear a contentious case. Requests for provisional measures often accompany the initial application by a party to the ICJ. Thus, the decision to issue a provisional measure and accept jurisdiction are frequently intertwined, with the former often conditioned on the latter. But there is some leeway; in *Georgia v Russian Federation*, the ICJ held that “the Court need not finally satisfy itself... that it has jurisdiction on the merits of the case” in order to issue a provisional measure, and could issue an injunction in the absence of a definitive jurisdictional ruling if “the [jurisdictional arguments] invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.” Provisional measures are thus a powerful tool that potential applicants can use to encourage the ICJ to respond to human rights violations. Human rights violations are usually urgent situations, such that the ICJ would feel compelled to act immediately. Even if eventual jurisdiction is denied, a provisional measure may be enough to allow intervening nations the opportunity to stop the violence.

D. The Ability to Bring Suits Against States

The ICJ can hear cases involving *states* that violate international human rights norms, a complement to the ICC, which can only hear complaints against...
individuals. This is significant because states have the capacity, at least in theory, of offering the kinds of restitution that simply cannot be ordered from the prosecution of an individual. The ICJ can give a financial damage award to the "victorious" party in human rights litigation and even in the absence of a specific damage award, once the Court signals that it will give an entitlement to one party over the other, the door opens for the two parties to arbitrate a settlement themselves.\footnote{See Attila Tanzi, Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations, 6 Eur J Intl L 539 (1995) (noting that agreements between states, and self help actions, remain prominent when enforcing ICJ judgments).}

There is a good normative argument to be made that a financial damage award is superior to criminal sanctions. Criminal sanctions lose their retributive and disincenitizing qualities when the punishment is far removed in time from the initial crime.\footnote{Yair Listokin, Crime and (with a lag) Punishment: Equitable Sentencing and the Implications of Discounting, Faculty Scholarship Series, Paper 552 (2007) online at http://digitalcommons.law.yale.edu/fss_papers/552 (visited Apr 13, 2013) (arguing that because criminals discount the future the lag between the commission of a crime and the imposition of a punishment decreases the deterrence and retributive value of the sentence).} Further, scholarship has yet to demonstrate (possibly due to the short existence of the ICC and the few final rulings it has handed down) that there is actually a deterrent effect to ICC criminal punishments. Relatedly, there is a good argument that financial damage awards are better for victims.\footnote{Dinah Shelton, Remedies in International Human Rights Law (Oxford 1999), in Richard B. Bilder and Beth Stephens, Book Reviews and Notes, 95 Am J Intl L 257–60 (2001) (discussing the benefits of both compensatory and punitive damages in human rights violations).}

Although making full restitution for human rights violations is almost inherently impossible, a financial award may have a much larger effect on the victim's quality of life than an ICC prosecution could. For example, victims of forced detention or non-refoulement laws can receive money awarded as damages and use those funds to purchase new dwellings or other basic necessities.

V. JURISDICTION AND THE ICJ

All of the ICJ's normative advantages are, of course, irrelevant without a way of getting human rights issues brought before the Court. Indeed, the ability to bring human rights cases in front of a court that places consent at the center of its jurisdictional grants is challenging, to say the least. The ICJ can hear cases in two different types of forums: contentious cases and advisory opinions. Because ICJ contentious cases can only be brought against a state that consents, the jurisdictional prerequisites block many potential cases from getting into the Court. ICJ advisory opinions also have jurisdictional rules that can be challenging, but can be fairly easy to overcome in the human rights context.
A. Contentious Cases

Article 36 of the Statute of the International Court of Justice establishes the basic jurisdictional rules for bringing a contentious case before the ICJ.\(^6\) Contentious cases are the types of formal adjudications familiar to most legal systems, with a panel of ICJ judges receiving written briefs and hearing oral arguments before giving an entitlement to one party and issuing a formal legal opinion.\(^6\) There are four primary ways in which a case can meet the ICJ's consent requirements and be heard on the merits as a contentious case.

First, parties may base their claim on jurisdiction by special agreement.\(^6\) Once a dispute arises between two states they may agree to submit the matter to the ICJ. These agreements and submissions formally consent to jurisdiction and also define the scope of the issues in which the parties want the ICJ to decide.\(^6\)

Second, parties may base their jurisdictional claim on a dispute resolution clause in a treaty.\(^6\) Many international treaties, both bilateral and multilateral, contain clauses referring any disputes that may arise under the treaty to the ICJ. Although these referral clauses are common in treaties, reservations, understandings, and declarations (RUDs) are almost as common. RUDs are frequently used by states to define the individual states' commitments under, and understandings of, the treaty agreement. Many states include RUDs that specifically exempt that state from mandatory ICJ referral clauses.\(^6\)

Although many states use RUDs of this nature to escape the consequences of breaching their treaty obligations, the ICJ itself has upheld the use of RUDs to circumvent this jurisdictional avenue. In *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Rwanda argued that the ICJ did not have jurisdiction because it attached an RUD to the Genocide Convention, the treaty giving jurisdiction to the ICJ. The Democratic Republic of the Congo (DRC) argued that to allow the reservation would be incompatible with the purpose of the Genocide Convention. The ICJ disagreed with the DRC, holding that the RUD dealt with the jurisdiction of the court and

\(^{63}\) Statute of the International Court of Justice, Art 36 (cited in note 47).
\(^{64}\) For a detailed look into the basic procedural structure of the ICJ, see id at Arts 39–64.
\(^{65}\) Id at Art 36 ¶ 1.
\(^{66}\) Id at Art 40.
\(^{67}\) Statute of the International Court of Justice, Art 40 (cited in note 47).
\(^{68}\) See Section VI.A.2 for examples in this context.
not the substantive obligations under the Genocide Convention, and thus the RUD did not defeat the treaty's purpose.\footnote{Id.}

Third, parties may bring their case before the Court if they have consented to jurisdiction in advance under the Optional Clause of the Statute of the ICJ.\footnote{Statute of the International Court of Justice, Art 36 ¶ 2 (cited in note 47).} In doing this, states consent to compulsory ICJ jurisdiction over any claim that deals with an international legal dispute. The ICJ statute treats declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ) as Optional Clause declarations for purposes of Article 36(2).\footnote{See generally Rules of the International Court of Justice, online at http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0 (visited Apr 13, 2013).} Although some nations have consented to Optional Clause jurisdiction, most have not, and the United Kingdom is the only permanent member of the UN Security Council that has consented.\footnote{See International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory, online at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (visited Apr 13, 2013).}

Finally, states can assent to jurisdiction through a method called \textit{forum propogatum}, which is closely related to the “special agreement” method.\footnote{Statute of the International Court of Justice, Art 36 ¶ 5 (cited in note 47).} Through this avenue, a party submits a dispute to the ICJ without working out an agreement with the other state beforehand. Following the petition from the single state, the court cannot take action or begin proceedings until the other state consents to jurisdiction. Although the Rules of the Court, upon which this jurisdictional grant is regulated, came into force in 1978, \textit{forum propogatum} was not used until 2003, when France consented to jurisdiction after the Republic of the Congo filed an application that was later designated \textit{Certain Criminal Proceedings in France (Republic of the Congo v France)}.\footnote{Certain Criminal Proceedings in France (Republic of the Congo v France), Application Instituting Proceedings, 2003 ICJ (Apr 11, 2003).}

\section*{B. Advisory Opinions}

In addition to its more conventional jurisdiction in contentious cases, the ICJ has the ability under the UN Charter,\footnote{United Nations Charter, Art 96.} and its own statute,\footnote{Statute of the International Court of Justice, Art 65 (cited in note 47).} to issue advisory opinions on legal issues. Advisory opinions are issued at the request of either multiple states seeking a legal opinion in the course of dispute resolution, or by an authorized organization, and are issued by the Court without a trial-type
The UN General Assembly and Security Council, along with other UN agencies and organizations, may request advisory opinions, though the ICJ has required that UN organizations submit only legal questions that arise out of their respective scopes and expertise. In 1993, for example, the World Health Organization (WHO) requested an ICJ advisory opinion on whether, considering the probable health effects of detonating a nuclear device, the use of nuclear weapons would be a breach of international law. The ICJ declined to give an opinion, stating that:

>The question put to the Court in the present case relates, however, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons . . . Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them.™

While this strict requirement to stay within the confines of a department's expertise and purview may restrict the ability of UN agencies and organizations to request advisory opinions on human rights, it does not similarly restrict the Security Council or General Assembly. Article 96 of the UN Charter states “[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

Discussions about the legal effect of advisory opinions are complicated. On one hand, the ICJ stands on unquestionably stable legal ground when issuing an advisory opinion on any question relating to international law, including human rights situations, when requested to do so by the Security Council or General Assembly. History has shown that the ICJ does not hesitate to issue advisory opinions in politically sensitive circumstances, a trend that could be useful when the Court addresses human rights issues. Some scholars, however, have questioned the legal status of advisory opinions, noting that on their own, they are not binding in the absence of state consent, but that states can agree to treat advisory opinions as binding. Even though such advisory opinions are not independently legally binding, many argue that they still have considerable legal effect. One scholar noted that ICJ advisory opinions have can be efficacious “because the legal reasoning embodied in them reflects the Court's authoritative

78 See id at Arts 65–68.
79 Advisory Opinion No 679, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 ICJ 66, 76, 80 (July 8, 1996).
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views on important issues of international law and in arriving at them, the Court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations. 83

VI. THE ICJ AND HUMAN RIGHTS IN MYANMAR

A. The Possibility of a Contentious Case Before the ICJ

A contentious case filed with the ICJ would probably represent the Rohingya's best chance for redress. The government of Myanmar is certainly liable for most of the human rights abuses, but any legal proceeding in front of the ICJ could draw in the nations of Bangladesh and Thailand, who have, in turn, violated the international principle of non-refoulement by forcing refugees to return to Myanmar. Because the rights at issue here are human rights norms, many of which have reached the status of jus cogens, or universal norms, and are thus affronts to the entire international community, 84 it is both proper and necessary that another nation bring up the cause of the Rohingya before the ICJ.

1. Jurisdiction by special agreement or under the optional clause.

Although it is legally possible to bring a contentious case to the ICJ by special agreement, the practical odds of accomplishing this, or finding jurisdiction under the Optional Clause, are extremely low. First, Myanmar, Thailand, and Bangladesh have not consented to automatic ICJ jurisdiction under the Optional Clause. 85 Second, there is no recognizable legal framework that can force those nations, including Myanmar, to accept jurisdiction by special agreement. Although Myanmar is, in many ways, democratizing and receiving the benefits of increased connection to the West, it would undoubtedly be hesitant to consent to jurisdiction when the facts implicate Myanmar so clearly. Of course, there are possible political and diplomatic options that could be explored to coax Myanmar to accept jurisdiction by special agreement, some


84 For a general discussion of how international law has come to embrace individual rights, see Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am U L Rev 1, 14–18 (1982).

kind of quid pro quo perhaps, but that inquiry is beyond the scope of this Comment.

2. Jurisdiction through a referral clause in an applicable treaty.

Looking at applicable human rights treaties and conventions is the next logical step in the process of getting the Rohingya’s case in front of the ICJ in the form of a contentious case. The Convention Relating to the Status of Refugees and the 1967 Protocol on the Status of Refugees is a natural place to begin the inquiry, as the Protocol contains provisions on non-refoulement and the overall status of refugees, violations that apply to all three of the nations in question. However, Myanmar, Bangladesh, and Thailand are not signatories to either the Convention or the Protocol.

The UN Convention on the Prevention and Punishment of the Crime of Genocide is another natural place to look for both a cause of action and grant of jurisdiction. It is nearly certain, given that they are both an ethnic and religious minority in Myanmar, that the Rohingya could be seen as a group falling within the Convention’s protection; that is, “a national, ethnical, racial or religious group.” Further, the nation that brings the claim on behalf of the Rohingya could argue that by returning refugees with the knowledge that they would be persecuted, Bangladesh and Thailand are complicit in genocide, a crime provided for in the Genocide Convention. Although Thailand is not a party, both Myanmar and Bangladesh have signed and ratified the convention. However, Myanmar included in its signature and RUD stating that “nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in

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91 Id at Art 2.
92 Id at Art 3.
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Article III committed within the Union territory,” effectively blocking ICJ jurisdiction. Bangladesh similarly declared: “For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case.”

The UN Convention on the Elimination of Racial Discrimination is another possible cause of action and source of jurisdiction. Thailand has signed the convention, but has declared (through an RUD) exemption from the referral clause. Significantly, Bangladesh has ratified the treaty without any RUDs, opening itself up to ICJ jurisdiction through the Convention. Article 22 of that Convention refers disputes between two parties to the ICJ. Because the Rohingya can be classified as an ethnic group, they receive protection under the Convention according to Article 1 of the agreement. Thus, a party that brings a suit on behalf of the Rohingya could find both a cause of action and grant of jurisdiction with respect to a suit involving Bangladesh.

Another potential source is the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 30 of that Convention provides for international arbitration and referral to the ICJ if states parties are involved in a dispute concerning the convention. Myanmar is not a state party to the Convention, but Thailand and Bangladesh are parties. Of the two, only Thailand exempted itself from Article 30’s referral of disputes to the ICJ. Thus, as with the UN Convention on the Elimination of Racial Discrimination.

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94 Id.
95 Id.
100 Id at Art 1.
101 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UN Treaty Ser No 85 (1984).
102 Id at Art 30.
103 For a list of signatories, see id, online at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (visited Apr 13, 2013).
Discrimination, a potential litigant nation could use the UN Torture Convention as a source of jurisdiction and a cause of action in a suit against Bangladesh on behalf of the Rohingya.

B. The Applicability and Utility of an ICJ Advisory Opinion

The situation in Myanmar, and perhaps the international human rights cause as a whole, could greatly benefit from an ICJ advisory opinion issued on the subject of the Rohingya persecutions in Myanmar, and the non-refoulement violations committed by Bangladesh and Thailand. This advisory opinion could address the legal questions of whether Myanmar, Bangladesh, and Thailand have violated a principle of international law that binds those individual nations, and it could define the potential legal remedies for those violations.

1. Sources of law that the ICJ could draw upon.

The 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol (the Refugee Protocol) were based in part on the principle of non-refoulement, a guarantee that refugees will not be forced to return to their former place of inhabitation if they will face further persecution or inhumane treatment.\(^{105}\) The Convention specifically states that “[n]o Contracting State shall expel or return (‘refoul’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”\(^{106}\)

The ICJ, in issuing an advisory opinion, could also draw upon the human rights principles articulated in the UN Charter. As participants in the UN system, Myanmar, Bangladesh, and Thailand have ratified the UN Charter.\(^ {107}\) Articles 55 and 56 of the Charter obligate member nations to promote, among other things, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”\(^ {108}\) Although not legally binding, the Universal Declaration of Human Rights can also be seen as expressing some aspects of customary international law, if anything because it is often seen as “an authoritative interpretation of the U.N. Charter . . . [constituting] part of the constitutional structure of the world community.”\(^ {109}\)

\(^{105}\) Convention Relating to the Status of Refugees at Art 33 (cited in note 86).

\(^{106}\) Id.


\(^{109}\) Sohn, 32 Am U L Rev at 14–17 (cited in note 84).
Because the governments of Myanmar, Bangladesh, and Thailand have not signed some of the treaties that establish basic norms of human rights, the ICJ would have an acute need to draw upon customary international law in issuing an advisory opinion. According to Restatement of the Law (Third), the Foreign Relations of the United States, “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Many scholars argue that despite the relative prevalence of human rights violations across the international community, the legal norms embodied in the most important human rights treaties and agreements have become settled customary international law.111

Thus, the ICJ would have ample source of law to draw on when issuing an advisory opinion. The legal questions in this dispute are not complicated; rather, the real issue is jurisdictional, requiring a way to give credence and legitimacy to an ICJ advisory opinion on the Rohingya.

2. Jurisdiction and an ICJ advisory opinion.

As recounted above, there are jurisdictional hurdles to surmount when attempting to obtain an advisory opinion by the ICJ. If the opinion is requested by a state, the other state or states involved must consent to the opinion. In any event, if we assume that the nations in question here—Myanmar, Bangladesh, and Thailand—will not consent to a contentious case, it is reasonable to assume that they will also likely not consent to an advisory opinion.

However, the UN agencies empowered to request an advisory opinion will have both the interest and the purview to request an opinion. Even though neither the Office of the High Commissioner for Human Rights nor the UN Office of the High Commissioner for Refugees are on the list of UN agencies or


111 See Tomuschat, Human Rights: Between Idealism and Realism at 37–38 (cited in note 27) (arguing that consistent state practice is no longer the best barometer for gauging whether a legal norm has achieved customary practice, and claiming that customary international law has claimed many of the most important human rights legal norms). But see Bruno Simma and Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Austl YB Intl L 82, 82–85 (1989) (arguing for a more traditional view of customary international law).

112 As a side matter, there have been recent, persuasive proposals to allow a single state to request an advisory opinion that deals with a legal dispute with another state, without having to amend the UN Charter or Statute of the ICJ. See Andrew Strauss, Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice With Referral Jurisdiction, 44 Cornell Intl L J 603 (2011).
specialized bodies that can request an advisory opinion,\textsuperscript{113} that fact is not likely to be detrimental to the cause of the Rohingya. This is so primarily because the General Assembly, although not empowered to issue binding statements of law itself, can request an ICJ advisory opinion.\textsuperscript{114}

In the past, the General Assembly has not hesitated to request advisory opinions on either politically controversial cases or human rights issues. Examples include the \textit{Construction of a Wall} opinion,\textsuperscript{115} where the ICJ was asked to opine on the legality of the separation wall being built in Israel; the opinion in \textit{Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide},\textsuperscript{116} which grappled with state compliance with the Genocide treaty; and the \textit{Legality of the Threat or Use of Nuclear Weapons} opinion,\textsuperscript{117} in which the ICJ was asked to rule on the legality of nuclear weapons.

There is good reason to think that the General Assembly could or would request an advisory opinion in the case of the Rohingya. First, given the foregoing discussion on the General Assembly's willingness to request advisory opinions on sensitive issues, the politically charged nature of the situation in Myanmar, made more salient with the loosening of restrictions on trade and aid from the West, would probably not prevent the General Assembly request. Second, the General Assembly has been monitoring interest in the human rights situation in Myanmar. The Assembly has consistently issued resolutions on the human right situation in Myanmar,\textsuperscript{118} with the most recent resolution expressing concern at continuing violations, and declaring that they will continue to monitor the matter.\textsuperscript{119}

3. Soft law and the enforcement of an ICJ advisory opinion.

Although obtaining an advisory opinion that addresses the plight of the Rohingya could be relatively easy, giving that advisory opinion legal efficacy is a


\textsuperscript{114} Id.

\textsuperscript{115} Advisory Opinion No 883, \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, 2004 ICJ (July 9, 2004).


\textsuperscript{119} Id.
more difficult matter, though not impossible. The difficulty comes in trying to convert the “soft law” nature of an ICJ advisory opinion (“soft” because it is not predicated on the consent of the states involved) into “hard law,” or a norm that is binding on the participants, much like contentious case decisions are.\textsuperscript{120}

There are, in effect, two ways in which aspects of soft law, like an ICJ advisory opinion, can crystalize into hard law. First, the legal principles or reasoning used in the opinion can be given legal status. For example, the ICJ could hold in an advisory opinion that certain features of international humanitarian or treaty law have reached the status of customary international law. In this way, the ICJ could convert soft law assumptions about human rights obligations into clearer legal norms that have the capacity to influence future legal decisions.

Secondly, an ICJ advisory opinion could lose its status as soft law and become hard law if another agency or government gives it the force of hard law by adopting it, or if the nations involved voluntarily choose to accept the provisions of the advisory opinion. This aspect of soft law is much more pertinent to this Comment’s analysis because, as shown above, finding sources of law in relevant treaties or in customary international law will not be prohibitively challenging. Rather, the practical difficulty lies in connecting an ICJ advisory opinion to redress for the Rohingya.

Legal scholarship is prone to address the issue of soft law’s enforceability in two distinct ways. First, some scholars point out that to fully understand soft law’s legal effects one must have “an understanding of compliance and the impact of international law that goes beyond traditional doctrinal approaches.”\textsuperscript{121} In this calculus, the effectiveness of any rule of international law is best understood by evaluating how the mechanisms of reputation, reciprocity, and retaliation follow the imposition of the rule.\textsuperscript{122} Thus, a legal rule, hard or soft, that damages the reputation of a non-compliant state sufficient to incentivize that state to comply is effective. Similarly, if a non-compliant state risks negative consequences from other states’ non-compliance or from direct retaliatory action from other states then the legal rule is considered binding. Some scholarship has gone so far as to suggest that soft law rules may have more efficacy in areas like human rights because even though they reduce their “compliance pull,” they include more states in their scope in the first place.\textsuperscript{123}

\textsuperscript{120} See José E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex Int'l L. J 405, 427 (2003).


\textsuperscript{122} Id at 527.

\textsuperscript{123} Id at 532.
Another way of looking at soft law is to define it more narrowly, distinguishing it from both political agreements on one side of the international legal spectrum and hard law, on the other end of the scale. In this analysis, soft law is given a binding character because it can create legal obligations through another treaty or international convention, or though domestic law, even though on its own it is unable to command compliance.

In analyzing the efficacy of an ICJ advisory opinion that addresses the plight of the Rohingya by detailing the applicable violations of international law and outlining what kind or level of compensation would address those legal violations, it is possible to look at both of the above frameworks. It is clear, as stated above, that because Myanmar is taking increased steps to reintegrate into the global community, including receiving aid from the World Bank, it is not unreasonable to assume that they would be more susceptible to the reputational and retaliatory effects described above. Although it is easy to dismiss this analysis as purely political, it is worth noting that, under this framework, all international law can be seen this way.

It is equally clear that the second framework is applicable here. If an international organization—like the General Assembly, the Security Council, or the World Bank—adopted an ICJ advisory opinion as binding or persuasive, the advisory opinion gains the same force of law as any other act by that body. For example, the World Bank could adopt an advisory opinion as evidence in weighing whether or not to continue to aid, or extend current aid, to Myanmar, Bangladesh, and Thailand. Of course, the Security Council could always adopt the advisory opinion as binding, although the politically charged nature of that body makes it less likely to adopt an advisory opinion than the General Assembly.

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125 Id.

126 See Section II (cited in note 2).


129 One example of the General Assembly being willing to adopt a politicized advisory opinion happened in 2004, when the General Assembly voted 150 to 6 to “demand that Israel comply with the ICJ advisory opinion” on the ‘Apartheid’ Wall. See *UN Assembly votes overwhelmingly to demand Israel comply with ICJ ruling*, (UN News Centre July 20, 2004) online at http://www.un.org/apps/news/story.asp?NewsID=11418&Cr...Crl# (visited Apr 12, 2013).
As the foregoing analysis makes clear, presenting the plight of the Rohingya to the international community via the ICJ would certainly be a difficult and formidable task, but not an impossible one. Potential jurisdictional avenues exist in both contentious cases and advisory opinions. The ICJ has distinct advantages when compared with other international and domestic human rights institutions. The Court enjoys the support and participation of a broad swath of nations, including most of the Western powers, and its procedures could help secure the Rohingya preliminary relief and a chance to have sufficient compensation debated on the world stage.

Options for a contentious case are limited, but they do exist. A nation pursuing an opinion on behalf of the Rohingya could bring Bangladesh before the ICJ under the referral clauses of the UN Convention on the Elimination of All Forms of Racial Discrimination, and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This may seem like a hollow victory, as it would include only one of the nations that have broken the legal principle of non-refoulement, and it would not include the government of Myanmar, which is certainly the most culpable party involved.

The situation brightens when considering a potential ICJ advisory opinion. The General Assembly could easily call for an advisory opinion in the absence of state initiation and consent. Furthermore, the substantive legal obligations involved in humanitarian and refugee law are not complicated. Even though the nations involved have significantly hedged their commitment to human rights through treaties, enough human rights norms have reached customary status to provide the ICJ with plenty of applicable law to draw upon in an advisory opinion.

As with any act of international adjudication, enforcement of an advisory opinion will be problematic. If Myanmar, Bangladesh, and Thailand are unwilling to consent to jurisdiction by special agreement in a contentious case, they will, unless the advisory opinion is more favorable than expected, probably not consent to be bound by an advisory opinion. However, there are other ways to lend legal weight to an advisory opinion. First, individual nations could draw upon the recommendations contained in an advisory opinion when crafting their own diplomatic relations with Myanmar, Bangladesh, and Thailand. Second, a UN agency, like the World Bank, can incorporate the advisory opinion into its own decision-making, effectively giving full legal effect to what would otherwise only be soft law. In addition, the UN General Assembly, though not a body that can itself issue legally binding resolutions, can increase the statute and international recognition of the opinion. Finally, the Security Council itself can take action rooted in the advisory opinion.
In conclusion, human rights violations will likely continue to vex the international legal community. With a human rights system that is fragmented among domestic courts, regional institutions, and the UN system, the enforcement of human rights norms will be sporadic and inconsistent at best. Although the ICJ will never truly be a "court of human rights" in the true sense of the phrase, it can take greater action against human rights violators—the persecuted Rohingya would be a welcome starting point.