

AIDING AND ABETTING IN THE INTERNATIONAL CRIMINAL COURT: COULD MYANMAR'S AUNG SAN SUU KYI FACE PROSECUTION?

THOMAS JUPE*

The Prosecutor of the International Criminal Court is currently investigating allegations of crimes against humanity carried out by Myanmar's official military. Members of the military have allegedly breached the Rome Statute's provisions concerning deportation or forcible transfer under art 7(1)(d), relating to their attacks on the ethnic Rohingya group.

The civilian government at the time, led by State Counsellor Aung San Suu Kyi, has made no visible attempt to condemn or disrupt the attacks on this civilian population. Under art 25 (3)(c) of the Rome Statute, an individual may be found responsible for aiding and abetting the principal offence, even if the assistance is provided through omission.

This article questions whether the conduct of Aung San Suu Kyi could constitute aiding and abetting under the Rome Statute if the principal offence is established.

Analysis has shown that the actus reus for aiding and abetting through omission proper could potentially be met. However, it is difficult to establish that Aung San Suu Kyi's omission was carried out for the purpose of facilitating the principal offence. Due to this, it appears unlikely that Aung San Suu Kyi could bear responsibility for the military's alleged crimes.

Keywords: International Criminal Court; aiding and abetting; crimes against humanity; Aung San Suu Kyi; Myanmar

* PhD, LL.M(IL/IR), LL.B, BBus (Flinders); Casual Academic, College of Business Government and Law, Flinders University.

I INTRODUCTION

Aung San Suu Kyi is a national icon who has captured the hearts and minds of many in Myanmar's recent history.¹ As the champion for democracy in a nation with a long history of military dictatorship,² it is understandable why Aung San Suu Kyi has become such a popular figure among Myanmar's public. Notable instances of Aung San Suu Kyi's success include her de facto leadership of the *National League for Democracy* ('NLD')³ and Nobel Peace Prize acceptance.⁴

Myanmar has been subject to a significant degree of instability during this time of Aung San Suu Kyi's role in governance, particularly with regard to the situation in the region of Rakhine State. From 2016 to 2018, Myanmar's official military carried out targeted attacks against the ethnic Rohingya population. Reports of these 'Clearance Operations' state that the nation's official military has murdered, raped, detained, beat and tortured Rohingya civilians.⁵

¹ Jesper Bengtsson, *Aung San Suu Kyi: A Biography* (Potomac Books, 2012); Josef Silverstein, 'Aung San Suu Kyi: Is She Burma's Woman of Destiny' (1990) 30(10) *Asian Survey* 1007; Josef Silverstein, 'The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi' 69(2) (1996) *Pacific Affairs* 211.

² Kyaw Yin Hlaing 'Aung San Suu Kyi of Myanmar: A Review of the Lady's Biographies' (2007) 29(2) *Contemporary Southeast Asia* 359.

³ Stefano Ruzza, Giuseppe Gabusi, and Davide Pellegrino, 'Authoritarian Resilience Through Top-Down Transformation: Making Sense of Myanmar's Incomplete Transition' (2019) 49(2) *Italian Political Science Review* 193, 201; Richard Roewer, 'Three Faces of Party Organisation in the National League for Democracy' (2019) 38(3) *Journal of Current Southeast Asian Affairs* 286, 290; Peter Coclanis, 'Aung San Suu Kyi is a Politician, not a Monster'. *Foreign Policy* (online, 14 May 2018) <<https://foreignpolicy.com/2018/05/14/aung-san-suu-kyi-is-a-politician-not-a-monster/>>.

⁴ Bengtsson (n 1); Benjamin Matheson, 'Should Aung San Suu Kyi's Nobel Peace Prize Be Revoked?' *Bij Nader Inzien* (Web Page, 18 March 2018) <<https://bijnaderinzien.com/2019/03/18/should-aung-san-suu-kyis-nobel-peace-prize-be-revoked/>>.

⁵ Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* UN DOC A/HRC/39/CRP.2 (17 September 2018) [1069]–[1095] ('*Detailed Findings 2018*').

The Prosecutor of the *International Criminal Court* ('ICC') is currently investigating the situation,⁶ with particular focus on allegations of crimes against humanity.⁷ Through this action in the ICC, there is a chance that individuals of the military could be found guilty for the forced deportation of the Rohingya from Rakhine State to neighbouring Bangladesh. As State Chancellor of the nation's governing party at the time of the attacks, Aung San Suu Kyi was effectively acting as the country's de facto leader during the Clearance Operations.⁸ This could potentially trigger responsibility in the ICC.

Under the *Rome Statute*, there are multiple ways that a de-facto head of State could bear responsibility for the conduct of that State's military forces. First, a head of State could be considered to have possessed 'effective control' over the military. This could trigger the provisions concerning command responsibility.⁹ However, in this particular situation, it is difficult to argue that Aung San Suu Kyi passed effective control over the military. There is a complex relationship between the civilian government at the time and the military, with the military possessing a significant degree of control over the civilian leaders.¹⁰ Second, a head of State could be held responsible if they were found to have ordered 'ordered the commission of the criminal conduct.'¹¹ Although, there is no evidence

⁶ In November 2019 the ICC authorized an investigation to begin with regard to the Rohingya and the alleged crimes committed by the Military after a request to the prosecutor from alleged victims; *Situation in the Peoples Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (International Criminal Court, Pre-Trial Chamber 3 ICC-01/19-27, 14 November 2019); Douglas Guilfoyle, 'The ICC Pre-trial Chamber Decision on Jurisdiction Over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2. As of writing, the case is currently in the pre-trial stage.

⁷ *Situation in the Peoples Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (n 6); International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' (Media Release, 14 November 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>>.

⁸ Ruzza, Gabusi, and Pellegrino (n 3) 201; Roewer (n 3) 290; Coclanis (n 3).

⁹ *Rome Statute of the International Criminal Court*, opened for Signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 28, 57(3)(a) ('*Rome Statute*').

¹⁰ Human Rights Council, *Detailed Findings 2018* (n 5) 390, [1546].

¹¹ *Rome Statute* (n 9) art 253(b). This provision also includes soliciting and inducing, which do not appear to be relevant to Aung San Suu Kyi's position either.

to suggest that Aung San Suu Kyi's issued direct orders during the military's operations. There is, however, a possibility that she could be found to have aided and abetted the military's alleged crimes.¹²

Aiding and abetting is outlined under art 25(3)(c) of the *Rome Statute*.¹³ As stated in this provision:

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ... for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.¹⁴

There are indications that Aung San Suu Kyi's conduct could fall within this provision. In its 2018 report, *The Fact-Finding Mission on Myanmar* describes Aung San Suu Kyi's failure to act on the military's Clearance Operations:

[N]othing indicates that civilian authorities at Union and State level used their limited powers to influence the situation on the ground in the country, in Rakhine State in particular, where the gravest crimes under international law were being perpetrated. The State Counsellor, Daw Aung San Suu Kyi, has not used her de facto position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet the Government's responsibility to protect the civilian population or even to reveal and condemn what was happening.¹⁵

¹² Ibid art 25(3)(c). Such a position has been touched on in the past within the *Fact-Finding Mission on Myanmar*: Human Rights Council, *Detailed Findings 2018* (n 5) 392, [1550].

¹³ *Prosecutor v Nahinama (Appeal Judgment)* (International Criminal Court for Rwanda, Appeals Chamber, Case No. ICTR-99-52-A, 28 November 2007) [482].

¹⁴ *Rome Statute* (n 9) art 25(3)(c); Manuel Ventura, 'Aiding and Abetting and the International Criminal Court's Bemba et al. Case: The ICC Trial and Appeals Chamber Consider Article 25 (3)(c) of the Rome Statute' (2020) 20 (6) *International Criminal Law Review* 1138; Caspar Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders Under the Rome Statute of the International Criminal Court' (2014) 30 (79) *Utrecht Journal of International and European Law* 4, 7.

¹⁵ Human Rights Council, *Detailed Findings 2018* (n 5) 391, [1548].

This poses the question: If crimes against humanity are established, would Aung San Suu Kyi bear responsibility for aiding and abetting?

Initially, there appears to be two ways in which Aung San Suu Kyi's failure to act on the military's attacks against civilians could meet the requirements for aiding and abetting. The first way Aung San Suu Kyi could be found responsible is through aiding and abetting through tacit approval and encouragement. This requires the accused to have provided tacit approval and encouragement of the crime,¹⁶ which has 'an effect'¹⁷ or 'substantial effect'¹⁸ on the perpetration of the crime.¹⁹ Instances that have amounted to tacit approval and encouragement have tended to involve a position of authority, along with a physical presence at the crime scene.²⁰ The second way Aung San Suu Kyi could be found responsible for the military's crimes

¹⁶ Tacit approval and encouragement has been considered to amount to aiding and abetting in many cases spanning the various avenues of international criminal law, from the ICC to the ad-hoc tribunals: *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [867]–[869] ('*Prosecutor v Bemba (Article 61 Decision)*'); *Prosecutor v Nyiramasuhuko (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-98-42-A, 14 December 2015) [2088], [2096]; *Prosecutor v Ntagerura (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-99-46-A, 7 July 2006) [374]; *Prosecutor v Mrkšić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-13/1-T, 27 September 2007) [671]; *Prosecutor v Brdanin (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-99-36-A, 3 April 2007) [273]; *Prosecutor v Ndahimana (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-01-68-A, 16 December 2013) [147]; *Prosecutor v Kayishema and Ruzindana (Appeal Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-95-1-A, 1 June 2001, [201]; Ventura, 'Aiding and Abetting and the International Criminal Court's Bemba et al. Case' (n 14) 1152–1157.

¹⁷ *Prosecutor v Bemba (Public Redacted Version of Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber VII, Case No ICC-01/05-01/13, 19 October 2016) [90] ('*Article 74 Decision*').

¹⁸ *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147].

¹⁹ *Prosecutor v Brdanin (Appeal Judgment)* (n 16) [273].

²⁰ *Prosecutor v Kayishema (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [200]. See also *Prosecutor v Furundžija (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No.: IT-95-17/1-T, 10 December 1998) [207].

is through aiding and abetting by omission proper.²¹ In this form, criminal responsibility can be triggered by an individual failing to act. This requires the accused to possess a legal duty²² and the means to act.²³ Furthermore, aiding and abetting under the Rome Statute requires a mental element to also be fulfilled. Under art 25, the assistance of the principal offence must be carried out ‘for the purpose of facilitating the commission of such a crime’.²⁴

Through an examination of Aung San Suu Kyi’s conduct, this article will ultimately determine whether the ex-State Counsellor could meet the elements for aiding and abetting through tacit approval and encouragement or omission proper.

II FACTUAL AND CONTEXTUAL BACKGROUND

A Alleged Crimes of Myanmar’s Military

For Aung San Suu Kyi to be found to have aided and abetted, it must first be established that the base crime has been committed by the individual members of Myanmar’s military.

²¹ *Prosecutor v Blaškić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004) [47], [663]; *Prosecutor v Nahinama (Appeal Judgment)* (n 13) [482]; *Prosecutor v Ntagerura* (n 16) [335], [370]; *Prosecutor v Brdanin (Appeal Judgment)* (n 16) [274]; Jessie Ingle, ‘Aiding and Abetting by Omission before the International Criminal Tribunals’ (2016) 14(4) *Journal of International Criminal Justice* 747, 753-759; Christopher Gosnell, ‘Damned if You Don’t: Liability for Omissions in International Criminal Law’ in William Schabas, Yvonne McDermott (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013) 117.

²² *Prosecutor v Orić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-03-68-A, 3 July 2008) [43]. See also *Prosecutor v Mrkšić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-13/1-A, 5 May 2009) [134].

²³ *Prosecutor v Ntagerura* (n 16) [335]; *Prosecutor v Karadžić (Public Redacted Version of Judgment Issued on 24 March 2016 – Volume I of IV)* (International Criminal Tribunal for the Former Yugoslavia Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) [575].

²⁴ *Rome Statute* (n 9) art 25(3)(c).

Allegations of crimes against humanity have arisen in relation to the official military's 'Clearance Operations'. Reports suggest that these attacks were carried out by the 33rd and 99th light infantry divisions, commanded by General Min Aung Hlaing.²⁵ According to the Fact-Finding Mission, the military has attacked 54 separate locations in the period of 2017–2018, leaving 392 Rohingya villages destroyed and thousands of Rohingya being killed.²⁶

More specifically, the Prosecutor is investigating the presence of crimes against humanity for deportation or forcible transfer.²⁷ To establish this crime, there are many elements that need to be established. Firstly, the Prosecution needs to prove that the members of the military have deported or forcibly transferred the victims to another State or location by expulsion or other coercive acts.²⁸ Secondly, the Prosecution must prove that the Rohingya were lawfully present on Myanmar's territory, and that these attacks were part of a widespread or systematic attack directed against a civilian population,²⁹ pursuant to a common policy or plan.³⁰ Thirdly, the

²⁵ Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/39/64 (12 September 2018) 10 [52].

²⁶ Human Rights Council, *Detailed Findings 2018* (n 5) [1394], [1395], [959], [1429].

²⁷ *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Authorization of Investigation)* (International Criminal Court, Pre-Trial Chamber 3 ICC-01/19-27, 14 November 2019); 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Judicial Authorisation to Commence an Investigation into the Situation in Bangladesh/Myanmar', *International Criminal Court* (Web Page, 22 November 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar>>; International Criminal Court, 'ICC Judges Authorise Opening and Investigation into the Situation in Bangladesh/Myanmar' ([n](#) 7); Douglas Guilfoyle, 'The ICC Pre-trial Chamber Decision on Jurisdiction Over the Situation in Myanmar' (2019) 73(1) *Australian Journal of International Affairs* 2.

²⁸ International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) art 7(1)(d); *Rome Statute* (n 9) art 9; Victoria Colvin and Phil Orchard, 'The Rohingya Jurisdiction Decision: A Step Forward for Stopping Forced Deportations' (2019) 73(1) *Australian Journal of International Affairs* 16, 18; Payam Akhavan, 'The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute' (2019) 17(2) *Journal of International Criminal Justice* 325.

²⁹ *Elements of Crimes* (n 28) art 7(1)(d); *Rome Statute* (n 9) art 9.

³⁰ *Rome Statute* (n 9) art 7(2)(a).

relevant mental elements in relation to each individual accused must also be met.³¹

While the establishment of the principal offence requires a far deeper discussion than the scope of this article allows, it initially appears possible that these elements could be met if brought to trial. It is arguable that the Rohingya have been deported³² to the State of Bangladesh through means of expulsion.³³ Expulsion in this regard has been achieved through the acts of burning, looting, murder, torture, and rape.³⁴

In terms of lawful presence, it could be argued that, as many of the victims were born on Myanmar's territory and meet the legal criteria for citizenship, they were lawfully present. The discussion on whether the Rohingya are citizens of Myanmar is a controversial topic,³⁵ although it could be argued that many Rohingya are considered citizens, or associate citizens under the *Citizenship Act 1948*,³⁶ or *Citizenship Law 1982*.³⁷ Given

³¹ *Elements of Crimes* (n 28) art 7(1)(d); *ibid* art 9.

³² *Prosecutor v Krnojelac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-97-25-T, 15 March 2002) [474]; Victoria Colvin and Phil Orchard, 'A Forgotten History: Forcible Transfers and Deportations in International Criminal Law' (2021) 32(1) *Criminal Law Forum* 51, 87; Akhavan (n 28) 339.

³³ *Elements of Crimes* (n 28) art 7(1)(d); Colvin and Orchard, 'The Rohingya Jurisdiction Decision' (n 28) 18; Michail Vagias, 'Case No. ICC-RoC46 (3)-01/18' (2019) 113(2) *American Journal of International Law* 368, 371.

³⁴ Human Rights Council, *Detailed Findings 2018* (n 5) 180, [754].

³⁵ Penny Green, Thomas McManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (International State Crime Initiative, 2015) 53–55; Human Rights Council, *Detailed Findings 2018* (n 5) 362 [1424].

³⁶ The Rohingya could be considered as a 'racial group [that] has settled in Myanmar's territory before 1823 A.D': *Union Citizenship Act 1948* (Burma) art 3(1); Sanzhan Guo and Madhav Gautam, 'Stateless Rohingyas in Bangladesh and Refugee Status: Global Order and Disorder under International Law' in Leon Wolff and Danielle Ireland-Piper (eds), *Global Governance and Regulation: Order and Disorder in the 21st Century* (Routledge 2018) 83, 84; Iqthyer Uddin Md Zahed and Bert Jenkins, 'The Politics of Rohingya Ethnicity: Understanding the Debates on Rohingya in Myanmar' (2022) 42(1) *Journal of Muslim Minority Affairs* 117, 121; Muhammad Saleem Mazhar and Naheed Goraya, 'Plight of Rohingya Muslims' (2016) 53(1) *Journal of the Research Society of Pakistan* 27, 30.

³⁷ Under article 7, there are multiple ways in which the Rohingya could be considered a citizen, including: '(a) persons born of parents, both of whom are citizens; (b) persons born of parents, one of whom is a citizen and the other an

the heavy, incorrect narrative that the victim Rohingya group are ‘illegal Bengali immigrants’,³⁸ this lawful presence element may be a deeply contested point in the case.

In relation to the contextual elements, it could be argued that the attacks are widespread and systematic. This can be demonstrated through the scale of the attacks,³⁹ the coordination involved⁴⁰ and a consistent *modus operandi*⁴¹ between them. Furthermore, the historic alteration of the ethnic composition of populations in the region,⁴² existence of propaganda,⁴³ and the use of public resources,⁴⁴ may indicate the existence of a common policy or plan.

B The Separation Between the Military and Aung San Suu Kyi’s Civilian Government

The degree of separation between the military and civilian government is unique to this case. While the Clearance Operations may have been carried out by the State’s official military, it must be noted that there is a significant degree of distance between the military and the civilian government led by Aung San Suu Kyi. This distance is a result of an obscure power dynamic caused by the nation’s deep history as a military dictatorship and its longstanding influence on the nation’s governance.

associate citizen; (c) persons born of parents, one of whom and the other a naturalized citizen’: *Burma Citizenship Law 1982* (Burma) art 7.

³⁸ Green, McManus and de la Cour Venning (n 35) 53–55; Human Rights Council, *Detailed Findings 2018* (n 5) 362 [1424].

³⁹ *Prosecutor v Bemba (Article 61 Decision)* (n 16) [83]; Human Rights Council, *Detailed Findings 2018* (n 5) 354 [1394]–[1395].

⁴⁰ Human Rights Council, *Detailed Findings 2018* (n 5) [961]–[962].

⁴¹ *Prosecutor v Blaškić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 3 March 2000) [203]–[204], [631]; Human Rights Council, *Detailed Findings 2018* (n 5) 363 [1429].

⁴² *Prosecutor v Blaškić (Trial Judgment)* (n 41) [203]–[204], [631]; Human Rights Council, *Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar, UN Doc A/HRC/42/CRP.5 (9 September 2019)* 362 [1425] (‘*Detailed Findings 2019*’).

⁴³ *Prosecutor v Šešelj (Judgment Volume 1)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-03-67-T, 31 March 2016) 362, [1424].

⁴⁴ *Prosecutor v Blaškić (Trial Judgment)* (n 41) [203]–[204], [631]; Human Rights Council, *Detailed Findings 2019* (n 42) 71, [222].

Before the NLD's elected rise to power, Myanmar had been administered under military rule for many decades.⁴⁵ Beginning in General Ne Win's initial 1958 caretaker government and 1962 coup,⁴⁶ military rule expanded to the Burma Socialist Programme Party's military dictatorship.⁴⁷ The closely aligned, allegedly 'democratically elected', Union Solidarity and Development Party ('USDP') rose to power after this period.⁴⁸ The power had theoretically been transferred over to the relevant elected civilian government in 2010 with the military junta's dissolution and the election of the USDP.⁴⁹ Although, the real power, in the form of military capability, still remained in the hands of the military led by General Min Aung Hlaing.

As the 'Supreme Commander' of all armed forces within Myanmar, General Min Aung Hlaing possesses an unrivalled level of influence.⁵⁰ In terms of political power, the constitutional framework has enabled General Min Aung Hlaing to wield full control over the military's operations and capabilities at the time of the attacks.⁵¹ General Min Aung Hlaing has effectively controlled the majority of the votes in the National Defence and Security Council, which has been made possible through the military's appointment of the Ministers of Defence, Border Affairs and Home Affairs.⁵²

This position provides the general an unusual degree of autonomy for a military leader that is not operating within in a military dictatorship. Usually, the head of State is placed at the top of the hierarchy of military institutions within the standard modern constitutional framework.⁵³ According to *The Fact-Finding Mission on Myanmar* '[t]he constitutional

⁴⁵ Kongsam Devi, 'Myanmar Under the Military Rule 1962-1988' (2014) 3(10) *International Research Journal of Social Sciences* 46.

⁴⁶ *Ibid* 47.

⁴⁷ Archana Parashar, and Jobair Alam, 'The National Laws of Myanmar: Making of Statelessness for the Rohingya' (2019) 57(1) *International Migration* 94, 100.

⁴⁸ Adam Burke, 'New Political Space, Old Tensions: History, Identity and Violence in Rakhine State, Myanmar' (2016) 38(2) *Contemporary Southeast Asia* 258; Krishna Mirmala, 'The Rohingya Plight, The Role of State Actors and Non-States Actors' (2018) 9(1) *The Journal of Defence and Security* 49.

⁴⁹ Udai Bhanu Singh, 'Do the Changes in Myanmar Signify a Real Transition' (2013) 37(1) *Strategic Analysis* 101, 104.

⁵⁰ Human Rights Council, *Detailed Findings 2018* (n 5) 390 [1546].

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid*.

powers of the civilian authorities afford little scope for controlling the actions of the Tatmadaw'.⁵⁴ Similarly, Human Rights Watch has even referred to the relationship between the two as an 'illiberal democracy,' indicating that the true power lies with the military.⁵⁵ Due to this power imbalance, it is more than arguable that Myanmar's civilian leaders were ultimately acting under the military's control during Myanmar's democratic era.⁵⁶

Myanmar's 2021 military coup has demonstrated the true depth of this power imbalance, with the military taking control of the nation through brute force, imprisoning Aung San Suu Kyi and assuming control of the nation.⁵⁷ As of writing, there is no official civilian government in Myanmar and the former members of the NLD have formed a government in exile, known as the National Unity Government.⁵⁸

III ACTUS REUS: AIDING AND ABETTING THROUGH TACIT APPROVAL AND ENCOURAGEMENT

Moving forward to Aung San Suu Kyi's conduct in relation to the *Rome Statute*, the focal point for analysis begins with the actus reus of aiding and abetting.

Generally speaking, the actus reus of this offence requires the accused to provide 'practical assistance, encouragement or moral support to a principal offender of a crime, which... contributes to the perpetration of

⁵⁴ Ibid. 'Tatmadaw' is often used in reference to Myanmar's military.

⁵⁵ Shayna Bauchner, 'In Myanmar, Democracy's Dead End', *Human Rights Watch* (Web Page, 10 March 2020) <<https://www.hrw.org/news/2020/03/10/myanmar-democracys-dead-end>>.

⁵⁶ Michael Lidauer, 'Democratic Dawn? Civil Society and Elections in Myanmar (2012) 31(2) *Journal of Current Southeast Asian Affairs* 91, 92.

⁵⁷ Nehginpao Kipgen, 'The 2020 Myanmar Election and the 2021 Coup: Deepening Democracy or Widening Division' (2021) 52(1) *Asian Affairs* 1.

⁵⁸ National Unity Government of the Republic of the Union of Myanmar, 'Heads of Government' (Web Page) <<https://www.nugmyanmar.org/en/>>; Catherine Renshaw, 'The National Unity Government: Legitimacy and Recognition' in Makiko Takeda and Chosien Yamahata (eds), *Myanmar's Changing Political Landscape: Old and New Struggles* (Springer, 2023) 225–241.

the crime'.⁵⁹ There are two possible avenues for aiding and abetting that are relevant to an action against Aung San Suu Kyi. First, is aiding and abetting through tacit approval and encouragement, which requires a physical presence at the scene. Second, is aiding and abetting through omission, which deals with a government's failure to act.⁶⁰

This analysis will begin by discussing the threshold of the actus reus of aiding and abetting. Next, the actus reus for aiding and abetting through tacit approval and encouragement will be discussed in relation to Aung San Suu Kyi's conduct. Finally, the actus reus for omission proper will be examined.

A The Threshold for Meeting the Actus Reus of Aiding and Abetting

The actus reus for aiding and abetting carries a different threshold based on the jurisdiction of the case. Historically, the actus reus for aiding and abetting has required a 'substantial effect' on the commission of crimes, which imposes a relatively high threshold.⁶¹ This position has been taken in the International Criminal Tribunal for Rwanda ('ICTR'), as seen by the acceptance of the substantial effect requirement in the *Ndahimana* Appeals case.⁶² Generally speaking, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and ICTR do not require the act of assistance to have directly caused the principal offender's acts to have been carried out. Instead, it is sufficient for the act of assistance to have had a *substantial effect* on the principal crime's commission.⁶³

⁵⁹ *Prosecutor v Delalić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [327].

⁶⁰ It is also noted that high-ranking military commander who has permitted the use of resources is a further form of aiding and abetting that is not relevant to the situation at hand: *Prosecutor v Krstić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-98-33-A, 19 April 2004) [137], [138], [144]; *Prosecutor v Blagojević (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-02-60-A, 9 May 2007) [127].

⁶¹ *Prosecutor v Taylor (Appeals Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No. SCSL-O3-01-A, 26 September 2013) [390]; Oona Hathaway et al, 'Aiding and Abetting in International Criminal Law' (2019) 104(6) *Cornell Law Review* 1593, 1609; Plomp (n 14) 9.

⁶² *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147].

⁶³ *Prosecutor v Vasiljević (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-98-32-A, 25

Within the *Rome Statute* and jurisprudence of the ICC however, it is argued this threshold is lowered even further. The actus reus in the ICC no longer requires the conduct to have had a *substantial effect* on the commission of the principal crime.⁶⁴

The ICC has briefly considered the use of this substantial effect test, but has ultimately settled for the ‘an effect’ test. The cases of *Prosecutor v Lubanga*,⁶⁵ *Prosecutor v Mbarushimana*⁶⁶ highlighted that the Court was considering the position of the ad hoc tribunals. However, the Court’s position was finally addressed in the later case of *Prosecutor v Bemba*. Within the Bemba case, the Trial Chamber focussed on the plain wording of the *Rome Statute*, finding that: ‘the [Rome] Statute does not require the meeting of any specific threshold. The plain wording of the statutory provision does not suggest the existence of a minimum threshold’.⁶⁷ As a result, the substantial effect test was not adopted, confirming that abetting

February 2004) [102]; *Prosecutor v Aleksovski (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-14/1-A, 24 March 2000) [162].

⁶⁴ Hathaway et al describes the *Rome Statute* as including a ‘weak actus reus element’ for aiding and abetting in comparison to the ad-hoc tribunals, as it does not require ‘substantial’ assistance. Schabas suggests that: ‘The absence of words like “substantially” in the Statute, and the failure to follow the International Law Commission draft, may imply that the Diplomatic Conference meant to reject the higher threshold of the recent case law of The Hague’. Hathaway et al (n 61) 1612; William Schabas, ‘Enforcing International Humanitarian Law: Catching the Accomplices’ (2001) 83(842) *International Review of the Red Cross* 439, 448. See also Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 127; Mark Summers, ‘Prosecuting Generals for War Crimes: The Shifting Sands of Accomplice Liability in International Criminal Law’ (2014) 23 *Cardozo Journal of International & Comparative Law* 519, 538–540.

⁶⁵ The Trial Chamber could be considered to have implied that the substantial test was required, although this was only used in order to provide context to the issue of liability for co-operators. *Prosecutor v Lubanga (Appeal Judgment)* (International Criminal Court, Case No. ICC-01/04-01/06 A, 1 December 2014) [468].

⁶⁶ The Chamber briefly stated in dicta that ‘a substantial contribution to the crime may be contemplated’, without further addressing the issue. *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Case No. ICC-01/04-01/10, 16 December 2011) [279]; Ventura, ‘Aiding and Abetting and the International Criminal Court’s Bemba et al. Case’ (n 14) 1144.

⁶⁷ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [93].

under the Rome Statute requires ‘an effect on the commission of the offence’.⁶⁸ This position was also taken in the case of *Prosecutor v Al Mahdi*, further affirming that aiding and abetting requires ‘an effect’ on the perpetration of the principal crime.⁶⁹ It is noted though, that the controversial nature of this threshold (or lack thereof) leaves a degree of uncertainty on the issue.⁷⁰

B Aung San Suu Kyi’s Sanction of the Attacks as ‘Silent Spectator’?

The next question is whether Aung San Suu Kyi’s conduct fits within the actus reus threshold of ‘an effect’ on the facilitation of the crime. It could be argued that Aung San Suu Kyi has shown support for the criminal conduct by playing the role of the approving silent spectator. From this perspective, the lack of opposition to the attacks on the Rohingya by the nation’s official military has created the assumption that the attacks against the Rohingya have been officially sanctioned.⁷¹

This concept of the approving silent spectator is best demonstrated by the facts of the *Ndahimana* case. Grégoire Ndahimana was the Mayor of Kivumu during the extermination of Tutsis in the Nyange parish in Kivumu.⁷² Ndahimana was present at the Nyange parish on the days prior to the attacks, as well as during the attacks. Due to this presence, The ICTR

⁶⁸ *Ibid*; Hathaway et al (n 61) 1612. Although, in relation to the uncertainties left by the Bemba case, Ventura notes that ‘the level of assistance [that] remains unsettled’ at the ICC: Ventura, ‘Aiding and Abetting and the International Criminal Court’s Bemba et al. Case’ (n 14) 1144.

⁶⁹ *Prosecutor v Al Mahdi (Decision on the Confirmation of Charges)* (International Criminal Court, Pre Trial-Chamber I, Case No. ICC -01/12-01/15, 24 March 2016) [26].

⁷⁰ There are earlier ICC cases suggesting otherwise, such as *Mbarushimana*, which deals with the similar provision of 25 (3)(d), and *Prosecutor v Lubanga*. In the academic setting, Ventura notes the uncertain nature of this requirement, stating that that ‘it would be odd indeed if no minimum contribution threshold would be required under Article 25(3)(c)’: *Prosecutor v Mbarushimana* (n 66) [283]-[285]; *Prosecutor v Lubanga (Appeal Judgement)* (n 65) [468]; Ventura, ‘Aiding and Abetting and the International Criminal Court’s Bemba et al. Case’ (n 14) 1152.

⁷¹ Sanction of the principal offence in such a manner has been considered to ‘substantially’ contribute to the offence — meeting a higher threshold than required by the ICC’s ‘an effect’ principle: *Prosecutor v Bemba (Article 74 Decision)* (n 17) [90]; Hathaway et al (n 61) 1611.

⁷² *Prosecutor v Ndahimana (Appeal Judgment)* (n 16); *Prosecutor v Ndahimana (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No. ICTR-01-68-T, 30 December 2011).

considered Ndahimana as an ‘approving spectator’.⁷³ As Ndahimana possessed moral authority through his position as Mayor, his failure to openly object to the killings was viewed as an official sanction of the crime.⁷⁴ As stated by the Appeals Chamber:

[I]t has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused’s conduct amounts to official sanction of the crime and thus substantially contributes to it.⁷⁵

Similarly, the Chamber in *Kayishema and Ruzindana*, found that ‘failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority’.⁷⁶ In the ICC case of *Bemba*, the Court found that being present at a crime scene as a ‘silent spectator’ can be interpreted as tacit approval or encouragement of the principal crime.⁷⁷ As de facto leader of the nation and a representative of the country on the international stage,⁷⁸ Aung San Suu Kyi undoubtedly fits within this position of authority.⁷⁹

The problem with a case against Aung San Suu Kyi, however, lies within the reliance of past cases on the accused’s physical presence. Prior cases in the ad-hoc tribunals have involved individuals who were directly present

⁷³ *Prosecutor v Ndahimana (Trial Judgment)* (n 72) [831].

⁷⁴ *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [144].

⁷⁵ *Ibid* [147]. As explained by Peterson, ‘encouragement and moral support describe conduct which affects someone’s psyche. Such conduct can have a substantial effect on the commission of a crime only if the [principal] perpetrator actually feels encouraged or supported’: Ines Peterson, ‘Open Questions Regarding Aiding and Abetting Liability in International Criminal Law: A Case Study of ICTY and ICTR Jurisprudence’ (2016) 16(4) *International Criminal Law Review* 565, 573; Ventura, ‘Aiding and Abetting and the International Criminal Court’s Bemba et al. Case’ (n 14) 1156.

⁷⁶ *Prosecutor v Kayishema and Ruzindana (Appeal Judgment)* (n 16) [201].

⁷⁷ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [89].

⁷⁸ ‘Transcript: Aung San Suu Kyi’s Speech at the ICJ in Full’, *Al Jazeera* (online, 12 December 2019) <<https://www.aljazeera.com/news/2019/12/12/transcript-aung-san-suu-kyis-speech-at-the-icj-in-full/>>.

⁷⁹ *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147]; *Prosecutor v Kayishema and Ruzindana (Trial Judgment)* (n 16) [200], see also *Prosecutor v Furundžia (Trial Judgment)* (n 20) [207].

at the scene.⁸⁰ As recently outlined, Ndahimana was present at the Church which was determined to be the scene of the principal crime.⁸¹ In the *Kalimanzira* case, the defendant held a position as *directeur de cabinet* of the Ministry of Interior. Physical presence at various roadblocks that involved acts of genocide against the ethnic Tutsi population played an important role in establishing the actus reus of the offence.⁸²

Aung San Suu Kyi's position can be easily distinguished from these cases. There is no evidence to suggest that she was present at any of the attacks involved in the Clearance Operations in Rakhine State.⁸³ Throughout the detailed reports of *The Fact-Finding Mission* in 2018⁸⁴ and 2019,⁸⁵ alongside the report of the *Special Rapporteur*,⁸⁶ there is no mention of Aung San Suu Kyi's physical presence at the scene. On the other hand, evidence suggests that Aung San Suu Kyi lived and worked in Yangon at the time of the attacks. The NLD's headquarters at the time, where Aung San Suu Kyi worked, was located in Yangon, where Aung San Suu Kyi was

⁸⁰ *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147]; *Prosecutor v Kayishema and Ruzindana (Appeal Judgment)* (n 16) [201]; *Prosecutor v Furundžija (Trial Judgment)* (n 20) [213]; Auriane Botte-Kerrison, 'Responsibility for Bystanders in Mass Crimes: Towards a Duty to Rescue in International Criminal Justice' (2017) 17(5) *International Criminal Law Review* 879, 902.

⁸¹ In this case, the reoccurrence of the defendant's presence at the scene played a significant role in the Tribunals decision: *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147]; Peterson, 'Open Questions Regarding Aiding and Abetting Liability in International Criminal Law: A Case Study of ICTY and ICTR Jurisprudence' (n 75) 577.

⁸² Along with Ndayamabaje's inflammatory hate speech that fuelled such actions. *Prosecutor v Kalimanzira (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No. ICTR-05-88, 22 June 2009) [292]; Khoury Cyrena et al, 'Updates From the International and Internationalized Criminal Courts' (2009) 17(1) *Human Rights Brief* 52, 54; Slava Kuperstein et al, 'Updates from the International and Internationalized Criminal Courts' (2011) 18(2) *Human Rights Brief* 44, 47.

⁸³ Human Rights Council, *Detailed Findings 2018* (n 5) [1394]–[1395], [959], [1429].

⁸⁴ *Ibid.*

⁸⁵ Human Rights Council, *Detailed Findings 2019* (n 42).

⁸⁶ Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc A/HRC/34/67 (1 March 2017).

living at 54 University Avenue.⁸⁷ As a result, it is difficult to suggest that physical presence could be established.

It is noted that physical presence is not strictly required, although this does not appear relevant to Aung San Suu Kyi. The Chamber in Bemba did suggest that the ‘vicinity’ of a crime scene can also be considered for determining a ‘silent spectator’ for these purposes.⁸⁸ However, arguing that a ‘vicinity’⁸⁹ of a crime scene could include ‘within the same country’ appears to stretch this principle too far. Ultimately, this lack of physical presence provides great difficulty for a case against Aung San Suu Kyi for aiding and abetting through tacit approval and encouragement.

IV ACTUS REUS: AIDING AND ABETTING THROUGH OMISSION PROPER

Moving forward, it may still be possible for Aung San Suu Kyi’s lack of action to be considered as aiding and abetting through omission proper.⁹⁰ Omission proper, in the context of ongoing mass crimes, does not necessarily require physical presence.⁹¹

⁸⁷ When not abroad, Aung San Suu Kyi has resided at 54 University Avenue Yangon since 1953 even serving her House Arrest Periods there. Although, Aung San Suu Kyi has been imprisoned since 2021. Amitav Ghosh, ‘54 University Avenue, Yangon’ (2001) 23(2) *The Kenyon Review* 158; Michal Lubina, *A Political Biography of Aung San Suu Kyi A Hybrid Politician* (Routledge, 2021) 24, 37; Kipgen (n 57).

⁸⁸ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [89].

⁸⁹ *Ibid.*

⁹⁰ The actus reus and mens rea for aiding and abetting through omission are no different than aiding and abetting through a positive act: *Prosecutor v Orić* (n 22) [43]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [47].

⁹¹ Botte-Kerrison (n 80) 905; Arne Vetlesen, ‘Genocide: A Case for the Responsibility of the Bystander’ (2000) 37(4) *Journal of Peace Research* 519, 529.

The actus reus for aiding and abetting through omission proper contains two key elements. The accused must possess a legal duty to act on the situation,⁹² along with the means to do so.⁹³

A Duty to Act

Firstly, it must be questioned whether the civilian leaders possessed a legal duty to act on the military's attacks against the Rohingya.⁹⁴

State officials may possess a legal duty to ensure the tranquillity, public order, and security of people, amid violent attacks on civilians and refugees.⁹⁵ Within *Prosecutor v Nyiramasuhuko*, the Chamber referred to arts 7 and 13 of *Additional Protocol II to the Geneva Conventions* ('Protocol II'), finding that a legal duty exists for State officials to protect civilians against violence during non-international armed conflict.⁹⁶ Art 7 of Protocol II requires the wounded, sick and shipwrecked to be respected, protected and treated humanely during domestic armed conflict.⁹⁷

⁹² *Prosecutor v Brdanin (Appeal Judgment)* (n 16) [274]; *Prosecutor v Orić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-A, 3 July 2008) [43]; *Prosecutor v Karadžić* (n 23) [575]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [47], [663]; *Prosecutor v Nahinama (Appeal Judgement)* (n 13) [482]; *Prosecutor v Ntagerura* (n 16) [335], [370]; *Prosecutor v Brdanin (Appeal Judgment)* (n 16) [274]; Ines Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (2018) 18(5) *International Criminal Law Review* 749, 757, 762; Manuel Ventura, 'Aiding and Abetting' in Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt (eds) *Modes of Liability in International Criminal Law* (Cambridge University Press, 2019) 188.

⁹³ *Prosecutor v Ntagerura* (n 16) [335]; *Prosecutor v Mrkšić* (n 22) [49], [82], [154].

⁹⁴ *Prosecutor v Karadžić* (n 23) [575]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [47], [663]; *Prosecutor v Nahinama (Appeal Judgement)* (n 13) [482]; *Prosecutor v Ntagerura* (n 16) [335], [370]; *Prosecutor v Brdanin (Appeal Judgment)* (n 16) [274]; Ines Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (2018) 18(5) *International Criminal Law Review* 749, 757, 762.

⁹⁵ *Prosecutor v Nyiramasuhuko (Trial Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-98-42-T, 24 June 2011) [5897]–[5899] citing *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*; Signed 8 June 1977, 1125 UNTS 609 (entered into force: 7 December 1978) arts 7, 13 ('Protocol II').

⁹⁶ *Prosecutor v Nyiramasuhuko (Trial Judgment)* (n 95) [5897], [5899]; *Protocol II* (n 95) arts 7, 13.

⁹⁷ *Protocol II* (n 95) art 7.

Furthermore, Article 13 requires the civilian population to be protected against the dangers arising from military operations,⁹⁸ which includes the requirement to not attack civilians who are not actively taking part in hostilities.⁹⁹

Myanmar has not signed the Additional Protocols to the Geneva Conventions,¹⁰⁰ although it is still bound by Protocol II's provisions that are considered Customary International Law. As discussed by the Tadić Appeals Chamber, there are many rules in international customary law that are contained in the provisions of Additional Protocol II, including the protection of civilians from hostilities in the event of non-international armed conflict.¹⁰¹ As Myanmar's military was involved in non-international armed conflict with the militia group 'ARSA' at the time of the Clearance Operations,¹⁰² the State and its officials possessed a legal duty to protect civilians.

While it is noted that some scholars stress that this is another uncertain position of law,¹⁰³ the authority set in *Nyiramasuhuko* and its similarities to Aung San Suu Kyi provide a strong argument. In her roles as the Butare Prefecture's representative on the 'MRND' National Committee and as Minister of Family and Women's Development, Pauline Nyiramasuhuko was considered to be an official representative of Rwanda.¹⁰⁴ It is also

⁹⁸ Ibid art 13.

⁹⁹ Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (n 94) 768

¹⁰⁰ Myanmar is not listed as a party: United Nations, *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)* (Web Page) <<https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8>>.

¹⁰¹ *Prosecutor v Tadić (Decision on Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1, 2 October 1995) [117], [127]; Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90(2) *American Journal of International Law* 238, 238–244.

¹⁰² Human Rights Council, *Detailed Findings 2018* (n 5) 19 [59]. Aung San Suu Kyi herself has stressed the existence of this non-international armed conflict: Al Jazeera (n 78).

¹⁰³ Peterson, 'Criminal Responsibility for Omissions in ICTY and ICTR Jurisprudence' (n 94) 768, Ingle (n 21) 752. See also Gideon Boas, 'Omission Liability at the International Criminal Tribunals: A Case for Reform', in Shane Darcy and Joseph Powderly (eds); *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010) 212.

¹⁰⁴ *Prosecutor v Nyiramasuhuko (Appeal Judgment)* (n 16) [2].

noted that Nyiramasuhuko was a comparatively lower ranking official than Aung San Suu Kyi, State Counsellor of Myanmar. Much like in the case of *Nyiramasuhuko*, Myanmar's State Counsellor is also required to uphold the duty to protect civilians from hostilities in the event of non-international armed conflict.¹⁰⁵

B Means to Fulfil this Duty

Secondly, the accused is required to have possessed the means to fulfil this duty to act.¹⁰⁶

Cases in the ad-hoc tribunals have shown the importance of this means requirement. In the *Ntagerura Appeals Judgment*, this requirement was discussed in relation to Rwandan Prefect Emmanuel Bagambiki, who was argued to have possessed a duty to protect refugees.¹⁰⁷ The Prosecution failed to demonstrate which possibilities Bagambiki possessed to fulfil this duty.¹⁰⁸ Since the means to protect refugees were not demonstrated, the case ultimately failed.¹⁰⁹ Afterwards, the Appeals Chamber in *Mrkšić and Šljivančanin* relied on the *Ntagerura Appeals Judgment* to require the Prosecution to prove that the accused possessed the means to fulfil the relevant duty.¹¹⁰ As stated in the *Mrkšić and Šljivančanin* case:

The Appeals Chamber recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty.¹¹¹

The threshold for this means test for a potential case against Aung San Suu Kyi differs from the many cases dealing with this issue in the past. In the ad hoc tribunals, the actus reus can be met if the accused possessed the means to have a 'substantial effect' on the commission of the principal

¹⁰⁵ *Prosecutor v Nyiramasuhuko (Trial Judgment)* (n 95) [2191].

¹⁰⁶ *Prosecutor v Ntagerura* (n 16) [335]; *Prosecutor v Mrkšić* (n 22) [49], [82], [154]. *Prosecutor v Šainović (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-05-87-A, 23 January 2014) [1677]; *Prosecutor v Popović (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88-A, 30 January 2015) [1740]; *Prosecutor v Nyiramasuhuko (Appeal Judgment)* [2205]; Ventura, 'Aiding and Abetting' (n 92) 189.

¹⁰⁷ *Prosecutor v Ntagerura* (n 16) [335].

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Prosecutor v Mrkšić* (n 22) [49], citing *Prosecutor v Ntagerura* (n 16) [335].

¹¹¹ *Prosecutor v Mrkšić* (n 22) [49].

offence.¹¹² As investigation into the principal offence is taking place in the ICC under the *Rome Statute* however, this threshold does not apply.¹¹³ The action is only needed to have ‘an effect’ on the commission of the crimes.¹¹⁴ This leads to the question as to whether Aung San Suu Kyi possessed the means to have ‘an effect’ on the security and safety of the Rohingya civilians.

Before other means are discussed, it must be stressed that Aung San Suu Kyi did not possess the means to directly cause the military to cease the attacks. Whereas leaders of other States may possess direct control over their military, this is not the case in Myanmar. As the factual and contextual background has explained, the military is controlled by General Min Aung Hlaing, who is enabled full control over the military’s operations and capabilities.¹¹⁵ Aung San Suu Kyi’s civilian government on the other hand, was afforded little scope under Myanmar’s constitution for controlling the military and its operations.¹¹⁶ Although Aung San Suu Kyi may not have possessed the means to directly cause the military to cease the attacks, there are other ways in which such an influential figure could have had ‘an effect’ on the situation.

The strongest argument is that Aung San Suu Kyi could have impacted the situation through moral authority, which is based upon perceived legitimacy. As a popular icon holding a high degree of perceived legitimacy through her position as State Counsellor, Aung San Suu Kyi undoubtedly possessed a moral authority, capable of persuading public opinion.¹¹⁷ By publicly condemning the Clearance Operations, Aung San Suu Kyi’s moral authority and her legitimacy as State leader could have provided a strong moral backing for opposing the attacks.

¹¹² Ventura, ‘Aiding and Abetting’ (n 92) 189; *Ibid* [97], [100]; *Prosecutor v Šainović (Appeal Judgment)* (n 106) [1679], [1682]; *Prosecutor v Popović (Appeal Judgment)* (n 106) [1741], [1744].

¹¹³ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [90]; Hathaway et al (n 61) 1611.

¹¹⁴ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [90]; Hathaway et al (n 61) 1611.

¹¹⁵ Human Rights Council, *Detailed Findings 2018* (n 5) 390, [1546].

¹¹⁶ *Ibid*.

¹¹⁷ Ndahimana possessed a ‘moral authority’ over a civilian population due to his position as Mayor: *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [144].

There are many ways in which her use of this position of authority could have impacted the situation on the ground indirectly. For example, it could be argued that the exertion of political pressure could have resulted in a scaled back, or more subtle operation, resulting in fewer casualties to avoid public backlash. There is also the argument that Aung San Suu Kyi may have possessed the means to impact the situation on the ground by using this power to call for external help on the issue. An argument could even be put forth that as each member of the 33rd and 99th Light Infantry Divisions makes an individual decision to attack the Rohingya, moral condemnation from such an influential figure could lead to fewer direct perpetrators choosing to carry out the attacks.

None of these means to protect civilians were ultimately utilized by Aung San Suu Kyi, which indicates that the *actus reus* for omission proper could potentially be met if tested in Court. Whether it be through public condemnation of the attacks, exerting political pressure, or another use of her position of authority, it is more than arguable that Aung San Suu Kyi possessed the means to have ‘an effect’ on the safety of civilians. As this concept of moral authority has played an important role in determining whether conduct could have a ‘substantial effect’ on the commission of a crime in the ICTR’s *Ndahimana Case*,¹¹⁸ there should be no difficulty with its application under the ICC’s lower ‘an effect’ threshold.

V MENS REA FOR AIDING AND ABETTING THROUGH OMISSION PROPER

Although it may be possible to establish the *actus reus* for aiding and abetting through omission proper, the mental element of the offence must still be met.¹¹⁹

Similar to the *actus reus* of the offence, the *mens rea* of aiding and abetting differs between the *Rome Statute* and the ad hoc tribunals. Within the ICTY and ICTR, the mental element for aiding and abetting requires *knowledge* that the aid or abettor’s conduct may assist in the commission of the

¹¹⁸ *Ibid.*

¹¹⁹ It is generally accepted that the *mens rea* for aiding and abetting by omission are the same as that of aiding and abetting by a positive act *Prosecutor v Orić* (n 22) [43]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [47].

principal offender's crimes.¹²⁰ The *Rome Statute* on the other hand, requires the accused to desire for their act or omission to facilitate and assist with the perpetration of the principal offence.¹²¹ This arises from the wording 'for the purpose of facilitating the commission of such a crime' within art 25 of the *Rome Statute*.¹²² Due to art 25's focus on the word 'purpose', the mens rea for aiding and abetting in the ICC requires a significantly higher standard than the *knowledge* requirement within the ICTY and ICTR.¹²³

Determining what the ICC's Purpose standard precisely requires at this stage is difficult. Especially when considering that the definition of 'purpose' is not expressly defined in the *Rome Statute*, and there is limited

¹²⁰ *Prosecutor v Vasiljević* (n 63) [102]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [49].

¹²¹ *Rome Statute* (n 9) art 25 (3)(c); Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese et al, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 801; Kai Ambos, 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Baden-Baden, 1999) 475, 483; Cherif Bassiouni, *International Criminal Law, Volume 3: International Enforcement: Third Edition* (Martinus Nijhoff, 2008) 491.

¹²² *Rome Statute* (n 9) art 25(3)(c); *Prosecutor v Bemba (Article 74 Decision)* (n 17) [97]; Hathaway et al (n 61) 1616. This is made possible due to the inclusion of the following phrase in Article 30(1): '[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime'. Use of 'unless otherwise provided' allows for further requirements to be added to the mental element through article 25(3)I: Plomp (n 14) 14; Sarah Finnin, 'Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis' (2012) 61 *International and Comparative Law Quarterly Law Journal* 325, 354.

¹²³ Ventura, 'Aiding and Abetting and the International Criminal Court's Bemba et al. Case' (n 14) 21; Kai Ambos, *Treatise on International Criminal Law — Volume I: Foundations and General Part* (Oxford University Press, 2013) 165–166; Kai Ambos, 'Article 25', in Otto Triffterer and Kai Ambos (eds); *The Rome Statute of the International Criminal Court: A Commentary 3rd Edition* (Beck/Hart Publishing/Nomos, 2016) 1009; Eser (n 121) 801; Geert-Jan Knoops, *Mens Rea at the International Criminal Court* (Leiden, Brill Nijhoff, 2017) 48–49; van Sliedregt (n 64) 128; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure 3rd Edition* (Cambridge, University Press, 2014) 374; Miles Jackson, *Complicity in International Law* (Oxford University Press, 2015) 50; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute 2nd Edition* (Oxford University Press, 2016) 578.

jurisprudence on the issue.¹²⁴ As a result, the definition of purpose has been left somewhat open to interpretation.¹²⁵

The Chamber in Bemba has attempted to clarify the ICC's purpose test, highlighting its distinct heightened threshold. According to the Chamber, the subjective mental element is heightened through the addition of the word 'purpose', which is distinct from the term 'knowledge.'¹²⁶ The purpose threshold requires the defendant to have partaken in the act or omission in question with the purpose of facilitating the principal offence.¹²⁷ By contrast, the defendant's knowledge that their actions will assist the commission of the principal crimes is not enough.¹²⁸ With this in mind, the relevant question is whether Aung San Suu Kyi failed to act on the attacks on the Rohingya for the purpose of facilitating the attacks.¹²⁹

There are two potential arguments for Aung San Suu Kyi meeting the purpose requirements. First, it could be argued that Aung San Suu Kyi has explicitly expressed her intention to assist the military. Second, it could be argued that this purpose to assist the military's crimes can be assumed from Aung San Suu Kyi's position as State leader. Both of these arguments, however, hold very little merit.

First, there is no evidence to suggest that Aung San Suu Kyi has directly expressed support for the military's Clearance Operations against the Rohingya.¹³⁰ A complete discussion on this issue will require further information gathered through interviews with Aung San Suu Kyi to establish her subjective state of mind.¹³¹ Although, the currently available information indicates that this purpose requirement will not be met.

¹²⁴ Hathaway et al (n 61) 1615–1616; Plomp (n 14) 14-15; Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (n 64) 443.

¹²⁵ Hathaway et al (n 61) 1615–1616; Plomp (n 14) 14-15; Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (n 64) 443.

¹²⁶ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [97]. See also *Prosecutor v Mbarushimana* (n 66) 281; Hathaway et al (n 61) 1616.

¹²⁷ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [97].

¹²⁸ *Ibid.*

¹²⁹ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [97].

¹³⁰ See Human Rights Council, *Detailed Findings 2018* (n 5); Human Rights Council, *Detailed Findings 2019* (n 42); Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar* (n 86).

¹³¹ *Rome Statute* (n 9) art 30; Mohamed Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a

Second, it could be argued that linkage between Aung San Suu Kyi's role in governance and the official nature of the military indicates an intention to aid the military. Although, such an argument also holds very little merit. The military may have been accepted and sanctioned by the civilian government. But this does not mean that the government's de facto leader agrees with the military's attacks, let alone possesses a purpose to aid the military in this way. Returning to the power imbalance outlined in the factual and contextual background, the military has effectively been able to operate as it wishes, regardless of whether it has obtained the support or authorisation of the civilian government.¹³² In practice, the military can even be considered to possess a higher degree of power than Aung San Suu Kyi and the civilian government.¹³³ As a matter of fact, this linkage between Aung San Suu Kyi's role as de-facto leader and the fact that the attacks were carried out by the nation's official military cannot be used to establish Aung San Suu Kyi's purpose behind this omission.

Aung San Suu Kyi may have known that failing to act on the military's attacks would help facilitate their commission, although this is not enough.¹³⁴ It must be proven that the purpose behind Aung San Suu Kyi's refusal to act was to assist with the forced deportation of the Rohingya.¹³⁵ Proving beyond reasonable doubt that the ex-State leader, Nobel Peace Prize winner¹³⁶ and champion for human rights¹³⁷ possessed this purpose is an arduous task requiring some deep, substantiative evidence. Until any convincing evidence of this nature surfaces, it is hard to consider that Aung San Suu Kyi would meet these heightened thresholds.

The mental requirements of the ICTY and ICTR requiring Aung San Suu Kyi to possess *knowledge* that her conduct may assist in the commission of the military's crimes could lead to a deeper and more contested discussion.¹³⁸ But, given the heightened mental requirements of the ICC, it

Comparative Criminal Law Perspective' (2008) 19(3) *Criminal Law Forum* 473, 495.

¹³² Human Rights Council, *Detailed Findings 2018* (n 5) 390, [1546].

¹³³ *Ibid.*

¹³⁴ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [97].

¹³⁵ *Ibid.*

¹³⁶ Bengtsson (n 1) 15.

¹³⁷ Laura Kittel, 'Healing Heart and Mind: The Pursuit of Human Rights in Engaged Buddhism as Exemplified by Aung San Suu Kyi and the Dalai Lama' (2011) 15(6) *International Journal of Human Rights* 905, 916–918.

¹³⁸ *Prosecutor v Mrkšić (Appeal Judgment)* (n 22) [102]; *Prosecutor v Blaškić (Appeal Judgment)* (n 21) [49].

does not appear likely that this mental element could be met if Aung San Suu Kyi was brought to trial.

VI OUTLOOK

Ultimately, it does not appear that Aung San Suu Kyi's conduct would fall within the *Rome Statute's* provisions concerning aiding and abetting.

It is unlikely that the actus reus of aiding and abetting through tacit approval or encouragement could be met. This is due to the reliance of prior cases on the accused's physical presence at the scene.¹³⁹ On the other hand, the actus reus for aiding and abetting through omission proper could potentially be met, Aung San Suu Kyi possessed a legal duty to ensure the security of civilians, along with the means to have 'an effect' on the safety of these civilians.¹⁴⁰ Yet, none of these means, such as publicly condemning the military's actions or applying political pressure, were exercised.

Although Aung San Suu Kyi's conduct may meet the actus reus for omission proper, the mental elements are unlikely to be established. There is no currently available information to suggest that Aung San Suu Kyi possessed a purpose to assist the military in its attacks on the Rohingya, nor can this be inferred. At the time of the military's alleged crimes, Aung San Suu Kyi's civilian government was acting on the unfavourable end of a deep power imbalance with the military.¹⁴¹ Arguing that the democratically elected,¹⁴² Nobel Peace Prize winner¹⁴³ has chosen to side with this military force, who has a history of imprisoning her,¹⁴⁴ against a civilian population, will require a significant development in evidence.

¹³⁹ *Prosecutor v Ndahimana (Appeal Judgment)* (n 16) [147]; *Prosecutor v Kayishema and Ruzindana (Appeal Judgment)* (n 16) [201]; *Prosecutor v Furundžija, (Trial Judgment)* (n 20) [213].

¹⁴⁰ *Prosecutor v Mrkšić* (n 22) [49], citing *Prosecutor v Ntagerura* (n 16) [335].

¹⁴¹ Human Rights Council, *Detailed Findings 2018* (n 5) 390, [1546].

¹⁴² Kipgen (n 57) 3.

¹⁴³ Bengtsson (n 1) 15.

¹⁴⁴ See the various instances from 1989 to present: Aung Zaw, *The Face of Resistance: Aung San Suu Kyi and Burma's Fight for Freedom* (Silkworm Books, 2013) Silverstein, 'The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi' (n 1) 212; Hazel Lang, 'The Courage of Aung San Suu Kyi' (2006) 183 *Overland* 61, 64; Ruzza, Gabusi, and

This power imbalance between a head of State and deviant military force is relatively unique, but the ICC may face situations involving similar dynamics in the future. Situations of inaction by government officials in the face of blatant violations of international law by a sanctioned, yet separate military may also result in a similar conclusion to the case at hand. The ad hoc tribunals' 'an effect' threshold effectively requires members of civilian governments to take a stand against powerful military regimes, even if they do not possess the means to substantially reduce the impact of the military's actions.¹⁴⁵ By contrast, the Rome Statute's additional 'purpose' requirement in aiding and abetting may ultimately prove instrumental in drawing a line on where responsibility ends.¹⁴⁶ The ICC's purpose requirement is a crucial element in determining whether government officials can be found responsible for the actions of these powerful, sanctioned, and separate military forces.

Pellegrino (n 3) 200; Ardeth Maung Thawngmung and Khun Noah, 'Myanmar's Military Coup and the Elevation of the Minority Agenda?' (2021) 53(2) *Critical Asian Studies* 297.

¹⁴⁵ *Prosecutor v Bemba (Article 74 Decision)* (n 17) [93]; Hathaway et al (n 61) 1612.

¹⁴⁶ See *Rome Statute* (n 9) art 25(3)(c); Plomp (n 14) 14.