

MYANMAR:



Violence Against the Rohingya Population. The Importance of the Evidence

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The situation in Myanmar presents two main legal questions: the qualification of the alleged crimes and the jurisdiction. Whether assuming the Rohingya¹ population were killed or deported, what is the correct word to contextualize the acts that occurred in Myanmar against them? Is it genocide?² Crimes against humanity (CAH) under murder, extermination, deportation, or forcible transfer?³ Or ethnic cleansing?⁴ Various types of atrocities are often labeled under the crime of genocide (also called the “crime of crimes”), even when they do not meet the term’s legal definition.

The number of Rohingya victims is uncertain: estimates range between 400⁵ and 6,700,⁶ but the categorization of the crime depends on the perpetrator’s intention rather than on the number of victims.⁷ Since August 2017, more than 670,000 Rohingya, lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh, joining more than 160,000 Rohingya refugees who were forced out of Myanmar in previous years.⁸ Approximately 80 percent of those are women and children, and while sexual violence has not been limited to women and girls, they appear to comprise the majority of victims of sexual violence in this context.⁹

Genocide, CAH, and ethnic cleansing refer to different punishable acts and each have a different *mens rea*. To qualify as genocide, a crime must be committed with a *dolus specialis*, or specific intent to eliminate, an entire group of people based on their ethnicity, nationality, race, or religion.¹⁰ International criminal courts and tribunals have confirmed that this list of groups is conclusive. The narrow definition of the crime in the Genocide Convention,¹¹ in particular the exclusion of conduct committed with intent to destroy political, economic, social, or cultural groups, was influenced by the negotiation process that led to the adoption of the treaty and the need to gain widespread state support in order for the treaty to be effective.¹²

Absent proof of this specific intent, perpetrators can still be found guilty of CAH or ethnic cleansing.¹³ CAH are widespread and systematic attacks (*chapeau element*) knowingly directed against any civilian population, while ethnic cleansing only refers to the expul-

sion of a group from a particular area and has not been defined and recognized as a separate crime under international law.¹⁴ There is no precise definition of this concept or the exact acts to be qualified as ethnic cleansing.¹⁵

Excluding the hypothesis that the act could be ethnic cleansing, it is important to focus on the other two options. While CAH focuses on the killing of a large number of individuals and is aimed at protecting the individual, genocide focuses on the destruction of groups and is aimed at protecting the group.¹⁶

Criminal responsibility hinges on proof of intent, which is easier to establish with hard evidence in the form of a confession or a written document.¹⁷

Intent is discerned from direct and circumstantial evidence.¹⁸ The special intent requirement for genocide is particularly hard to establish since it is difficult to prove the perpetrators’ reasoning.¹⁹ In the case of the Holocaust, intent was made explicit in Nazi documentation and propaganda.²⁰ A few decades later during the Rwandan genocide, in which national radio called for the extermination of the Tutsi ethnic group, propaganda played a similar role.²¹

A different scenario played out during the Srebrenica massacre in 1995, where the International Criminal Tribunal for Former Yugoslavia convicted only Ratko Mladi of genocide in Srebrenica.²² In 2007 the International Court of Justice exonerated Serbia of direct responsibility for the mass slaughter of Bosnian Muslims at Srebrenica during the 1992-95 Bosnian war, but ruled that it failed to prevent genocide.²³

“The evidence never lies”²⁴ because the legal fact-finder—whether a judge, lay jury, or both—establishes a “formal legal truth,” which may or may not match the substantive truth.²⁵ It does not matter what people say; all that matters is what they can prove at trial.

Last April, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) filed a request to the Pre-Trial Chamber²⁶ seeking, for all intents and purposes, an advisory opinion on whether the ICC may exercise jurisdiction²⁷ over the alleged deportations of Rohingya people from Myanmar to Bangladesh.²⁸

Immediately, the Myanmar government expressed “serious concern” about the request.²⁹ The prosecution reviewed an enormous number of reports and other public information alleging that the crime of deportation was committed against the Rohingya population.³⁰ These reports and other public information appear credible and consistent. Article 12(2)(a) of the Rome Statute provides that



in this case with the majority of elements having been consummated in a nonmember state (Myanmar). In other words, the alleged crime started in a nonmember state and it was completed in a member state. Also relevant to the question of jurisdiction is that the Myanmar government claims that Bangladesh is the Rohingya's country of origin.³²

But the question is even if Pre-Trial Chamber agrees with the OTP, will it be able to investigate in Myanmar considering the Myanmar government's tensioning and blocking of access to Rakhine State?³³

And again, what about the other crimes of murder, rape, and persecution? These alleged crimes were fully completed in Myanmar so probably are beyond the ICC's reach.³⁴

Collecting evidence to support any alleged charged crimes required the OTP to conduct investigations not only in Bangladesh or anywhere the displaced and deported Rohingya are being hosted but also in Myanmar.³⁵ This will be very difficult unless and until the Myanmar government decides to cooperate.³⁶

In the meantime, while anyone is questioning the situation, the massacre in Myanmar is still without a real solution and without any responsible party.

As of press time, the ICC had given Myanmar until July 27 to respond to a prosecution request that they consider hearing a case on alleged deportation of Rohingya population to Bangladesh. ©

Endnotes

¹U.N. High Comm'r for Hum. Rights, Human Rights Council, 32d sess., *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Situation of Human Rights of Rohingya Muslim and Other Minorities in Myanmar*, U.N. Doc. A/HRC/32/18 (Jun. 28, 2016), http://ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A_HRC_32_18_AEV.docx; Off. of the U.N. High Comm'r for Hum. Rights, *Report of the OHCHR Mission to Bangladesh: Interviews With Rohingya Fleeing From Myanmar Since 9 October 2016*, Flash Report (Feb. 3, 2017), <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>. The Rohingya are an ethnic group, the majority of whom are Muslim and living in Rakhine State in Myanmar, and an estimated 90 percent of the population is Buddhist. There are about 1.1 million Rohingya in Southeast Asia.

²The term "genocide" was coined by Raphaël Lemkin in 1944 from

"the court may exercise its jurisdiction" if the "state on the territory of which the conduct in question occurred" is a state party to the statute. This "conduct" requirement means only that "at least one legal element of an Article 5 crime" must occur on the territory of a member state.³¹

ICC has jurisdiction if only a fraction of the elements of a crime were committed on the territory of a member state (Bangladesh),

the Greek term “*genos*,” meaning race, nation or tribe, and the Latin term “*caed*,” which means to kill. It was adopted by prosecutors at the Nuremberg International Military Tribunal even though it was not included in the Nuremberg Charter. RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

³The definition of crimes against humanity was included, for the first time, as one of the three categories of crimes in the Nuremberg Charter in 1945. Nuremberg Charter art. 6(c) (Aug. 8, 1945). See also Rome Statute of the International Criminal Court, Doc. A/CONF.183/9 (July 17, 1998) (entered into force July 1, 2002) arts. 7(1)(a), (b), & (d). The debate on the distinction between forcible transfer and deportation is rather settled under existing international jurisprudence. These crimes are distinct and not mutually exclusive.

⁴The term “ethnic cleansing” surfaced in the context of the 1990s conflict in the former Yugoslavia and is considered to come from a literal translation of the Serbo-Croatian expression “etničko čišćenje.”

⁵*Who are the Rohingya?*, AL JAZEERA (Apr. 5, 2018), <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html>.

⁶Médecins Sans Frontières conducted surveys in refugee settlement camps in Bangladesh that estimate at least 9,000 Rohingya died in Rakhine State, Myanmar, between Aug. 25 and Sept. 24, 2017. Press Release, Médecins Sans Frontières, *MSF Surveys Estimate That at Least 6,700 Rohingya Were Killed During the Attacks in Myanmar* (Dec. 12, 2017), <http://www.msf.org/en/article/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks>; *Rohingya Crisis—a Summary of Findings From Six Pooled Surveys*, MÉDECINS SANS FRONTIÈRES (Dec. 9, 2017), <http://www.msf.org/en/article/myanmarbangladesh-rohingya-crisis-summary-findings-six-pooled-surveys>.

⁷*Id.*

⁸Int’l Crim. Ct., *Application Under Regulation 46(3): Prosecution’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute* (Apr. 9, 2018), at 3, https://www.icc-cpi.int/courtrecords/cr2018_02057.pdf.

⁹Andrea Raab & Siobhan Hobbs, *The Prosecutor’s Request for a Ruling on the ICC’s Jurisdiction Over the Deportation of Rohingya From Myanmar to Bangladesh: A Gender Perspective*, EJIL: TALK (Apr. 18, 2018), <https://www.ejiltalk.org/the-prosecutors-request-for-a-ruling-on-the-iccs-jurisdiction-over-the-deportation-of-rohingya-from-myanmar-to-bangladesh-a-gender-perspective>.

¹⁰Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, adopted by resolution 260(III)A of the United Nations General Assembly (Dec. 9, 1948), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

¹¹*Id.*

¹²Micheal P. Scharf & Brianne M. Draffin, *Foreword: To Prevent and To Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 5 (2007-2008).

¹³INTERNATIONAL CRIMINAL COURT, ELEMENT OF CRIMES 1-6 (2011).

¹⁴Rome Statute, art. 7.

¹⁵A U.N. Commission of Experts mandated to look into violations of international humanitarian law committed in the territory of the former Yugoslavia defined ethnic cleansing in its 1993 interim report and in its final report in 1994. U.N. Commission of Experts, U.N. Doc. S/25274 (Feb. 10, 1993); U.N. Security Council, *Letter Dated 24 May*

1994 From The Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674 (May 27, 1994), http://www.icty.org/xl/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

¹⁶Robert Coalson, *What’s the Difference Between “Crimes Against Humanity” and “Genocide”?*, ATLANTIC (Mar. 19, 2013), <https://www.theatlantic.com/international/archive/2013/03/whats-the-difference-between-crimes-against-humanity-and-genocide/274167>.

¹⁷Michael G. Karnavas, *The Evidence Never Lies: What to Make of the Myanmar Military’s Bulldozing of Rohingya Villages/Alleged Crimes Scenes*, MICHAELGKARNAVAS.NET/BLOG (Feb. 26, 2018), <http://michaelgkarnavas.net/blog/2018/02/26/bulldozing-rohingya>.

¹⁸*What Is Intent?*, LAW DICTIONARY, <https://thelawdictionary.org/intent> (last visited July 16, 2018).

¹⁹Wa Lone et al., *Massacre in Myanmar: A Reuters Special Report*, REUTERS (Feb. 8, 2018, 10:00 PM) <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events>.

²⁰Adnar Oktar, *The Role of Propaganda in Holocaust*, JERUSALEM POST (Jan. 27, 2018), <http://www.jpost.com/Opinion/The-role-of-propaganda-in-the-Holocaust-539981>.

²¹*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 94-4-T (Sept. 2, 2008).

²²*Prosecutor v. Ratko Mladić*, Case No. ICTY 09-92-T (Nov. 22, 2017), http://www.icty.org/x/cases/mladic/tjug/en/171122-4of5_1.pdf.

²³In 2015, Russia vetoed a U.N. Security Council resolution that would have condemned the 1995 Srebrenica massacre as a genocide. INT’L CT. OF JUSTICE, APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA V. SERBIA AND MONTENEGRO), JUDGMENT, I.C.J. REPORTS 2007 (Feb. 26, 2007), <http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.

²⁴See *supra*, note 8; ALFRED ALLAN LEWIS & HERBERT LEON McDONNELL, *THE EVIDENCE NEVER LIES: THE CASEBOOK OF A MODERN SHERLOCK HOLMES* (1986).

²⁵Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, CORNELL L. FACULTY PUBLICATIONS 498.

²⁶*Supra* note 8.

²⁷Rome Statute, art. 19(3)(c). The ICC has jurisdiction over natural persons, art. 25, and has prospective jurisdiction over crimes committed after entry into force of the Rome Statute, in 2002. Myanmar is not a state party while Bangladesh is.

²⁸See *supra*, note 6.

²⁹*Myanmar Says “Seriously Concerned” Over War Crimes Prosecutor Move on Rohingya Jurisdiction*, REUTERS (Apr. 13, 2018, 7:13 AM), <https://www.reuters.com/article/us-myanmar-rohingya-court/myanmar-says-seriously-concerned-over-war-crimes-prosecutor-move-on-rohingya-jurisdiction-iduskbn1hk1qa>.

³⁰See *supra*, note 26, at 4.

³¹See *supra*, note 23, at 14.

³²See *supra*, note 9.

³³Michael G. Karnavas, *The ICC-OTP’s Request For a Jurisdictional Ruling: Bold Move or Timid Half-Step?*, MICHAELGKARNAVAS.NET/BLOG (Apr. 25, 2018), <http://michaelgkarnavas.net/blog/2018/04/25/icc-otp-request>.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*