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How a People's Cries of Pain and Suffering Fell on Deaf Ears Around the World: The Rohingya Genocide

Meagan Free*

INTRODUCTION

The international community has failed to serve justice on behalf of the Rohingya people, who have been suffering in Myanmar for decades. In 1982, the Burmese government revoked the citizenships of the Rohingya people and has since promoted the idea that they are foreigners within the Rakhine State. The Rohingya people have suffered through violence, gang rape, and forced deportation while the international community has remained somewhat silent for far too long. The crisis in Myanmar should have been categorized by the International Criminal Court (“ICC”) as a genocide, thereby allowing the necessary international intervention into the abysmal living conditions of the Rohingya people produced by the Burmese government and military. If the ICC were to find that genocide has been committed by the Burmese government and military, then individual perpetrators can be brought to justice for their crimes.

Thus far, the international community has been reluctant to label the Rohingya crisis as a genocide but has instead referred to it as “ethnic cleansing.”¹ In November 2019, Gambia was the first nation to label the atrocities committed by the Burmese government and military as genocide when it filed a claim against Myanmar in the International Court of Justice (“ICJ”) for the crime of genocide.² The ICJ has not officially classified the actions by the Myanmar military as genocide but has issued an order mandating that the Myanmar government act to prevent a genocide against

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¹ Sahar Khan, *Ethnic Cleansing v. Genocide: The Politics Behind Labeling the Rohingya Crisis*, CATO Institute (November 29, 2017), <https://www.cato.org/blog/ethnic-cleansing-vs-genocide-politics-behind-labeling-rohingya-crisis> (last visited April 29, 2020).

² Owen Bowcott, *Gambia files Rohingya genocide case against Myanmar at UN court*, The Guardian (November 11, 2019) <https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court> (last visited April 29, 2020).

the Rohingya people remaining in the country.³ While the ICJ labeling the crisis as a genocide will help move things along, it won't serve the justice required for the brutalities suffered by the Rohingya people.

There have been articles discussing the crisis in Myanmar and its classification as a genocide for over a decade.⁴ This paper brings the use of sexual violence and rape against Rohingya women to the forefront of the argument, claiming that it was the weaponization of rape that facilitated the Myanmar military's genocide of the Rohingya people in light of recent attacks within the nation.

Part I discusses the history of the Rohingya people in Myanmar and the persecution they have endured for generations. Part II explains the qualifications for genocide and the relevant international statutes that govern. Part III outlines the specific tactics used by the Burmese military to carry-out genocide on the Rohingya people during the country's "clearance operations" in the Rakhine State. Special focus is given to the military's weaponization of rape to further its goal of removing the Rohingya people. This section compares the Burmese military's actions with those of other nations where genocide was committed, and international justice was served. Part IV shows the actions taken by the international community in response to the claims of abuse in Myanmar and how those measures failed to produce meaningful change in the treatment of the Rohingya people. This part argues that the international community should classify the situation in Myanmar as a genocide to provide the highest level of assistance to the Rohingya people,

³ Scott Neuman, *Myanmar Must Prevent Genocide of Rohingya, U.N. Court Rules*, NPR (January 23, 2020), <https://www.npr.org/2020/01/23/798821883/myanmar-must-prevent-genocide-of-rohingya-u-n-court-rules>

⁴ See generally Alexa Levy, *Rohingya in Myanmar: The United Nations' Failure to Enforce Violations of Crimes Against Humanity and Genocide*, 51 *Geo. Wash. Int'l L. Rev.* 321 (2019); Ariella Victoria Levine, *A Modern Day Holocaust: The Genocide of the Rohingya Muslims of Myanmar*, 19 *Rutgers J.L. & Religion* 398 (2017); Amie Bauer, *The Hidden Genocide: Humanizing the Struggle of the Muslim Rohingya of Myanmar*, 35 *Child. Legal Rts. J.* 79 (2015).

especially the women and children who have endured brutal abuse at the hands of the Myanmar military.

In conclusion, the international community will continue to fail the Rohingya people until their pain is heard and their suffering is brought to an end by classifying the Burmese military's actions as a genocide and punishing those responsible for these atrocities.

I. THE HISTORY OF THE ROHINGYA PEOPLE: THEIR LIFE AND SUFFERING IN MYANMAR

The struggles of the Rohingya people did not begin recently, rather, they have suffered violations of their internationally protected rights at the hand of the Myanmar government for decades. They are internationally known as one the most persecuted minority groups in the world.⁵ The Rohingya people have ancestral roots to the land of Myanmar dating back to the 1430s when they first began to settle in the Akaran kingdom.⁶ Under British colonization, the Muslim population in Myanmar grew substantially as a result of migrant workers moving to the country.⁷ The Rohingya people were even offered their own state as reward for aiding the British during World War II.⁸ Not all of Myanmar had initially supported Britain in WWII, in fact, the rest of the colony supported Japan, which was cause for some of the animosity shown towards the Rohingya people.⁹ Upon gaining its independence from Great Britain in 1948, Myanmar refused to acknowledge the Rohingya people and began its efforts to expel them from the country.¹⁰ The Burmese government has continuously refused to even use the term "Rohingya," thereby denying

⁵ <https://www.unrefugees.org/emergencies/rohingya/>

⁶ <https://www.nationalgeographic.com/culture/people/reference/rohingya-people/#close>

⁷ *Id.*

⁸ *Id.*

⁹ <https://newint.org/features/2008/04/18/history>

¹⁰ <https://www.nationalgeographic.com/culture/people/reference/rohingya-people/#close>

the ethnicity and name of the Rohingya people and adamantly referring to them as “Bengali” instead to signal they are foreigners from Bangladesh.¹¹

In 1982, Myanmar enacted the *Burma Citizenship Law*, which effectively denied citizenship to all, but a small portion, of the Rohingya people.¹² Because they have been denied citizenship in Myanmar, the Rohingya people have been denied many rights and privileges that would be associated with that citizenship.¹³ The Rohingya people are not permitted to freely travel within Myanmar or abroad; in order to do so they must first obtain permits from the government authorizing such movement.¹⁴ They also have restrictions on their education and employment.¹⁵ In Myanmar secondary education and state-run schools beyond primary education are reserved entirely for those with Burmese citizenship.¹⁶ Rohingya people are not eligible for employment in civil service positions such as teaching, health care, or local government.¹⁷

The Burmese military routinely extorted villagers throughout Myanmar, however, the Rohingya were required to pay higher fees than other populations.¹⁸ The local authorities in Myanmar have actually forced the Rohingya people, even children as young as seven years old, to perform unpaid labor by physically threatening them if they refuse.¹⁹ The government refused to

¹¹ *Fortify Rights, 2014. Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar. [online] Fortify Rights. Available at: <https://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf> [Accessed 2 April 2020].*

¹² Human Rights Watch, 2000. *Burma/Bangladesh Burmese Refugees in Bangladesh: Still No Durable Solution.* [online] Human Rights Watch. Available at: <<https://www.hrw.org/reports/2000/burma/index.htm>> [Accessed 28 March 2020].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Article 26(2) of the Universal Declaration of Human Rights and Article 13(b) of the International Covenant on Economic, Social, and Cultural Rights guarantees accessibility to secondary education.

¹⁷ *See supra* note 24.

¹⁸ *Id.*

¹⁹ *Id.*

pay or provide food for the workers and punished them with more work assignments or fines if they underperformed.²⁰

Beginning in 2005, the Burmese government have implemented policies restricting the marriage rights of the Rohingya people, requiring that they seek permission from the government before they get married.²¹ Additionally, the government implemented a strict two-child policy for Rohingya in certain regions of the Rakhine State and a prohibition on their having children out of wedlock.²² This restriction has heavily burdened the Rohingya women who have had to undergo unsafe and illegal abortions in order to not violate the country's policies.²³

The tensions flared in 2012 when a Rakhine Buddhist woman was raped and murdered by three Muslim men resulting in orchestrated attacks by the Rakhine Buddhists and Rohingya Muslims against each other.²⁴ The Buddhist majority in Myanmar organized to promote nationalist ideologies against the Rohingya following the violence in 2012.²⁵ Wirathu, a Buddhist monk in Myanmar, was one of the most prolific nationalist leaders who was known for inciting religious hatred.²⁶ He publicly compared the Rohingya to animals, calling them violent, crude, and savage and further warned of their “target[ing] innocent young Burmese girls and rap[ing] them.”²⁷ It was a common fear among Buddhist nationalists in Myanmar that the Muslim population was trying to take over the country by invading and outnumbering the Buddhist majority by breeding quickly.²⁸

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ronan Lee, *Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis*, 13 *Int'l J. Comm'n* 3209, 3224 (2019).

²⁷ *Id.*

²⁸ *See Id.* *See also* Grant Peck, *Myanmar Rohingya hatred has roots in Buddhist nationalism*, AP News (September 29, 2017), <https://apnews.com/bcf889617f2341e5888019937595431d> (last visited March 28, 2020); Hannah Beech,

II. GENOCIDE

This section will begin with a general history of the creation of genocide as an international crime during the Convention on the Prevention and Punishment of the Crime of Genocide. Additionally, the first section will define what constitutes a genocide under international law. Next, a history of the International Criminal Court will follow including discussion of its inception and the scope of its jurisdiction.

A. The Convention on the Prevention and Punishment of the Crime of Genocide

Genocide was not labeled an international crime until after the Nuremburg Trials of the Nazis for executing the Holocaust.²⁹ Before this declaration, people carrying out genocide could only be charged with crimes against humanity or the peace, war crimes, and conspiracy to commit these crimes.³⁰ It was not until 1946, when the General Assembly of the United Nations spoke out against genocide and defined the crime as when a group of people denies an entire human group's right to existence in a way that causes a detriment to all of humankind by preventing that group from contributing to humanity.³¹

In 1948, the General Assembly of the United Nations approved and proposed for ratification the Convention on the Prevention and Punishment of the Crime of Genocide.³² This resolution declared genocide as an international crime, "contrary to the spirit and aims of the United Nations and condemned by the civilized world"³³

Buddhists Go to Battle: When Nationalism Overrides Pacifism, N.Y. Times (July 8, 2019), <https://www.nytimes.com/2019/07/08/world/asia/buddhism-militant-rise.html> (last visited March 28, 2020).

²⁹ TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945 - 1 OCTOBER 1946 27-92 (charging crimes against humanity, the peace, war crimes, and conspiracy) (Nuremberg: Int'l Mil. Tribunal, 1946-49).

³⁰ *Id.*

³¹ G.A. Res. 96(I), U.N. GAOR, 1st Sess., Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947).

³² G.A. Res. 260, U.N. GAOR, 3rd Sess., Part I, at 174, U.N. Doc. A/810 (1948) ["Genocide Convention"].

³³ *Id.*

The Genocide Convention defined genocide as:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³⁴

The Genocide Convention was the first time in history where genocide was added to the list of *jus cogens* and therefore punishable by the international community.³⁵ The crimes punishable under the Genocide Convention include: “(a) Genocide; (b) Conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”³⁶ The first conviction for the crime of genocide was during the 1998 International Criminal Tribunal for Rwanda (“ICTR”).³⁷ Following this landmark conviction, history was made once again in the International Criminal Tribunal for the former Yugoslavia (“ICTY”) where it was the first time a trial was conducted solely seeking justice for sexual violence as a strategy for genocide.³⁸

³⁴ *Id.*

³⁵ *See Id.* *See also* https://www.law.cornell.edu/wex/jus_cogens (defining “*jus cogens*” as fundamental principles of international law including prohibitions on crimes against humanity and human trafficking).

³⁶ *See supra* note 4.

³⁷ *See Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998).

³⁸ Ian Black, *Serbs ‘enslaved Muslim women at rape camps’*, *The Guardian* (March 21, 2000) www.theguardian.com/world/2000/mar/21/warcrimes.balkans (last visited April 30, 2020).

“States that are party to the 1948 [Genocide Convention] agreed that genocide ‘whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish’ and, by extension, have an obligation not to commit.”³⁹

B. The Rome Statute

In 1998, the United Nations held the Diplomatic Conference of Plenipotentiaries in Rome, Italy to discuss the creation of an international criminal court.⁴⁰ The Statute of the International Criminal Court (“ICC Statute”) was approved and adopted with 120 favoring the statute, 7 against, and 21 abstentions thereby creating the International Criminal Court (“ICC”).⁴¹ The purpose of the ICC was to punish those responsible for committing genocide, war crimes, and crimes against humanity.⁴²

The ICC is somewhat limited in its scope of jurisdiction to crimes committed in those countries who have become a Party to the ICC Statute and have accepted the jurisdiction of the ICC.⁴³ Further, the ICC will deem a case inadmissible if a State with jurisdiction over the case’s prosecution has investigated or tried a person responsible for the crimes.⁴⁴ When a case has been referred to the Prosecutor, the State with jurisdiction over the case will be notified to give it a chance to complete an investigation and exercise its jurisdiction.⁴⁵ The Prosecutor may seek authority to investigate the situation itself where there are potential issues regarding evidence preservation that the ICC deems substantial.⁴⁶

³⁹ <https://www.hrw.org/news/2019/11/11/gambia-brings-genocide-case-against-myanmar>

⁴⁰ G.A. Res. 52/160, U.N. GAOR, 52nd Sess., Supp. No. 49, at 384 ¶ 3, U.N. Doc. A/52/49 (1997).

⁴¹ Report of the International Law Commission on the Work of its 46th Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 29, U.N. Doc A/49/10 (1994).

⁴² *Id.* Art. 5(1) (a)-(c).

⁴³ *Id.* Art. 12(1).

⁴⁴ *Id.* Art. 17(1) (a)-(c).

⁴⁵ *See Id.* Art. 18.

⁴⁶ *Id.* Art. 18(6).

The actions by the Myanmar military should qualify as the crime of genocide, specifically the tactic of weaponization of rape and sexual violence, and those responsible for these actions should be held accountable under the jurisdiction of the ICC.

III. THE USE OF RAPE AS A WEAPON OF GENOCIDE

Part III begins with a discussion of how rape and sexual violence have been used by the Burmese military against the Rohingya people as a weapon to facilitate genocide. The remainder of this section will outline how other countries, namely Yugoslavia and Rwanda, similarly used rape and sexual violence as a weapon for genocide.

A. *Sexual violence as a tactic to force the Rohingya people out*

The Burmese military have committed heinous acts as part of their “clearance operations” in 2017 to remove the Rohingya people.⁴⁷ The campaign is the Burmese military’s response to attacks by the Akaran Rohingya Salvation Army (“ARSA”) on police stations and an army base.⁴⁸ Some of the atrocities committed against the Rohingya villages include murder, torture, and rape.⁴⁹ The weaponization of rape and sexual violence against the Rohingya women and girls has been labeled by some as genocidal because it was “seemingly aimed at the extermination and removal of the Rohingya as a group.”⁵⁰ In a 2019 report by the United Nations Security Council, sexual

⁴⁷ *UN report details brutal Myanmar effort to drive out half a million Rohingya*, The Guardian (October 11, 2017), <https://www.theguardian.com/world/2017/oct/11/rohingya-refugees-myanmar-aung-san-su-kyi-un-report> (last visited March 28, 2020). *See also* United Nations, Human Rights Council, Report of the Human Rights Council on its thirty-ninth session, A/39/2 (23 November 2018), available from <https://www.ohchr.org/EN/hrbodies/hrc/regularsessions/session39/pages/39regularsession.aspx> [Burmese military] was the main perpetrator of sexual violence. A total of 80 per cent of incidents of rape corroborated by the Mission were of gang rape, and 82 per cent of these gang rapes were perpetrated by the [Burmese military].”

⁴⁸ Human Rights Watch, 2017. “*All of My Body Was Pain*”: *Sexual Violence against Rohingya Women and Girls in Burma*. [online] Human Rights Watch. Available at: <<https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma>> [Accessed 28 March 2020].

⁴⁹ *See supra* note 42.

⁵⁰ Pramila Patten, “Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten” (presented at the Security Council Briefing on Myanmar, December 12, 2017), <http://www.un.org/sexualviolenceinconflict/statement/statement-by-the-special-representative-of-the-secretary->

violence was reported as “integral to [the Burmese military’s] strategy, humiliating, terrorizing and collectively punishing the Rohingya community and serving as a calculated tool to for them to flee their homelands and prevent their return.”⁵¹ A United Nations Special Representative relayed accounts of “rape, gang rape, forced nudity, and abduction for the purpose of sexual slavery . . .” told by almost every woman in the Bangladesh refugee camp.⁵²

The harrowing accounts of sexual violence against the Rohingya women point to the Burmese military’s pure hatred and intent to remove the Rohingya people, not only from Myanmar but from existence. Human Rights Watch released a report on the Burmese military’s sexual violence against the Rohingya people in 2017.⁵³ The report included interviews of fifty-two Rohingya women and girls detailing accounts of sexual violence committed against the community.⁵⁴ “In every case described to [Human Rights Watch], the perpetrators were uniformed members of security forces, almost all military personnel.”⁵⁵ The organization believes that the number of reported rapes does not accurately reflect the true gravity of the situation as some women have been killed and there is stigma associated with being a rape victim.⁵⁶ The report shows a pattern among the survivors’ accounts: the military was present in and surrounding the villages before attacking the women.⁵⁷ The military would descend upon a village, stealing

general-on-sexual-violence-in-conflict-ms-pramilapatten-security-council-briefing-on-myanmar-12-december-2017/ (last visited March 28, 2020). *See also* United Nations, Human Rights Council, Report of the Human Rights Council on its thirty-ninth session, A/39/2 (23 November 2018), available from

<https://www.ohchr.org/EN/hrbodies/hrc/regularsessions/session39/pages/39regularsession.aspx> “One woman, gang raped with her sister, reported a member of the [Burmese military] saying, ‘We are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you. This is not your country.’”

⁵¹ United Nations, Security Council, *Women and peace and security: report of the Secretary-General, S/2019/800* (9 October 2019), available from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2019_800.pdf

⁵² *Id.*

⁵³ *See supra* note 43.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

whatever they found inside the Rohingya homes and days later they began beating and raping the women.⁵⁸ After finishing this campaign of abuse on a village, the military would light the homes on fire leaving whoever remained in the village without a shelter, forcing them to flee.⁵⁹

Of the rapes that have been reported to Human Rights Watch, all except one were gang rapes meaning they were committed by two or more people.⁶⁰ Survivors in Bangladesh have spoken of their experiences of being one of many Rohingya women abused during mass rapes where the military would strip the women and herd them like “cattle” into a hut before brutalizing them.⁶¹ A Rohingya women in a Bangladesh refugee camp spoke of her narrow escape from death at the hands of the Burmese military.⁶² The soldiers stormed her home killing both her husband and her two-month-old son before brutalizing her and setting her home on fire, leaving her inside the burning building to die.⁶³

Another survivor, bearing dark, red scars on her neck from the soldiers’ attempt to kill her, recounted her story to a journalist.⁶⁴ Her and four other women were forced into a house by the soldiers, their babies ripped from their arms and killed right before their eyes.⁶⁵ The soldiers went on to brutalize and rape the women before setting the house on fire and leaving them to die.⁶⁶ Of the women locked in the house, this woman was the only survivor as she regained consciousness from feeling herself burning and managed to escape the home.⁶⁷

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Thaslima Begum, *Rape is not a by-product of conflict in Myanmar – it is a strategy of it*, Independent (December 9, 2019) <https://www.independent.co.uk/voices/war-myanmar-burma-rohingya-muslims-a9239521.html> (last visited March 28, 2020).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Salma Abdelaziz, *‘It would be good if I too died’: Rape as weapon of war against Rohingya*, CNN (November 17, 2017) <https://www.cnn.com/2017/11/17/asia/myanmar-rohingya-rape/index.html> (last visited March 28, 2020).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

The Rohingya people attempted to protect their women from these abuses and rapes by marrying them off to older men at a young age, sometimes as young as twelve years old.⁶⁸ They hoped that if young women were pregnant, the army would target them less when looking for women to rape.⁶⁹ However, Pregnant Rohingya women were not safe from the threat of rape by the Burmese military, in many cases they were actually targeted and beaten worse seemingly with the intention of killing the unborn child in the womb.⁷⁰

Even worse, there are many accounts of soldiers abusing young girls, some as young as seven or eight years old.⁷¹ In the Bangladesh refugee camp an eight-year-old girl detailed her attack by soldiers in Myanmar.⁷² With her mother by her side she explains the pain of the experience and the tears she shed.⁷³ Another young survivor, a fifteen-year-old girl, explained how the soldiers came for her and that a few weeks later she learned she was pregnant.⁷⁴ Since it was only a few weeks into the pregnancy, she had an opportunity to have a safe and legal abortion and she did not hesitate to get one.⁷⁵ She explained having no choice because as a young, unmarried girl, if she had kept the child she would have never found a husband and would have been considered “tarnished goods.”⁷⁶

⁶⁸ Hannah Beech, *I'm Struggling to Survive: For Rohingya Women, Abuse Continues in Camps*, N.Y. Times (December 23, 2017), <https://www.nytimes.com/2017/12/23/world/asia/rohingya-women-abuse-myanmar.html> (last visited March 29, 2020).

⁶⁹ *Id.*

⁷⁰ United Nations, Human Rights Council, Report of the Human Rights Council on its thirty-ninth session, A/39/2 (23 November 2018), available from <https://www.ohchr.org/EN/hrbodies/hrc/regularsessions/session39/pages/39regularsession.aspx> One survivor's horrific account of abuse at the hands of the soldiers: “I was eight months pregnant. They stamped and kicked my stomach with their boots, and then stripped me naked. I recognised some of the [soldiers] from the local camp. I was blindfolded and hung by my wrists from a tree. I was raped nine times, both anally and vaginally. I counted all of them. Whilst they were raping me, they bit me on my breasts and neck. They left me tied to the tree. My mother found me in the evening. My unborn baby died.”

⁷¹ *See supra* note 51. *See also supra* note 65.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Julie Zaugg, *Tiny reminders of rape: Rohingya mothers cradle the unwanted*, CNN (August 24, 2018) <https://www.cnn.com/2018/08/24/asia/rohingya-rape-survivors-babies-intl/index.html> (last visited March 29, 2020).

⁷⁵ *Id.*

⁷⁶ *Id.*

There is a deep stigma surrounding rape victims in the conservative Rohingya-Muslim community where many survivors are blamed and shamed for their rapes and not avoiding them.⁷⁷ Rohingya rape survivors are often abandoned by their husbands once they find out about the rape.⁷⁸ These women are subject to increased risk of gender-based violence as the settlements could be a dangerous place for women without a husband to protect them.⁷⁹ Additionally, “once victims of sexual violence reach the camps, they are particularly susceptible to the sex trade because they are seen by their families as damaged goods.”⁸⁰ The women and girls in the refugee camps who have not been abandoned are often forced to dress in full burqa in an effort to be targeted less by rapists.⁸¹

Many of the women raped by the soldiers do not find out that they are pregnant until they are past the point when they can legally receive abortions in Bangladesh.⁸² This doesn’t deter some women from trying to undergo the procedure, it just causes them to turn to medically-untrained people who offer to perform the illegal abortions.⁸³ Many Rohingya refugees in Bangladesh take “abortifacient potions” that are created by the locals but toxic not only to the fetus but the mother as well.⁸⁴ Some women carry out the pregnancy without telling anyone out of fear they will be shamed or rejected by their families.⁸⁵ Some of these women will risk giving birth alone and later abandoning the newborn children.⁸⁶ Aid agencies report rumors in the Bangladesh camps that

⁷⁷ *Id.*

⁷⁸ Helen Nianias, ‘*Our men are leaving us*’: the Rohingya women facing life alone, *The Guardian* (June 28, 2018), <https://www.theguardian.com/global-development/2018/jun/28/our-men-are-leaving-us-the-rohingya-women-facing-life-alone> (last visited March 29, 2020).

⁷⁹ *Id.*

⁸⁰ *See supra* note 63.

⁸¹ *Id.*

⁸² *See supra* note 60.

⁸³ *Id.*

⁸⁴ *See supra* note 65.

⁸⁵ Kaamil Ahmed, *Nine months on, a race against time to find pregnant Rohingya rape survivors*, *The New Humanitarian* (April 16, 2018), <https://www.thenewhumanitarian.org/feature/2018/04/16/nine-months-race-against-time-find-pregnant-rohingya-rape-survivors> (last visited March 29, 2020).

⁸⁶ *Id.*

unwanted babies are being sold to traffickers.⁸⁷ The agencies have tried to set up a foster family system where babies will remain within the Rohingya community but “there have been cases of stolen babies sent over the border to West Bengal and sold to Indian or foreign couples wanting to adopt.”⁸⁸

These accounts of abuse are common among the Rohingya women and girls who have survived and fled to neighboring countries for their lives.⁸⁹ But some reports indicate that the sexual abuse and violence are not just endured by women and girls but men and boys as well.⁹⁰ The Human Rights Council reported that men and boys were subject to “rape, genital mutilation, and sexualized torture, sometimes leading to death.”⁹¹ The extent of the sexual violence committed on Rohingya men and boys is unknown as the Rohingya community is heavily influenced by conservative religious and patriarchal ideologies that prevent survivors from speaking up about their attacks.⁹²

There is a reluctance to accept that sexual violence can be committed on men and aid agencies have struggled to uncover how many men have been victimized, but some have experienced breakthroughs by changing the words used when interviewing these survivors.⁹³ Most refugees claimed to not know of male sexual violence survivors when the terms “sexual” or “rape” were used, however, when asked about “torture” on male “private parts” they answered affirmatively.⁹⁴ Further, when questioned about treating Rohingya men, non-profit workers in

⁸⁷ See *supra* note 69.

⁸⁸ *Id.*

⁸⁹ See *supra* note 63.

⁹⁰ See *supra* note 64.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Verena Holzl, *Male rape survivors go uncounted in Rohingya camps*, The New Humanitarian (September 4, 2019) <https://www.thenewhumanitarian.org/news-feature/2019/09/04/Rohingya-men-raped-Myanmar-Bangladesh-refugee-camps-GBV> (last visited March 30, 2020).

⁹⁴ *Id.*

Bangladesh denied treating sexual violence survivors but when asked “if they had treated men with genital trauma, the answer was: ‘Yes, of course’”⁹⁵

While driving 700,000 Rohingya out of Myanmar, the military placed land mines along the path from Rakhine to Bangladesh, in an effort to ensure that the Rohingya refugees do not return to Myanmar.⁹⁶ Unfortunately some of these land mines were detonated, killing or seriously injuring Rohingya as they fled the nation to escape persecution at the hand of the Burmese military.⁹⁷ The government took additional steps of ensuring the Rohingya do not return by erecting a fence along the border of Myanmar and Bangladesh.⁹⁸ To make the fence more threatening, sharpened sticks pointing towards Bangladesh from where the refugees would be returning to Myanmar were added to the structure to discourage any thoughts of attempting to bypass the fence.⁹⁹

B. The history of sexual violence classified as a component of genocide

The Burmese military’s use of sexual violence as a strategy of war and genocide is not the first time the world has seen this tactic. Some countries have already been reported, criticized, and ultimately brought to justice for this tactic such as Bosnia-Herzegovina and Rwanda.¹⁰⁰ “Sexual violence may be defined as sexual activity that manifests aggression or causes physical or psychological damage.”¹⁰¹ Sexual violence, while historically viewed as a conqueror’s reward, has been used increasingly as a strategy of conquering groups of people

⁹⁵ *Id.*

⁹⁶ *See supra* note 65.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Allison Ruby Reid-Cunningham, “Rape as a Weapon of Genocide.” *Genocide Studies and Prevention* 3, 3 (December 2008): 279–296.

¹⁰¹ *Id.*

because of its ability to destroy individuals, families, and communities at large.¹⁰² The UN Security Council has released numerous resolutions relating to the protection of civilian women and girls against sexual violence during times of conflict.¹⁰³ Security Council Resolution 1820 deemed sexual violence as a strategy of genocide as it can result in damage to the reproductive abilities of the women and can be seen as a method of “ethnically cleansing” the women and future generations of the group.¹⁰⁴ “Women are singled out as principal targets for the most effective destruction of a culture because of the centrality of their social roles in the family and community.”¹⁰⁵ “The humiliation, pain and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part.”¹⁰⁶

In Rwanda, the genocide against the Tutsi people was incited through extremist propaganda that used dangerous rhetoric to instill fears in the Hutu community that the Tutsi would “infiltrate and control” them by means of the Tutsi women’s sexuality.¹⁰⁷ The Tutsi women were brutally attacked by the soldiers of the Interahamwe militia.¹⁰⁸ The women suffered sexual violence on many levels: rape, gang rape, rape with objects such as gun barrels or sharpened sticks, sexual slavery¹⁰⁹, or sexual mutilation¹¹⁰ Most women were killed following

¹⁰² *Id.* at 280.

¹⁰³ *Id.* See also *Sexual Violence in Conflict* <https://www.un.org/sexualviolenceinconflict/digital-library/resolutions/> (last visited March 30, 2020) (listing resolutions 1325, 1820, 1888, 1960, 2106, 2242, 2331, 2467 aimed at protecting women from sexual violence during conflicts).

¹⁰⁴ See *supra* note 95 at 281.

¹⁰⁵ *Id.* at 282.

¹⁰⁶ Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, Human Rights Watch (September 1996) <https://www.hrw.org/reports/1996/Rwanda.htm> (last visited March 30, 2020).

¹⁰⁷ See *supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Sexual slavery included collective slavery or individual slavery called forced “marriage.” The latter refers to when a woman is taken as a sexual slave for a period of time. Some forced marriages lasted a few days while others lasted the duration of the genocide. Still, some forced marriages persisted after the conclusion of the genocide.

¹¹⁰ *Id.* Rapists would sometimes mutilate the woman’s genitalia after raping her. Sexual mutilation “of the vagina and pelvic area” was performed using “machetes, knives, sticks, boiling water, and in one case, acid.”

the vicious attacks but others were spared, often being told that they were “already killed” and that they “will die of sadness.”¹¹¹ After escaping the hands of their attackers, the survivors often were found and captured by another group Interahamwe militiamen for the cycle of abuse to begin once again.¹¹² The majority of Tutsi women survivors do not speak publicly of their experiences being brutalized by the Interahamwe militia because of the stigma associated with sexual assault in Rwanda and the fear of being shunned by their families.¹¹³ The systematic rape committed against the Tutsi women in Rwanda left the community struggling with many women suffering from HIV and other sexually transmitted infections.¹¹⁴ Some women were left with more than just scars from the attacks, they became pregnant as a result.¹¹⁵ Many women obtained abortions, some requiring medical treatment after the poorly performed procedures.¹¹⁶ Yet others carried the pregnancies to term and either accepted the children or considered them “children of hate” and abused them.¹¹⁷

Many survivors never received justice and continued to see some of the men around town daily who committed these atrocious acts of violence against them.¹¹⁸ “The U.N. International Criminal Tribunal for Rwanda found former mayor, Jean-Paul Akayesu, guilty of nine counts of genocide, crimes against humanity and war crimes.”¹¹⁹ This verdict made history as it was the

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime*, Human Rights Watch (September 2, 1998) <https://www.hrw.org/news/1998/09/02/human-rights-watch-applauds-rwanda-rape-verdict#> (last viewed March 30, 2020).

first international conviction for genocide, the first international punishment for sexual violence, and “the first time that rape was found to be an act of genocide to destroy a group.”¹²⁰

In the former Yugoslavia, up to 60,000 women were raped during campaigns of ethnic cleansing and genocide.¹²¹ The soldiers detained women of reproductive age in rape camps and took turns raping the women with the intention of getting all of them pregnant.¹²² One survivor shares her experiences detained and abused by the soldiers who yelled at them saying, “now you are going to have [their (the soldiers’)] children.”¹²³ The women were brutally raped repeatedly for almost a month and the only women spared were pregnant or had recently given birth as they could not become pregnant with the soldiers’ children.¹²⁴ Some of the younger women who the Serbian gunmen found particularly attractive were taken from the gymnasium where they were being detained and never seen again.¹²⁵ The survivor explained how most women understood that the girls were taken to a brothel and forced into prostitution.¹²⁶ The soldiers often sold women and girls as young as twelve years old to other soldiers.¹²⁷ The ICC’s Prosecution charged three Serbian men “whose individual brutality in their home town had made possible the wider project of ethnic cleansing.”¹²⁸ The landmark case was a success for the survivors as the international war crimes tribunal at the Hague administered justice and held each of the men

¹²⁰ *Id.*

¹²¹ Larissa Peltola, *Rape as a Weapon of War and Genocide: An Examination of its Historical and Contemporary Tactical Uses, Effects on Victims and Societies and Psychological Explanations*, <https://www.cmc.edu/sites/default/files/humanrights/Rape%20as%20a%20tool%20of%20war.pdf> (last visited March 30, 2020).

¹²² Robert Fisk, *Bosnia War Crimes: ‘The rapes went on day and night’: Robert Fisk in Mostar, gathers detailed evidence of the systemic sexual assaults on Muslim women by Serbian ‘White Eagle’ gunmen*, Independent (February 8, 1993) <https://www.independent.co.uk/news/world/europe/bosnia-war-crimes-the-rapes-went-on-day-and-night-robert-fisk-in-mostar-gathers-detailed-evidence-of-1471656.html> (last visited March 30, 2020).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See supra* note 51.

¹²⁸ *Id.*

guilty and sentenced them to prison.¹²⁹ This was the ICC's "first trial dealing exclusively with sexual violence."¹³⁰

The atrocities committed by the Burmese military draw stark similarities with those committed in Rwanda and the former Yugoslavia. The unfortunate and disconcerting reality, however, is that the only difference between the crimes committed in Myanmar and those committed in Rwanda and the former Yugoslavia is that no one has been held accountable for the barbarity inflicted on the Rohingya people in Myanmar while the perpetrators in the latter countries have been brought to justice.

IV. ANALYSIS: THE ROHINGYA CRISIS IS A GENOCIDE AND THE CLASSIFICATION MAKES A DIFFERENCE

The striking resemblance between the sexual violence committed against the Rohingya women and the women of Yugoslavia and Rwanda mandates that justice be delivered for the Rohingya women. To commit genocide, a party must attempt to destroy in whole or in part a group. The Myanmar military meets that requirement through their rounding up men, women, and children before publicly killing the men and brutally raping the women in front of their families. These attacks fall under two of the potential methods of carrying out genocide: (1) killing members of the group and (2) Causing serious bodily or mental harm to members of the group.

Further, the soldiers' attacking pregnant women, severely beating them specifically targeting their stomachs before raping them could qualify as a measure imposed to prevent births within the community. Many Rohingya women miscarried immediately after these attacks or gave birth to stillborn children. The injuries sustained by the Rohingya survivors were similar to those

¹²⁹ Marlise Simons, *3 Serbs Convicted in Wartime Rapes*, N.Y. Times (February 23, 2001) [nytimes.com/2001/02/23/world/3-serbs-convicted-in-wartime-rapes.html](https://www.nytimes.com/2001/02/23/world/3-serbs-convicted-in-wartime-rapes.html) (last visited March 30, 2020).

¹³⁰ *Id.*

of the Rwandan survivors. These injuries could prevent the women from having children in the future if they ever wanted to again after such traumatizing abuse. Families were destroyed following the sexual violence against the Rohingya women. The destruction of the familial structure following the rape of Rohingya women can also be seen as a measure designed to prevent births. If the husbands had been killed or abandoned their wives because they blame her for the rape, the sexual violence strategy of genocide has accomplished its goal of preventing births within the community thereby aiding in the group's extermination.

Since the first violence erupted in the Rakhine State between the Buddhist majority and the Rohingya people, the Myanmar government has denied any allegations of human rights violations and supported the military. The government has repeatedly claimed that no Rohingya civilians have been killed or raped. Further, the government remains firm in its position that the military actions taken were only against the Arakan Army terrorists who committed the attacks on the military and police posts throughout the country. Despite numerous refugee accounts of murder, torture, rape, and pillaging by the military, the government continues to deny these allegations saying these accounts are exaggerated and that the Rohingya had burned their own villages to the ground before fleeing the country.

In March 2017, the U.N. Human Rights Council ("UNHRC") proposed a resolution on the human rights violations committed in Myanmar.¹³¹ Part of this resolution was the establishment of an independent international fact-finding mission ("FFM") to investigate the accusations of human rights violations by the Burmese military against the Rohingya people in the Rakhine State of Myanmar.¹³² The resolution also mandated the Myanmar government's cooperation with the

¹³¹ J Int Criminal Justice (2018) 16 (1): 93

¹³² *Id.*

FFM and the Special Rapporteur, which had been established in the nation since 1992.¹³³ Aung San Suu Kyi opposed the UNHRC’s investigation blaming it for inciting “greater hostility between the different communities”¹³⁴ The country further showed their refusal to cooperate with the UNHRC by denying entry visas to the members of the FFM.¹³⁵

Following the UN’s investigation, the Myanmar government began its own investigations into the situation in the Rakhine State.¹³⁶ Published in August 2017, the first report prepared by the Investigation Commission for Maungdaw rejected many of the accusations of human rights violations against the military.¹³⁷ A few weeks later a second report from the Advisory Commission on Rakhine State was released.¹³⁸ This second report only addressed recommendations for how to promote “prospects for peace, justice and development in Rakhine State.”¹³⁹

The FFM Chair, Marzuki Darusman, addressed the UNHRC during which he claimed that the FFM has found “a grave humanitarian crisis underway . . .” in Myanmar that required “urgent attention.”¹⁴⁰ In a report published on August 27, 2018, the FFM called for the investigation and prosecution of the top military generals in Myanmar’s military.¹⁴¹ The report detailed its finding of gross human rights violations that it considered to “undoubtedly amount to the gravest crimes under international law.”¹⁴² The FFM found crimes against humanity committed throughout the nation, however, the most severe persecution was committed in the Rakhine State where the crimes

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* See also <http://www.rakhinecommission.org/mandate-of-the-commission/> Website created by the Advisory Commission on Rakhine State to provide information about its mission and findings.

¹³⁹ *Id.*

¹⁴⁰ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22099&LangID=E>

¹⁴¹ <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475&LangID=E>

¹⁴² *Id.*

could be viewed as an effort of extermination.¹⁴³ Highlighted in the report was the severity and prevalence of sexual violence towards women and girls as one of the indicators that the military was trying to eradicate the Rohingya.¹⁴⁴ The report mentions the disregard for human life shown by the Myanmar government through its consistent denial of the allegations against the military.¹⁴⁵

The FFM found that a long history of systemic oppression led to the attacks by the Arakan Army and that the response by the Burmese military was significantly disproportionate.¹⁴⁶ “The security forces’ response to the [Arakan Army] attacks in August 2017 started within hours, ‘was immediate, brutal and grossly disproportionate,’ suggesting ‘a level of preplanning and design’ consistent with Commander-in-Chief Min Aung Hlaing’s stated vision to finish ‘the unfinished job’ of solving ‘the long-standing Bengali problem.’”¹⁴⁷ The Mission found that in the beginning of August 2017, there was an increased military presence in the Rakhine State evidencing the alleged preplanning.¹⁴⁸ It is striking that the FFM was able to uncover these atrocities and release a 440-page report of these findings without ever having been granted access to Myanmar.¹⁴⁹

On November 11, 2019, Gambia filed a suit against Myanmar in the International Court of Justice (“ICJ”) alleging violations of the Genocide Convention.¹⁵⁰ A number of other countries have called for Myanmar’s prosecution for genocide against the Rohingya people, including Canada, Bangladesh, Nigeria, Turkey, France, and Malaysia.¹⁵¹ The nations met to discuss the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See supra* note 10.

¹⁵¹ *Id.*

implications of this suit and potential redress for the victims of the abuses.¹⁵² The ICJ has jurisdiction over disputes between nations, not over individual perpetrators of international crimes.

In January 2020, the ICJ issued an order that the Myanmar government must take all precautions to prevent genocide being committed on the Rohingya people.¹⁵³ However, the issue lies within the ICJ's considering the Rohingya people "at serious risk of genocide."¹⁵⁴ The Rohingya people have already endured genocide, they have fled their homeland after suffering persecution and abuse for decades. While the order is an important step towards obtaining justice for the Rohingya people, it falls short of that goal. If it works, the order may facilitate a way for the Rohingya people to return safely to their homeland, the Rakhine State of Myanmar, however, there is serious risk that this won't work. The Myanmar government has already denied any allegations of wrongdoing and it is unlikely that this order will change their behavior in any significant way.

Another issue that has stood in the way of rectifying the plight of the Rohingya and labeling it a genocide has been China and Russia's support of the Myanmar government.¹⁵⁵ This ally relationship seemingly follows agreements between China and Myanmar to extend China's "21st century silk road" through Myanmar.¹⁵⁶ A look into the history of the two nations shows a contentious relationship filled with distrust of China's economic influence over the smaller nation.¹⁵⁷ After the violence in the Rakhine State that forced over 730,000 Rohingya people into

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ David J. Scheffer, *Why the ICJ Is Trying to Protect Myanmar's Rohingya*, Council on Foreign Relations (January 24, 2020) <https://www.cfr.org/article/why-icj-trying-protect-myanmars-rohingya> (last visited April 30, 2020).

¹⁵⁵ Abrar Aowsaf, *Will China still prevent UN action against Myanmar?*, The Business Standard (January 24, 2020) <https://tbsnews.net/analysis/will-china-still-prevent-un-action-against-myanmar-38991> (last visited April 30, 2020).

¹⁵⁶ Thu Thu Aung & Poppy McPherson, *Myanmar, China ink deals to accelerate Belt and Road as Xi courts an isolated Suu Kyi*, Reuters (January 18, 2020) <https://www.reuters.com/article/us-myanmar-china/myanmar-china-ink-deals-to-accelerate-belt-and-road-as-xi-courts-an-isolated-suu-kyi-idUSKBN1ZH054> (last visited April 30, 2020).

¹⁵⁷ *Id.*

Bangladesh, Myanmar government has been criticized for its participation and complacency in the attacks.¹⁵⁸ China began to defend Myanmar at the U.N. Security Council and became “the biggest obstacle to a prosecution of its leaders at an international war crimes tribunal.”¹⁵⁹

There is potential that Chinese influence in Myanmar could facilitate peacemaking between the Arakan Army and the Myanmar military as Chinese diplomats may act as intermediaries between the two groups. Though, this potential positive result must not be overshadowed by China’s shielding the military from accountability.¹⁶⁰ China has thus far protected the Myanmar government and military from being brought to justice for their crimes against the Rohingya people and until Myanmar is forced to acknowledge the crimes committed against the Rohingya and held accountable, there could not truly be peace in the Rakhine State.

The individuals who lead the Myanmar military should be held responsible for the horrors they inflicted upon the Rohingya people. Additionally, those in the Myanmar government who had a position of power that could have ended the suffering but willingly chose to ignore it should likewise be held accountable for their inaction. The best way to bring these individuals to justice in an international forum would be through prosecution by the ICC.

The ICC has faced a jurisdictional challenge in trying to rectify the ongoing crisis and genocide in Myanmar, as Myanmar is not a Party to the Rome Statute and therefore the Court was unsure whether it had jurisdiction over the crimes committed against the Rohingya people.¹⁶¹ Upon reviewing the facts and circumstances, the ICC found it had jurisdiction over Myanmar for “the

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Andrew Nachevson, *China’s Xi turns to Myanmar as he pushes for ‘Belt and Road’ plan*, Aljazeera (January 16, 2020) <https://www.aljazeera.com/news/2020/01/china-xi-turns-myanmar-push-belt-road-plan-200116235227905.html> (last visited April 30, 2020).

¹⁶¹ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>

crime against humanity of deportation across the Myanmar-Bangladesh border . . .” since Bangladesh is a State Party after ratifying the Rome Statute in 2010.¹⁶² “The ICC prosecutor, Fatou Bensouda, has sought to open an investigation for the crime against humanity of deportation and possibly other offenses, but a broader investigation would need a referral by the UN Security Council.”¹⁶³

V. CONCLUSION

In conclusion, the ICJ should investigate and resolve the claim of genocide on the Rohingya people brought by Gambia against Myanmar on behalf of the Organization for Islamic Cooperation. This will force Myanmar to acknowledge the pain and suffering inflicted upon the Rohingya people, especially the women, by the military. Further, the UN Security Council should refer Myanmar for a broader investigation into the crimes committed in the Rakhine State. The ICC’s Prosecution should charge the leaders of the Myanmar military who have committed genocide by orchestrating this brutal, extermination effort using sexual violence against the Rohingya as well as the top government officials who have been complacent in bringing justice to the Rohingya people. These perpetrators of genocide need to be held accountable for their actions that caused such immense suffering among the Rohingya people for decades that will be felt for generations to come.

¹⁶² *Id.*

¹⁶³ *Id.*