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Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis

RAJIKA L. SHAH*

I. INTRODUCTION

Beginning in August 2017, hundreds of thousands of Rohingya Muslims, an ethnic and religious minority in Rakhine state of Myanmar (Burma),¹ fled their homes for refugee camps in neighboring Bangladesh.² The proximate cause of the sharp increase in displacements was the Burmese response to an August 25, 2017 attack by Rohingya militants (the Arakan Rohingya Salvation Army or “ARSA”) on police posts and a military base located in the northern part of Rakhine state, which resulted in several deaths.³ In the swift and brutal response that followed, “security forces supported by Buddhist militia launched a ‘clearance operation’” that forced upwards of 300,000 to flee within only a few weeks.⁴ As of February 2018, the number of Rohingya refugees in

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1. Though “Myanmar” is the official name of the country as declared by the ruling military junta in 1989, and continued use of the word “Burma” after that date was sometimes used in an expression of solidarity with those protesting against the junta, many people in the country use both. See, e.g., J.F., *Should You Say Myanmar or Burma?*, *The Economist*, (Dec. 20, 2016), <https://www.economist.com/blogs/economist-explains/2016/12/economist-explains-19>. The distinction between the two written words is largely a function of the transliteration into a Roman script and, in recent years, has lost much of its meaning. See *id.* Accordingly, this article refers to both Myanmar and Burma interchangeably. No particular meaning or import is intended with respect to the use of one or another, and none should be implied or construed.

2. See Austin Ramzy, *270,000 Rohingya Have Fled Myanmar*, *U.N. Says*, *N.Y. TIMES*, (Sept. 8, 2017), <https://nyti.ms/2xhknSD>.

3. *Id.*

4. *Id.*; see also Rebecca Ratcliffe, *Who Are the Rohingya and What Is Happening in Myanmar*, *THE GUARDIAN*, (Sept. 11, 2017), <https://www.theguardian.com/global-development/2017/sep/06/who-are-the-rohingya-and-what-is-happening-in-myanmar>.

Bangladesh was estimated to be at least 700,000 out of the approximately one million Rohingya who had been living in Myanmar.⁵

Numerous outlets reported widespread and severe atrocities committed by Myanmar government forces, in particular from August through November 2017, which included large-scale coordinated attacks on Rohingya villages characterized by “massacres, widespread rape, arbitrary detention, and mass arson.”⁶ There were reports of landmines laid near the Burmese-Bangladeshi border by Burmese military,⁷ shootings of Rohingya civilians as they fled,⁸ and the alleged bulldozing of mass graves in a “deliberate attempt by the authorities to destroy evidence of potential international crimes, including possible crimes against humanity.”⁹

Also surprising to many was the conspicuous lack of strong leadership from the head of Myanmar’s civilian government, noted democracy activist and Nobel Peace Prize winner Aung San Suu Kyi. As the face of more than twenty years of Burmese resistance to the hardline military junta, many expected that Suu Kyi—who previously endured imprisonment under house arrest, forced exile, and years of separation from her husband and son in furtherance of her cause—would be a vocal supporter of minority rights and the rule of law in Burma. Instead, it appeared that she was “fearful of the military and reluctant to confront the human rights crisis unfolding in her own country.”¹⁰ In her first public remarks on the issue, Suu Kyi did not offer the strong denunciation many had hoped for, but rather downplayed the extent and seriousness of the violence, perhaps as a calculated response to domestic political pressures—the Burmese military still wields “considerable political and economic power” and some experts believe it is the military, acting

5. Ramzy, *supra* note 2; *see also* Hannah Beech, *Will the Rohingya Ever Return Home?* N.Y. TIMES, (Feb. 15, 2018), <https://nyti.ms/2C2zEsw>.

6. HUMAN RIGHTS WATCH, WORLD REPORT 2018: EVENTS OF 2017 100 (2018); *see also* Ramzy, *supra* note 2.

7. *See* HUMAN RIGHTS WATCH, *supra* note 6, at 100.

8. *See* Zeid Ra’ad Al Hussein, High Comm’r for Human Rights, U.N. Human Rights Council, Opening Statement before 36th Session (Sept. 11, 2017) [hereinafter Al Hussein Opening Statement].

9. Stephanie Nebehay & Simon Lewis, ‘Acts of Genocide’ Suspected Against Rohingya in Myanmar: UN, REUTERS, (Mar. 7, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-rights/acts-of-genocide-suspected-against-rohingya-in-myanmar-u-n-idUSKCN1GJ163> (quoting U.N. High Commissioner for Human Rights, Zeid Ra’ad Al Hussein).

10. *See* James Griffiths, *Has the Rohingya Crisis ‘Changed’ Myanmar’s Aung San Suu Kyi?*, CNN, (Jan. 26, 2018), <https://www.cnn.com/2018/01/26/asia/aung-san-suu-kyi-myanmar-rohingya-intl/index.html>.

without civilian oversight, that is primarily to blame.¹¹ Nevertheless, in recent months, numerous groups and institutions rescinded previous honors they had awarded Suu Kyi, and many felt she should be stripped of her Nobel prize.¹² Suu Kyi has approached the Association of Southeast Asian Nations (“ASEAN”) for humanitarian and capacity-building assistance with respect to the situation in Rakhine.¹³

The shocking reports prompted U.N. High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, to call for the situation to be referred to the International Criminal Court (“ICC”) for investigation and potential prosecution.¹⁴ He previously cited the reported “killings, rape, torture and abductions by the security forces and local militia, as well as apparently deliberate attempts to force the Rohingya to leave the area through starvation, with officials blocking their access to crops and food supplies,” in support of his statement that “acts of genocide” may well have been committed.¹⁵ As early as September 2017, even while the events were still unfolding, Mr. Al Hussein termed the atrocities in Rakhine a “textbook example of ethnic cleansing.”¹⁶ The ICC Prosecutor apparently agreed; on April 9, 2018, she filed a request for a ruling on jurisdiction with the President of the Pre-Trial division of the Court, on the basis that she had reviewed “[c]onsistent and credible public reports” of intentional deportations of Rohingya across Myanmar’s international border with Bangladesh (as well as multiple other potential crimes).¹⁷

11. See, e.g., Rebecca Wright, Katie Hunt & Joshua Berlinger, *Aung San Suu Kyi Breaks Silence on Rohingya, Sparks Storm of Criticism*, CNN, (Sept. 19, 2017), <https://www.cnn.com/2017/09/18/asia/aung-san-suu-kyi-speech-rohingya/index.html>; see also Remarks of Simon Billenness and Priscilla A. Clapp, Teleconference on The Plight of the Rohingya, sponsored by the Pacific Council on International Policy (Feb. 7, 2018) (recording available at <https://www.pacificcouncil.org/activities/plight-rohingya>).

12. See, e.g., *U.S. Holocaust Museum Rescinds Award to Myanmar’s Suu Kyi*, REUTERS, (Mar. 7, 2018) <https://www.reuters.com/article/us-usa-myanmar-award/u-s-holocaust-museum-rescinds-award-to-myanmars-suu-kyi-idUSKCN1GJ2U0>.

13. See Ben Doherty, *Aung San Suu Kyi Asks Australia and Asean for Help with Rohingya Crisis*, THE GUARDIAN, (Mar. 18, 2018), <https://www.theguardian.com/world/2018/mar/18/aung-san-suu-kyi-asks-australia-and-asean-for-help-with-rohingya-crisis>.

14. See Tom Miles & Stephanie Nebehay, *U.N. Rights Boss Wants Allegations of Crimes against Rohingya Referred to ICC*, REUTERS, (Mar. 9, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-rights-boss-wants-allegations-of-crimes-against-rohingya-referred-to-icc-idUSKCN1GL12B>.

15. Nebehay & Lewis, *supra* note 9.

16. Al Hussein Opening Statement, *supra* note 8, at 2.

17. See Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1 (Apr. 9, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF [hereinafter “ICC Prosecution Request”]; see also Reuters, *‘Hallmarks of Genocide’: ICC Prosecutor Seeks Justice for Rohingya*, THE GUARDIAN, (Apr. 10, 2018), <https://www.theguardian.com/world/2018/apr/10/rohingya-crisis-icc-prosecutor-seeks-power-to-investigate-crimes-against-humanity>. In the ICC Prosecutor’s view, sufficient evidence existed of deportation

Although more is now known about the events of autumn 2017 than reporters and investigators were able to learn contemporaneously, the Myanmar government denies any wrongdoing and has said it would like to see “clear evidence” of ethnic cleansing or genocide, in light of its claim that “[t]he vast majority of the Muslim community that was living in Rakhine remains.”¹⁸

In light of the global attention the situation has received, this short piece will examine, based on public reporting to date (April 2018), whether the acts allegedly committed rise to the level of international crimes; namely, crimes against humanity, genocide, and war crimes. An important part of this discussion is the distinction in international law between ethnic cleansing—the term most commonly applied to the events in Rakhine in autumn 2017—and genocide. Much more evidence and information is needed in order to conduct a thorough legal analysis, and no official investigation has even begun.¹⁹ Thus, though necessarily preliminary, generalized, and subject to changing facts as they are discovered, this piece will hopefully shed some light on potential international criminal law violations and implications arising from these atrocities.

II. ROOTS OF THE CONFLICT

Violence and atrocities in Rakhine state are not new. Conflict in Rakhine has been simmering for decades, if not longer, with roots in

as a crime against humanity that she considered it prudent to seek a ruling on the Court’s territorial jurisdiction before proceeding further. *See* ICC Prosecutor Request, ¶¶ 3, 7-11 and accompanying text. Myanmar has not ratified the Rome Statute of the ICC, and thus the question arises as to whether the ICC has territorial jurisdiction. *See* Rome Statute of the International Criminal Court, art. 12(2)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter “Rome Statute”] (stating in relevant part that “the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court: (a) The State on the territory of which the conduct in question occurred”). Because one of the elements of the crime of deportation is the forced crossing of an international border, the Prosecutor argued that the crime is completed only when the forced crossing occurs; since that necessarily took place on the territory of Bangladesh, which is a State Party to the Rome Statute, territorial jurisdiction was thus established. *See* ICC Prosecutor Request, ¶¶ 13-14, 28-29. Alternatively, the ICC may exercise jurisdiction over any crime occurring in Myanmar if the situation is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. *See* Rome Statute, art. 13(b).

18. *See* Tom Miles, *Myanmar Says It Would Like to See ‘Clear Evidence’ of Genocide*, REUTERS, (Mar. 8, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-rights/myanmar-says-it-would-like-to-see-clear-evidence-of-genocide-idUSKCN1GK2JH>.

19. *See Security Council Urges Conditions That Allow Safe Return of Rohingya Refugees*, UN NEWS, (May 1, 2018), <https://news.un.org/en/story/2018/05/1008692> (noting that UN Security Council members, following a recent visit to Myanmar to assess the situation firsthand, called for a “proper investigation with evidentiary standards” in order to ensure accountability).

Burma's complex web of ethnic, religious, and territorial identities.²⁰ Rakhine state lies on the northwest coast of Myanmar, directly south of Bangladesh. The Rakhines themselves are an ethnic minority within Burma, though most are Buddhists, like nearly 90 percent of the Burmese population.²¹ The Rohingya are Muslims who claim to be descended from Arab and Persian traders, and speak Bengali like their neighbors in Bangladesh.²² When Burma gained independence from the British in 1948, the Muslims living in Rakhine hoped that Pakistan—of which at that time Bangladesh formed a part, being known as East Pakistan until achieving independence in 1971—would annex their territory, which did not happen.²³ A subsequent Muslim separatist rebellion continued until the 1960s, after which time sporadic violence continued.²⁴

The name “Rohingya” did not acquire political significance until 1982, when the military junta ruling Burma passed the Citizenship Law, restricting citizenship to only eight named groups—including the Rakhine ethnic group, but not the Rakhine Muslims.²⁵ All others, including the Rohingya, lost their citizenship overnight and became stateless.²⁶ Since then, the Rohingya saw their rights steadily eroded, together with an increase in persecution and violence.²⁷ They are seen as illegal immigrants, and have been forced to endure severe limitations on their “freedom of movement, access to medical assistance, [and] education.”²⁸ Muslim leaders in Rakhine increasingly coalesced around the term “Rohingya,” both as a way of defining their identity and in order to bring international attention to their plight.²⁹

Tensions ratcheted up dramatically in 2012, when several Muslim men were accused of having raped a Buddhist woman.³⁰ In the wake of the resulting religious violence, more than 100,000 Rohingya were forced into camps for internally displaced people.³¹ Another 300,000-500,000

20. See Krishnadev Calamur, *The Misunderstood Roots of Burma's Rohingya Crisis*, THE ATLANTIC, (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>.

21. *See id.*

22. *See id.*; Ratcliffe, *supra* note 4.

23. *See* Calamur, *supra* note 20.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. Ratcliffe, *supra* note 4.

29. *See* Calamur, *supra* note 20.

30. *See id.*

31. *See id.*

fled to refugee camps in Bangladesh and throughout Southeast Asia.³² Although the Burmese government eventually offered a reduced form of citizenship, it would have required Muslims in Rakhine to register as Bengalis (ethnically akin to Bangladeshis), rather than Rohingya.³³

Recent years have seen a downward spiral of increased Burmese military and police presence, together with militarism on the part of Rohingya Muslims.³⁴ The Burmese government and many civilians fear the Rohingya's territorial ambitions and are concerned about what they view as the presence of Muslim terrorist groups on Burmese soil, such as ARSA, reportedly linked to Pakistan and Saudi Arabia.³⁵ Humanitarian groups and Western nations, on the other hand, see "the world's most persecuted minority."³⁶ Other nations in the region fear that the instability in Rakhine will threaten regional peace and security. For example, a 2015 report prepared on behalf of the ASEAN Parliamentarians for Human Rights found that:

The longstanding persecution of the Rohingya Muslim minority in Myanmar has led to the highest outflow of asylum seekers by sea since the U.S. war in Vietnam. Human rights violations against Rohingya have resulted in a regional human trafficking epidemic, and there have been further abuses against Rohingya upon their arrival in other Southeast Asian countries.

This protracted culture of abuse threatens Myanmar's political transition, puts strains on regional economies, and supports the rise of extremist ideologies that pose potential security threats throughout the region. Ongoing human rights abuses against Rohingya pose a threat to regional peace and security and must end.

Broader anti-Muslim rhetoric and violence has also flared up in locations across Myanmar in recent years. These incidents, as well as ongoing abuses against ethnic minority groups throughout the country, pose similar risks for Myanmar and the Association of Southeast Asian Nations (ASEAN).³⁷

This difference in perception has made it difficult to find any solution for the Rohingya. An international commission chaired by Kofi

32. See Ramzy, *supra* note 2.

33. See Calamur, *supra* note 20.

34. See *id.*

35. See *id.*

36. *Id.*; see also Nicole Phillips & Sonam Sheth, 'The Most Persecuted Minority in the World': Here's What You Need to Know about the Rohingya Crisis, BUSINESS INSIDER (Sept. 20, 2017), <http://www.businessinsider.com/rohingya-crisis-conflict-explained-myanmar-what-you-need-to-know-2017-9>.

37. ASEAN PARLIAMENTARIANS FOR HUMAN RIGHTS, THE ROHINGYA CRISIS AND THE RISK OF ATROCITIES IN MYANMAR: AN ASEAN CHALLENGE AND CALL TO ACTION (2015).

Annan, former Secretary-General of the United Nations, issued recommendations on August 23, 2017—just before the events leading to the current humanitarian crisis.³⁸ Although Bangladesh and Myanmar have engaged in several rounds of talks regarding the return of Rohingya to Myanmar, little action has been taken by either side to implement a voluntary repatriation scheme agreed upon in November 2017.³⁹ Both sides blame each other for the inaction.⁴⁰ Bangladesh continues to work towards its controversial plan of relegating the Rohingya to an uninhabited offshore island, in part to relieve domestic political and economic pressures resulting from the influx of refugees.⁴¹ Meanwhile, the Myanmar military admits no wrongdoing, and it is not clear that the Rohingya want to return unless they are granted full citizenship rights.⁴² Grim longhouses constructed by the Myanmar government in Rakhine, supposedly to house returning Rohingya, have been compared to concentration camps with their barbed wire fencing, lack of vegetation, and seemingly no place for the Rohingya to grow food or support themselves.⁴³

Thus, as of this writing in April 2018, the situation remains a stalemate—albeit one in which the Rohingya have little choice but to remain in squalid, overcrowded camps on the Bangladeshi border, soon to be facing the muddiness and flooding of monsoon season, with little opportunity for work or adequate food, clothing, or medical care.⁴⁴

III. POTENTIAL INTERNATIONAL CRIMINAL LAW VIOLATIONS

Against this backdrop, it is possible to examine—though based on the limited alleged facts known to date—whether any international crimes, and if so, which ones, may have been committed in the wave of violence that began in Rakhine in late August 2017 (though events occurring prior to that time may also form part of the crimes). There are three main categories of potentially relevant international crimes: genocide, crimes against humanity, and war crimes. Each is discussed below in turn, highlighting particular aspects that are likely to feature in

38. See Calamur, *supra* note 20; see also ADVISORY COMM'N ON RAKHINE STATE, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE (2017).

39. See Beech, *supra* note 5; see also *Security Council Urges Conditions That Allow Safe Return of Rohingya Refugees*, *supra* note 19.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. See Reuters, *Monsoon Floods and Landslides Threaten 100,000 Rohingya Refugees in Bangladesh*, N.Y. TIMES, (Mar. 9, 2018), <https://nyti.ms/2GgQnYI>.

any full-length analysis. “Ethnic cleansing,” as such, is not recognized as a defined international crime, although the line between ethnic cleansing and genocide is indistinct and controversial, and therefore the two concepts will be discussed together.

A. Genocide and Ethnic Cleansing

The crime of genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), as adopted by the United Nations in 1948 and entered into force in 1951. According to this definition, genocide is:

[A]ny 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.⁴⁵

The same definition of genocide appears in the statutes of the International Criminal Tribunal for the former Yugoslavia (“ICTY”),⁴⁶ the International Criminal Tribunal for Rwanda (“ICTR”),⁴⁷ and the ICC.⁴⁸

With respect to the Rohingya, a few issues stand out. The first is the identity of the group. One of the unique features of the crime of genocide is its recognition that the target is not a particular individual, but rather the group *as such*: “the individual victim is ‘a means to an end: a step further along the path of destroying the group.’”⁴⁹ “The victim of the crime of genocide is therefore the group itself and not the individual

45. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277. [hereinafter Genocide Convention]. Although Article III of the Genocide Convention goes on to list five possible modalities for commission of the crime—genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide—this short survey will consider only primary liability for genocide itself. *See id.* art. III.

46. *See* U.N. Security Council, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4, (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

47. *See* U.N. Security Council, Statute of the International Criminal Tribunal for Rwanda, art. 2, (Jan. 31, 2010), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

48. *See* Rome Statute, *supra* note 17, art. 6.

49. CAROLA LINGAAS, DEFINING THE PROTECTED GROUPS OF GENOCIDE THROUGH THE CASE LAW OF INTERNATIONAL COURTS 2 (2015) (citing Int'l Law Comm'n, Draft Code of Crimes, art. 17, Commentary 6, UN Doc. A/51/10 (2016)).

alone.”⁵⁰ The drafters of the Genocide Convention ultimately restricted the definition to only four types of groups: national, ethnic, racial, or religious. The first judgment of an international criminal tribunal finding liability for genocide, *Prosecutor v. Akayesu*,⁵¹ took an objective view of the definitions of each of these four groups. Since then, many sources and commentators have moved toward a more subjective view of group identity for purposes of the crime of genocide, in recognition of the fact that “using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation.”⁵² Thus, the current prevailing view is that the important determining factor is whether the victims are “perceived . . . by their persecutors” as belonging to a particular national, ethnic, racial, or religious group.⁵³ The obvious group identities at play with respect to the Rohingya appear to be ethnic (they speak Bengali and are not ethnically Rakhine), religious (they are Muslims, not Buddhists like the large majority of Burmese people), and national (the Rohingya were targeted for the *removal* of citizenship in Burma’s 1982 Citizenship Law). Most importantly, these are some of the key characteristics for which they appear to have been targeted.

A second question is whether the *actus reus* of genocide, the acts constituting genocide, has been met. Here, with respect to subsection (a) (killing members of the group), there are numerous reports of indiscriminate killings of Rohingya villagers while their villages were being burnt, as they were fleeing the violence, or as the result of landmines laid along the border with Bangladesh, which the Rohingya had to cross in order to reach relative safety.⁵⁴ There are also reports of mass graves.⁵⁵ There cannot be any real dispute that subsection (b) (causing serious bodily or mental harm to members of the group) has also been met—not only as a result of the acts of persecution perpetrated against the Rohingya, but also and perhaps most clearly through the widespread rape of Rohingya women by Burmese soldiers. Rape or “any act of a sexual nature which is committed on a person under circumstances which are coercive . . . [and which] need not be evidenced

50. *Id.*

51. See *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (Sept. 2, 1998).

52. *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, ¶ 70 (Int’l Crim. Trib. of the Former Yugoslavia Dec. 14, 1999).

53. See William Schabas, *Genocide*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 24 (2007).

54. See, e.g., HUMAN RIGHTS WATCH, *supra* note 6, at 100; Ramzy, *supra* note 2.

55. See Nebehay & Lewis, *supra* note 9.

by a show of physical force” may constitute a form of genocide when perpetrated against only individuals of the targeted group.⁵⁶ That is because sexual violence can be “a step in the process of destruction of the [targeted] group—destruction of the spirit, of the will to live, and of life itself.”⁵⁷ Tragically, Rohingya women have described systematic and methodical allegations of rape by Burmese forces acting with total impunity, often by multiple assailants and in the context of larger assaults on Rohingya families and villages.⁵⁸ Finally, subsection (c) (deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part) is demonstrated in the attacks, looting, and arson of Rohingya villages and agricultural areas that forced the Rohingya to flee and leave their possessions behind. Though the Myanmar government has claimed that the Rohingya burned down their own villages, a BBC reporter witnessed firsthand a group of Rakhine Buddhists wielding machetes, swords, and slingshots, who admitted they had just set a Rohingya village on fire with help from the police.⁵⁹

The third, and here most crucial, question in determining whether a genocide was committed involves what is known as *dolus specialis* (special intent), often referred to as aggravated criminal intent: in order for the acts to be considered genocide, they must have been not only intentionally committed, but committed “with intent to destroy, in whole or in part,” the targeted group. The International Court of Justice (“ICJ”) elaborated: “It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required.”⁶⁰ Contrasting genocide with persecution as a crime against humanity, the Court stated that “genocide is an extreme and most inhuman form of persecution . . . [W]hen persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be

56. Akayesu, ICTR-96-4-T, ¶ 688.

57. *Id.* ¶ 732.

58. See, e.g., Kristen Gelineau, *Rohingya Methodically Raped by Myanmar’s Armed Forces*, AP NEWS (Dec. 11, 2017), <https://pulitzercenter.org/reporting/rohingya-methodically-raped-myanmars-armed-forces>. The UN Secretary General, António Guterres, highlighted the prevalence of rape, sexual violence, and forced marriage against the Rohingya in a recent report to the Security Council. See U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, ¶¶ 55-57, U.N. Doc. S/2018/250 (Mar. 23, 2018) [hereinafter “Secretary-General’s Sexual Violence Report”].

59. See Jonathan Head, *BBC Reporter in Rakhine: “A Muslim Village was Burning,”* BBC NEWS (Sept. 7, 2017), <http://www.bbc.com/news/world-asia-41189564>.

60. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, I.C.J. Rep. 2007 ¶ 187 (Feb. 26).

held that such persecution amounts to genocide.”⁶¹ Moreover, “the intent must be to destroy at least a substantial part of the particular group”—a number “significant enough to have an impact on the group as a whole.”⁶² A requirement of substantiality is inherent in “the very nature of the crime of genocide.”⁶³

Whether this special intent exists or can be demonstrated is really the key question in determining whether the Rohingya are victims of genocide. If the intent to destroy, in whole or in part, cannot be shown, there is certainly a fairly clear case of ethnic cleansing: “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”⁶⁴ Though the UN General Assembly has equated the two, and a Special Rapporteur on Extrajudicial Summary or Arbitrary Executions referred to ethnic cleansing as a “euphemism” for genocide,⁶⁵ the ICJ carefully stated, “deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”⁶⁶ While acts described as ethnic cleansing may constitute genocide, a characterization as genocide “depends on the presence or absence of acts listed in Article II of the Genocide Convention, and on the intent to destroy the group as such.”⁶⁷ Thus, it can be said that ethnic cleansing is really about territory and “the establishment of ethnically homogenous lands,” while genocide is about “the physical-biological destruction of an ethnic, racial, or religious group.”⁶⁸

Yet, ethnic cleansing is not considered an international crime in and of itself, and there is some ambiguity in both its definition and application, though it has “been filled with legal meaning.”⁶⁹ The term “ethnic cleansing” first came into use in the early 1990s in the context of the conflict in the Balkans, but since then has been more broadly applied

61. *Id.* ¶ 188 (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)).

62. *Id.* ¶ 198.

63. *Id.*

64. *Id.* ¶ 190 (citing the Interim Report by the United Nations Commission of Experts, ¶ 55, U.N. Doc. S/35374 (1993)).

65. See Robin Geiß, *Ethnic Cleansing*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 26 (2013) (citations omitted).

66. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 60, ¶ 190 at 84.

67. *Id.*

68. Geiß, *supra* note 65, ¶ 30.

69. *Id.* ¶ 36.

to a number of situations around the world.⁷⁰ It has been referenced in multiple UN Security Council and General Assembly resolutions, and was included together with genocide, crimes against humanity, and war crimes within the scope of the responsibility to protect.⁷¹ It is clear that the acts constituting ethnic cleansing—ethnic and/or religious discrimination, forced population transfer, a wide range of “violent and terror-inspiring means that may potentially be used to . . . compel flight or to enforce transfer of the target group” such as arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, forcible removal, displacement and deportation, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property—constitute serious violations of international human rights law, international criminal law, and (if committed in the context of an armed conflict) the law of armed conflict or international humanitarian law.⁷²

In view of these parameters, it seems—at least with the present state of public reporting—that a potential prosecutor would be on solid footing to bring charges based on ethnic cleansing against Myanmar government and security officials for their acts and omissions involving the Rohingya Muslims.⁷³ Charges of genocide are also a possibility if sufficient evidence of the special intent can be demonstrated.

B. Crimes Against Humanity

First mentioned in connection with the acts perpetrated against Armenians by the Ottoman Empire beginning in 1915, crimes against humanity was one of the three categories of crimes prosecuted at the International Military Tribunal (“IMT”) in Nuremberg, Germany, after

70. *Id.* ¶ 1.

71. *Id.* ¶¶ 1, 3. The principle of the responsibility to protect developed in the early 2000s specifically in response to the failure of the international community to prevent atrocities including genocide in the Balkans and Rwanda, as well as the controversial NATO military intervention in Kosovo in 1999 to prevent a humanitarian catastrophe there, which was considered by many to be an unlawful use of force. The principle is enshrined in a number of documents, including the 2005 World Summit Outcome, in which the UN General Assembly adopted language stating that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” G.A. Res. 60/1, ¶¶ 138, 139, 2005 World Summit Outcome (Sept. 16, 2005).

72. *Id.* ¶¶ 5, 9-30; *see also* Schabas, *supra* note 53, ¶ 21.

73. In the international context, such charges would be brought under the heading of crimes against humanity. *See* Schabas, *supra* note 53, ¶ 21 (noting that acts constituting ethnic cleansing which did not meet the definition of genocide “would be condemned as crimes against humanity”).

World War II. It is one of the crimes over which the ICTY—which probably contributed the most to its modern development and understanding—and ICTR had jurisdiction, and it can be prosecuted at the ICC. The fundamental animating idea behind crimes against humanity is that “certain crimes shock the conscience of all nations and of humankind as a whole.”⁷⁴ Even in the context of armed conflict, “some elementary principles of humanity should be adhered to in all circumstances”; when those principles are defied with sufficient gravity, criminal sanctions are warranted.⁷⁵

Unlike genocide, crimes against humanity does not have one single, agreed-upon definition. The IMT Charter listed the following as constitutive elements of the crime:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁷⁶

One of the major contributions of this definition is that it allows prosecution based on acts perpetrated against a state’s own nationals—an innovation in international law that is “closely associated” with the development of international human rights law in the post-war period.⁷⁷ Additionally, it is focused on protection of the civilian population, as opposed to the combatants in an armed conflict.

Since Nuremberg, the general features of crimes against humanity have crystallized into a number of key principles. First, there does not need to be any nexus with an armed conflict. Crimes against humanity may be committed in times of war or in times of peace.⁷⁸ Second, the constitutive crimes “must be committed as part of a widespread *or* systematic attack against the civilian population, that is a large-scale *or* organized attack the primary object of which is a civilian population.”⁷⁹

74. Guido Acquaviva & Fausto Pocar, *Crimes Against Humanity*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1 (2008).

75. *Id.* ¶¶ 1-2.

76. Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

77. See Acquaviva & Pocar, *supra* note 74, ¶ 11.

78. *Id.* at ¶ 13; see also Prosecutor v. Tadić, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 141-42 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

79. See Acquaviva & Pocar, *supra* note 74, ¶ 14 (emphasis added); see also Prosecutor v. Blaškić, IT-95-14, Appeal Judgment, ¶¶ 103-16 (Int’l Crim. Trib. for the Former Yugoslavia July

Thus, not every instance of violence will amount to crimes against humanity; the crimes cannot be isolated and must involve “the commission of multiple acts rising to the same level of gravity as the enumerated inhumane acts.”⁸⁰ Third, unlike genocide, crimes against humanity does not require any special intent. The perpetrator must have knowledge of the attack, though he or she need not share the same purpose.⁸¹

The acts that constitute crimes against humanity have also expanded in recent years and vary somewhat from tribunal to tribunal. In addition to the acts prosecuted at Nuremberg (murder, extermination, enslavement, deportation, persecution, and other inhumane acts), the ICC also recognizes imprisonment or other severe deprivations of physical liberty, such as torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, and apartheid, to be in violation of fundamental rules of international law.⁸² The ICC also expanded the grounds on which persecution may be committed, including “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law.”⁸³

Of these crimes, the three that appear most emblematic of the violence inflicted upon the Rohingya Muslims in the autumn of 2017 are deportation or forcible transfer, persecution, and rape or other sexual violence. In the ICC’s definition, deportation or forcible transfer of population means “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”⁸⁴ The deportations may, but need not, result in the transfer of a population across an international border.⁸⁵ In the case of the Rohingya, the forced displacement of nearly a million people from their homes in Rakhine,

29, 2004) (holding the presence of individual combatants within the civilian population does not change its status); *see also* Prosecutor v. Martić, IT-95-11-A, Appeal Judgment, ¶ 313 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (holding that soldiers who are not capable of taking part in hostilities may also be the target of crimes against humanity).

80. *See* Acquaviva & Pocar, *supra* note 74, ¶ 14; *see also* Blaškić, IT-95-14, ¶¶ 135-39; *see also* Prosecutor v. Kunarac, IT-96-23-A & 96-23-1-A, Appeal Judgment, ¶ 100 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

81. *See, e.g.*, Rome Statute, *supra* note 17, art. 7(1); *see also* Kunarac, IT-96-23-A, ¶ 103.

82. Rome Statute, *supra* note 17, art. 7(1)(a)-(k).

83. *Id.*, art. 7(1)(h).

84. *Id.* art. 7(2)(d).

85. *See* Prosecutor v. Stakić, IT-97-24-A, Appeal Judgment, ¶¶ 276-308 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

both within Myanmar and to Bangladesh and other Southeast Asian nations, even before the events of 2017, has been termed “the highest outflow of asylum seekers by sea since the U.S. war in Vietnam.”⁸⁶ The Rohingya were driven out of their homes and villages *en masse*, forced to flee from widespread arson, murder, torture, and abduction perpetrated by Burmese government security forces and militia in a targeted campaign of violence.⁸⁷

Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁸⁸ It is therefore fundamentally concerned with unlawful discrimination that denies a “fundamental human right laid down in international law,” and as such may be the best means of capturing the phenomenon of ethnic cleansing.⁸⁹ There is a wide range of underlying acts that may constitute persecution (including denial of freedom of movement, denial of employment, denial of the right to judicial process, denial of equal access to public services, and hate speech), as long as the acts are of the same gravity as the other crimes listed as crimes against humanity.⁹⁰ It is not the cruelty of the acts as much as the discriminatory intent that characterizes persecution.⁹¹ As noted by the UN High Commissioner for Human Rights, the situation with respect to the Rohingya—who were singled out for all manner of discriminatory treatment on the basis of their ethnic, linguistic, and religious differences from the majority of Burmese in Rakhine state—“seems a textbook example of ethnic cleansing.”⁹² Widespread rape and other forms of sexual violence have also been major features of the campaign against the Rohingya.⁹³

Thus, though any analysis is necessarily preliminary, based on the reports of alleged acts committed to date, it seems extremely likely that a number of crimes against humanity have been perpetrated against the

86. ASEAN PARLIAMENTARIANS FOR HUMAN RIGHTS, *supra* note 37.

87. See Ratcliffe, *supra* note 4; see also Ramzy, *supra* note 2; see also HUMAN RIGHTS WATCH, *supra* note 6, at 2.

88. Rome Statute, *supra* note 17, art. 7(1).

89. Acquaviva & Pocar, *supra* note 74, ¶ 16; see also Prosecutor v. Krnojelac, IT-97-25-A, Appeal Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003).

90. Acquaviva & Pocar, *supra* note 74, ¶ 16.

91. *Id.*

92. Zeid Ra’ad Al Hussein, High Comm’r for Human Rights, U.N. Human Rights Council, Opening Statement before 36th Session (Sept. 11, 2017) [hereinafter Al Hussein Opening Statement].

93. See, e.g., Kristen Gelineau, *Rohingya Methodically Raped by Myanmar’s Armed Forces*, AP NEWS (Dec. 11, 2017), <https://pulitzercenter.org/reporting/rohingya-methodically-raped-myanmar-armed-forces>; Secretary-General’s Sexual Violence Report, ¶¶ 55-57.

Rohingya—most prominently deportation or forcible transfer, persecution, and numerous forms of rape or other sexual violence.

C. War Crimes

The third major form of international crime is war crimes. A strict interpretation of the term is “any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law.”⁹⁴ Thus, in order to constitute war crimes as an international crime imposing liability on an individual perpetrator, the act or omission must violate the primary rules governing the conduct of war as well as the “secondary rules concerning the punishment of war crimes.”⁹⁵ Though the content of such primary rules may change from time to time, it is generally the case that war crimes encompass grave breaches of the four Geneva Conventions established after World War II (and at least some of the grave breaches identified in Additional Protocol I to the Geneva Conventions), serious violations of customary international law governing armed conflict, including Article 3 common to the Geneva Conventions (“Common Article 3”),⁹⁶ violations of “other general principles and rules of the protection of victims of internal armed conflict,” and breaches of “certain fundamental principles and rules regarding means and methods of combat in civil strife.”⁹⁷

The complicating factor with respect to the Rohingya is the threshold requirement of a nexus with an armed conflict. “[A]cts unconnected to an armed conflict are not considered to be war crimes.”⁹⁸ While the armed conflict need not have caused commission of the crime, it must have “played a substantial part in the perpetrator’s ability to commit it, the manner in which it was committed or the purpose for which it was committed.”⁹⁹

Whether an armed conflict existed in Myanmar at the time the acts were perpetrated against the Rohingya is a complicated factual question.

94. Alexander Schwarz, *War Crimes*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1 (2014).

95. *Id.*, ¶ 2.

96. The text of Article 3 of each of the four Geneva Conventions is identical. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Geneva Convention IV”].

97. Schwarz, *supra* note 94, ¶¶ 9-12.

98. *Id.*, ¶ 23; *see also* Prosecutor v. Mucić, IT-96-21-T, Judgment, ¶ 193 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Semanza, ICTR-97-20-A, Judgment, ¶ 369 (May 20, 2005).

99. Schwarz, *supra* note 94, ¶ 25; *Kunarac*, IT-96-23-A & 96-23-1-A, ¶ 58.

In international law, an armed conflict may be either international (i.e., involving two or more states) or non-international. There was no international armed conflict between Myanmar and another state at issue at the time of the violence perpetrated against the Rohingya. Thus, in order to meet the nexus with armed conflict required for war crimes charges to apply, the relevant acts must have been committed in the context of a non-international conflict.¹⁰⁰

According to Additional Protocol II to the Geneva Conventions, a non-international armed conflict is a conflict between a state's armed forces "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations."¹⁰¹ It does not include "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."¹⁰² Thus, the conflict must have reached a certain level of intensity, and the parties to it—on all sides—must have developed and maintained a certain degree of organizational control, in order to be characterized as a non-international armed conflict.

At least one source has characterized the scale of tensions in Rakhine state as an armed insurgency with a high-level intensity of violence rising to the level of a non-international conflict.¹⁰³ There certainly is some evidence that the ARSA group of Rohingya militants displays the requisite characteristics of organizational command and control, preparation, and military training, with sufficiently large numbers of members, to fall within Additional Protocol II's definition of an organized group—though key international groups such as the International Committee of the Red Cross (ICRC) appear to have remained silent on the question.¹⁰⁴ If that is the case, and the events of autumn 2017 can properly be characterized as one episode in a "sustained and concerted military operation," rather than an "isolated and sporadic act of violence," then it may well be the case that war crimes charges

100. It is now well-established that Common Article 3, at minimum, applies to both international and non-international armed conflicts. *See* Schwarz, *supra* note 94, ¶ 29; *see also* Tadić, IT-94-1-AR72, ¶¶ 126-32.

101. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1), June 8, 1997, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

102. *Id.* art. 1(2).

103. *See* LAURA BARON-MENDOZA, THE WAR REPORT 2017: MYANMAR: A BATTLE FOR RECOGNITION 4-5 (2017).

104. *See id.* at 5.

could apply to any alleged perpetrator with a sufficiently strong link to a party to the conflict—including non-state belligerent actors from the Rohingya side, such as the commanders and leaders of ARSA.¹⁰⁵

Though the list of potential war crimes is very long, many prohibited acts revolve around violations of the basic principles of distinction (distinguishing civilians from lawful military targets), proportionality, and necessity, as well as the protection of prisoners of war or those placed *hors de combat* (i.e., persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause).¹⁰⁶ Given the horrific acts of which Burmese military and security forces have been accused, which appeared to target civilians largely if not exclusively, and dramatically escalated the violence in relation to the threat presented, it is not a stretch to conclude that numerous war crimes have been committed.

IV. CONCLUSION

The list of alleged bad acts perpetrated against Rohingya Muslims in autumn 2017 is long and gruesome, and such acts appear to have been undertaken systematically while targeting the entire Rohingya Muslim population. There is little doubt that serious international crimes have occurred, and may still be occurring, with respect to the Rohingya. Such crimes would certainly include crimes against humanity (including acts constituting ethnic cleansing) in the form of murder, extermination, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape and multiple forms of sexual violence, persecution, enforced disappearances, and other inhumane acts. It is less clear, without a full investigation and analysis of the facts and evidence, whether genocide and war crimes have also been committed—though the possibility does not seem unlikely. At least one prominent voice has already called for the situation to be referred to the ICC for investigation and potential prosecution.¹⁰⁷ Let us hope that, regardless of where or how, a full accounting of the atrocities takes place and any perpetrators are brought to justice.

105. See Additional Protocol II, *supra* note 101, art. 1(2); see also Geneva Convention IV, *supra* note 96, art. 3 (stating that Common Article 3 applies, by its own terms, “[i]n the case of armed conflict not of an international character” to “each Party to the conflict,” and requires *all* the parties to adhere to certain minimum standards of behavior and due process).

106. See, e.g., Rome Statute, *supra* note 17, art. 8(2); see also Schwarz, *supra* note 94, ¶ 42.

107. See Miles & Nebehay, *supra* note 14.