



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

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Resisting the Rohingya Genocide: From Pity to Solidarity, Inside and Beyond the ICJ

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From 10th-12th December 2019, the International Court of Justice held its first set of hearings on Myanmar's responsibility for genocide against the Rohingya people. The hearings concerned the application of provisional measures to prevent further deterioration of the situation while the merits are being decided, a process that will likely take several years. The case, brought by Gambia against Myanmar, is a landmark event in the 'slow-burning'¹ Rohingya genocide that has been smoldering for more than three decades: the first Myanmar military operation to drive the Rohingya from their homes, Operation Nagamin (Dragon King), occurred in 1978, and the Rohingya were stripped of their citizenship *en masse* in 1982.²

Attending the hearings at the ICJ, however, we experienced them not simply as a forum for protecting the rights of the vulnerable, but also witnessed up close and firsthand the alienating and agency-erasing effects that international legal processes may have for victims of genocide. As Frédéric Mégret has observed,

One of the problems with the concept of the 'genocide victim' is that it has tended to be very univocal. Central to the conceit is that the victim be only that, in other words that the victim be meek, weak, and subdued ('lambs to the slaughter') ... Victims are by and large deprived of agency ... The victim is objectified as simply that, in a way that dispels anxieties about how its agency, potentially its opposition or reservations about an intervention, might affect the interventionist agenda.³

¹ Maung Zarni & Alice Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya' (2014) 23:3 *Washington*

² Allard K Lowenstein, 'International Human Rights Clinic at Yale Law School, Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis' (October 2015) https://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf (accessed 10 March 2020).

³ Frédéric Mégret, 'Not 'Lambs to the Slaughter': A Program for Resistance to 'Genocidal Law,' in Rene Provost and Payam Akhavan (eds.), *Confronting Genocide* (Springer, 2011) 195.

Law's Violence: Procedural, Physical, Epistemological

Start with the fact that the Rohingya had no legal standing to bring the case to the World Court themselves; only states can lodge complaints with the ICJ. If Gambia had not initiated the case on the Rohingya's behalf – the first time a non-directly injured state has brought a complaint under the Genocide Convention before the ICJ, on the basis that any violation of the Convention is an injury to all parties given the importance of the obligations involved⁴ – the possibility of holding Myanmar responsible as a state for its genocidal policies might forever have remained merely theoretical.

As ICJ Judge Cancado Trindade argued in his separate opinion in the Rohingya provisional measures judgement, the framing of issues as inter-state disputes is inadequate and inappropriate for dealing with situations of extreme human vulnerability. Such situations, Judge Cancado Trindade writes, should 'require the ICJ to go beyond the strict inter-state dimension (the one it is used to, attached to a dogma of the past), and to concentrate attention on the *victims* - be they individuals, groups of individuals, peoples or humankind, as subjects of international law.'⁵ In bringing the Rohingya's case to the ICJ, Gambia has admirably taken the initiative (and the risk), while better-resourced states have floundered; Gambia's Justice Minister, their State Agent at the ICJ, has a strong personal commitment to advocating for justice for genocide victims, rooted in his own history as a prosecutor at the International Criminal Tribunal for Rwanda.⁶ However, it is conceivable that the strategic interests of Gambia as the state complainant and those of the Rohingya as the victims may at some point diverge (regarding the participation of additional complainants in the case, for example). If so, whose interests will prevail?

The marginalization of the Rohingya victims was also manifest in the politics of physical presence in the hearings. We saw how the Rohingya, many of whom had travelled from around the world to attend the hearings, were largely excluded and displaced from the proceedings. Rohingya were forced to cede space in the courtroom for diplomats and dignitaries, and shoved aside by the hordes of journalists who descended on the Hague to capture the spectacle of Nobel Peace Prize Laureate Aung San Suu Kyi, former international darling of Myanmar's struggle for democracy, defending a genocide. In a courthouse that seated about a hundred

⁴ The ICJ has held the prohibition against genocide to be an obligation *erga omnes*: opposable against all. *National Trust Co. v Barcelona Traction, Light & Power Co.*, [1951] 1 DLR 537 at para 34, OR 864 (*Belgium v Spain*).

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (The Gambia v. Myanmar), 23 January 2020, <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-02-EN.pdf> at para 64 (accessed 10 March 2020).

⁶ BBC, 'Rohingya/Rohyngya crisis: The Gambian who took Aung San Suu Kyi to the world court' (January 2020) <https://www.bbc.com/news/world-africa-51183521> (accessed 10 March 2020).

people, only six Rohingyas were permitted. Three of them were flown in from the refugee camps – who listened to the proceedings without any official Rohingya translation – while three others who could speak English managed to secure their seats through some 'VIP connections' they had previously made.

There were three other Rohingyas, including one of us (Raiss), who had their names on the courthouse guests list; they were first offered balcony seats, but within the first hour of the first day of the hearings, they were moved by the Court's security personnel to make room for officials from diplomatic missions. Eventually they ended up in a separate room elsewhere in the courthouse building where they watched the proceedings on a screen. The remaining Rohingya, who had traveled from Europe, North America, and Southeast Asia to witness this ground-breaking moment of their people's history, were required to huddle together around phones and laptops in nearby coffee shops to watch the ICJ livestream as the traumas experienced by their people were recounted by international lawyers on the world stage.

Epistemic violence – violence through the production and articulation of knowledge – pervaded the hearings at the ICJ. There were the overt denialism and distortions promulgated by Myanmar's State Agent Aung San Suu Kyi and the rest of its legal team – who denied the documented existence of mass Rohingya graves; justified the regime's practices of mass rape, torture, and starvation as legitimate 'counter-insurgency' operations against Rohingya 'terrorists'; and maintained the pretence that Myanmar's own domestic legal system is capable of holding any perpetrators to account. In reality, the only soldiers prosecuted for crimes against the Rohingya were pardoned after less than one year, serving less time than the journalists who exposed the particular massacre in question.⁷

At the ICJ, Suu Kyi refused to even use the word 'Rohingya' except when referring to the name of the militant group Arakan Rohingya Salvation Army: a manifestation of the ongoing genocidal desire to erase the Rohingya as a distinct people off the map. Instead, they were referred to repeatedly as 'Muslims',⁸ consistent with Suu Kyi's long-held narrative that the deadly antipathy towards the Rohingya is an understandable reaction to the threat of 'global Muslim power'.⁹

⁷ Shoon Naing & Simon Lewis, 'Exclusive: Myanmar soldiers jailed for Rohingya killings freed after less than a year' (May 2019) <https://www.reuters.com/article/us-myanmar-rohingya-soldiers-exclusive/exclusive-myanmar-soldiers-jailed-for-rohingya-killings-freed-after-less-than-a-year-idUSKCN1SX007> (accessed 10 March 2020).

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Public sitting [2019], <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BL.pdf> (accessed 10 March 2020).

⁹ Haroon Siddique, 'Burma sectarian violence motivated by fear, says Aung San Suu Kyi' (October 2013) <https://www.theguardian.com/world/2013/oct/24/burma-sectarian-violence-fear-aung-san-suu-kyi> (accessed 10 March 2020).

While Myanmar's assault on reality was easily recognizable, a more subtle form of epistemic violence was embedded throughout the entire process. The hearings were broadcast in English, French, and Burmese, but not in the Rohingya language – as indeed, much of the international research on the genocide has not been made available in the language of the victims. The hundreds of thousands of Rohingya stranded in refugee camps in Bangladesh were forced to rely on hasty translations from English-speaking compatriots to follow the arguments, in between frequent internet blackouts.¹⁰ This is why at the time of delivery of the provisional measures decision, for the vast majority of the Rohingya in the refugee camps it was 'business as usual'. As Raiss witnessed, the streets of the camps were like any other day with men walking around, women in the shelters doing household chores, youth playing football in soccer fields, and children running barefoot on the streets and gullies. Even the few corner shops that sell chai and offer WiFi connections did not have people in them watching the ICJ hearings – simply because none of it was comprehensible to them in their language.

Legal recognition of oppression by systems of power is a double-edged sword. While such recognition may provide some validation and recourse for violations, it simultaneously entrenches the hegemony of law's framing and interpretation of issues. Victims are required to fit their experiences of violence into narrow legal categories in order to render them legible as injuries.

The Rohingya have long known that they have been experiencing a systematic project of elimination,¹¹ even while the rest of the international community refused to acknowledge it (in part to avoid triggering the Genocide Convention's duty to prevent). Despite the wealth of damning evidence now compiled,¹² the ICJ may still fail to make a finding of genocide – a conclusion about the situation that will be entrenched as authoritative. For example, the Court may choose to adopt the extremely restrictive conceptualization of genocidal intent put forward by Myanmar's star lawyer, internationally-recognized genocide expert William Schabas, who has argued (including at the ICJ) that the requisite intent to 'destroy a people' is mutually exclusive with the intent to displace or 'ethnically cleanse.'¹³ Or it may decide that the Rohingya do not constitute a 'protected group'

¹⁰ Mariam Berger, 'Rohingya refugees, cut off from the world, got to briefly watch Myanmar's rulers go to trial' (December 2019) <https://www.washingtonpost.com/world/2019/12/11/rohingya-refugees-cut-off-world-got-watch-myanmars-rulers-go-trial/> (accessed 10 March 2020).

¹¹ Zarni & Cowley (2014).

¹² This includes the reports of the UN-established Independent International Fact-Finding Mission on Myanmar, available at <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>.

¹³ For example at para 5 of William Schabas's arguments, <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf>.

under the terms of the Genocide Convention, as signalled by Myanmar's *ad hoc* judge on the Court Claus Kress in his separate opinion.¹⁴ Under the Genocide Convention, the ICJ only has jurisdiction to make a determination of genocide; even if Myanmar's actions against the Rohingya may constitute other crimes against humanity, the Court cannot make any judgement with respect to them.

The Question of Rohingya Resistance: Trapped in the Terrorist-Refugee Dichotomy

However, the experience at the ICJ was not simply one of Rohingya disempowerment, but also an occasion of Rohingya agency and resistance. The importance of the moment exceeded what was happening inside the courtroom during the hearings and spilled over into the streets outside – where hundreds of Rohingya and their allies, including from other persecuted ethnic groups in Myanmar, gathered to demonstrate their solidarity with the Rohingyas' historic quest for justice and accountability.

The question of resistance by the Muslim-majority Rohingya is highly fraught. This is not only because of the general pressure operating to portray genocide victims as passive, helpless targets of atrocity,¹⁵ but also because of the particular stigmatization, securitization, and criminalization of even non-violent Muslim opposition to oppression as 'terrorism' in the context of the Global War on Terror.¹⁶ The narrative of the Rohingya 'terrorist threat' has been adopted not only by Myanmar, but by the international community writ large. For example, international media reports generally framed the Myanmar military's genocidal 'clearance operations' of August 2017 as a response to a Rohingya 'terrorist' attack on police outposts – even though the UN and other international organizations have determined that the military's influx of troops and other preparations for these operations actually began *before* the alleged Rohingya attack that Myanmar claims triggered them.¹⁷ The irony is that the Rohingya are one of the *least* militarized ethnic

¹⁴ Both Myanmar and Gambia were permitted to select one *ad hoc* judge to be added to the panel hearing the case as set out in ar. 31 (3) ICJ Statute; <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-03-EN.pdf> at para 7.

¹⁵ Mégret (2011).

¹⁶ See, for example, Arun Kundnani, *The Muslims are Coming! Islamophobia, Extremism, and the Domestic War on Terror* (Verso, 2014).

¹⁷ Fortify Rights, 'They Gave Them Long Swords': Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar' (July 2018) http://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf (accessed 10 March 2020).

groups of Myanmar, many of which have actively been engaged in insurgencies against the central government for decades.¹⁸

In the prevailing system of representation, Rohingya appear either as violent 'terrorists' to be feared or abject refugees to be saved. Often depicted as opposites, these two figures in actuality function as two sides of the same coin. Both the terrorist and the refugee are cast out of the realm of the political: the terrorist as the object of universal repudiation,¹⁹ the refugee as the object of universal pity.

Indeed, as Didier Fassin has observed, discourses of compassion and repression are often intimately interlinked, with projects of humanitarianism towards refugees easily bleeding into policies of securitization.²⁰ In the case of the Rohingya, for instance, the prospect of their 'radicalization' to violence in the refugee camps has been cited as a pressing reason for the international community to aid in resolving their persecution.²¹ The fact that the Rohingya themselves have already been forced to endure unspeakable violence is apparently not reason enough. And the idea that they might be entitled to use some force in return is rendered virtually inconceivable, precluded by a 'Global War on Terror' narrative that insistently conflates local Muslim resistance to persecution with transnational terrorism.

Viewing the Rohingya's plight primarily through the prism of humanitarianism introduces its own distorting effects – framing the issue as one of technocratic relief of suffering, rather than political reformulation of a persecutory state. Perversely, some of the solutions generated within the humanitarian framework risk coinciding with Myanmar's own genocidal goals. For example, in the enthusiasm to repatriate Rohingya back to Myanmar from the camps in Bangladesh, refugees have been pressured to accept National Verification Cards effectively labelling them as 'foreigners' to Myanmar – when in fact the Rohingya have lived there for many

¹⁸ Navine Murshid, 'Why is Burma driving out the Rohingya – and not its other despised minorities?' (November 2017) <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/09/why-is-burmas-military-driving-out-the-rohingya-and-not-its-other-despised-minority-groups/> (accessed 10 March 2020).

¹⁹ Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford University Press, 2019).

²⁰ Didier Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France' (2005) 20:3 *Cultural Anthropology* 362.

²¹ See, for example, Zohaer Ahmed, 'Is Pakistani intelligence radicalizing Rohingya refugees?' (February 2020) <https://www.dw.com/en/is-pakistani-intelligence-radicalizing-rohingya-refugees/a-52364548> (accessed 10 March 2020); Andrew Selth, 'The Rohingyas: a new terrorist threat?' (September 2018) <https://www.lowyinstitute.org/the-interpreter/rohingyas-new-terrorist-threat> (accessed 10 March 2020); Financial Times, 'Rohingya plight in Bangladesh raises fear of radicalisation' <https://www.ft.com/content/ecf90090-d95a-11e7-a039-c64b1c09b482> (accessed 10 March 2020); International Crisis Group, 'Myanmar's Rohingya Crisis Enters a Dangerous New Phase' (December 2017) <https://www.crisisgroup.org/asia/south-east-asia/myanmar/292-myanmars-rohingya-crisis-enters-dangerous-new-phase> (accessed 10 March 2020).

generations.²² Alternatively, the drive to secure asylum and resettlement for Rohingya in other 'third' countries converges with Myanmar's aim of depopulating their lands of Rohingya. The emphasis on resettling Rohingya in Muslim-majority states is particularly problematic, inadvertently reinforcing Myanmar's narrative that reduces the Rohingya to their Muslim identity: exogenous implants from the so-called 'Muslim world,'²³ as opposed to integral elements in the fabric of Myanmar's pluralism. It should also be noted that not all Rohingya are Muslim.

From International Pity to Solidarity

What is occluded by the terrorist-refugee dichotomy is the agency of the Rohingya themselves – who are not passive objects for Western pity and salvation, but a people whose ongoing struggles to survive in the face of genocide should compel international solidarity.

But despite the now-widespread recognition of the atrocities the Rohingya have been made to endure, Rohingya resistance continues to receive inadequate international support. With the impotence of the international legal system – particularly the lack of power of the ICJ to enforce its rulings, with the UN Security Council failing to even agree on a statement urging Myanmar to comply with the provisional measures decision²⁴ – the possibilities for large-scale, effective resistance by the Rohingya remain vitiated. On the ground, in the surviving Rohingya settlements in Myanmar, any act of resistance would be crushed instantly and ruthlessly by the Tatmadaw military that continue to cordon the remaining villages with tight controls on access to food, medication, and basic necessities. On the other side, in the refugee camps in Bangladesh, any plans of gathering for passive resistance would be dismantled instantly by camp authorities – not to mention with further restrictions on mobile internet, phones, and movement in and out of the camps. No international legal entity has the teeth to intervene and protect the resisters.

The uncomfortable truth is that far from being the source of Rohingya salvation, the international community has often served as aider and abettor of Myanmar's 'slow-burning genocide.' Many states hastily normalized relationships

²² Fortify Rights, 'Tools of Genocide: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar' (September 2019) <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf> (accessed 10 March 2020).

²³ On the colonial genealogy of the concept of the 'Muslim world,' see Cemil Aydin, *The Idea of the Muslim World: A Global Intellectual History* (Harvard University Press, 2017).

²⁴ The Irrawaddy, 'UN Security Council Fails to Agree on Statement Urging Myanmar to Follow ICJ Measures in Genocide Case' (February 2020) <https://www.irrawaddy.com/news/burma/un-security-council-fails-agree-statement-urging-myanmar-follow-icj-measures-genocide-case.html> (accessed 10 March 2020).

with Myanmar to reap the benefits of investment with the country's supposed 'liberalization' and 'transition to democracy' in 2015²⁵ – at the very same time as the noose of repression was tightening around Rohingya necks.²⁶ A vast constellation of governments and corporations have continued to arm, fund, and collaborate with the Myanmar regime even after its genocidal character should have been too clear to ignore, as documented by the UN Fact-Finding Mission in a 110-page report.²⁷ International humanitarian and development organizations working in Myanmar have also been 'complicit in a process of preparation for ethnic cleansing' with their 'years of secrecy, self-censorship, and silent compliance with abuse,' according to a comprehensive review by veteran human rights fieldworker Liam Mahony.²⁸

While the discourses of compassion, humanitarianism, and aid imply a benevolent hand reaching out to help those in need, solidarity in contrast must begin by acknowledging that these hands of the international community are already tainted with blood. To the extent that our economic and political systems continue to enable and profit from genocide, we are not innocent bystanders but already-implicated parties. This is why the Free Rohingya Coalition, an international Rohingya-led group, is calling for an international boycott campaign against Myanmar. The coalition, which is an umbrella organization of Rohingya activists and supporters worldwide, is calling for boycotting of consumer goods, services, tourism, cultural activities, and any commercial activity that is connected with the State of Myanmar. The boycott campaign is inspired by the past anti-apartheid movement against South Africa, and the current Boycott Divestment Sanctions (BDS) movement initiated by the Palestinian people against Israel's occupation and colonization of their territories.²⁹

²⁵ For example, David Brunnstrom, 'Obama announces lifting of U.S. sanctions on Myanmar' (October 2016) <https://www.reuters.com/article/us-usa-myanmar-sanctions/obama-announces-lifting-of-u-s-sanctions-on-myanmar-idUSKCN127262> (accessed 10 March 2020); James Hookway & Myo Myo, 'Myanmar Set to Reap Benefits From Lifted U.S. Sanctions' (September 2016) <https://www.wsj.com/articles/myanmar-set-to-reap-benefits-from-lifted-u-s-sanctions-1473913905> (accessed 10 March 2020); House of Commons, *Sentenced to a slow demise: the plight of Myanmar's Rohingya minority* (June 2016) (Chair: Robert D. Nault) <https://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/report-1/page-60> (accessed 10 March 2020).

²⁶ Poppy McPherson, 'No vote, no candidates: Myanmar's Muslims barred from their own election' (November 2015) <https://www.theguardian.com/world/2015/nov/03/no-vote-no-candidates-myanmars-muslims-barred-from-their-own-election> (accessed 10 March 2020).

²⁷ Human Rights Council, *The economic interests of the Myanmar military. Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.3, August 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf (accessed 10 March 2020).

²⁸ Fieldview Solutions, 'Time to break old habits: Shifting from Complicity to Protection of the Rohingya in Myanmar' (June 2018) http://www.fieldviewsolutions.org/fv-publications/Time_to_break_old_habits.pdf (accessed 10 March 2020).

²⁹ Free Rohingya Coalition, 'Boycott Campaigns' https://freerohingyacoalition.org/en/?page_id=481 (accessed 10 March 2020).

As Frederic Mégret concludes in his essay on genocide and resistance, perhaps the best hope for preventing genocide lies not with big, international structures like the ICJ, but rather an infinity of on-the-ground, local acts of resistance.³⁰ Instead of treating the Rohingya like helpless “lambs” to be saved, the task of solidarity is to fight back against the multiplicity of forces upholding the butcher’s knife.

³⁰ Mégret (2011).