

## ON CRIMES COMMITTED AGAINST THE ROHINGYA

# Determining the Commission of Genocide in Myanmar

## Legal and Policy Considerations

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### Abstract

*In August 2018, what appears to be a draft statement to be delivered by United States Secretary of State Mike Pompeo on the persecution of the Rohingya minority in Myanmar was leaked to the press. The text suggests that the State Department was considering whether there are grounds to believe that genocide has been, or is being, committed in Myanmar and whether the State Department should issue a statement to this effect. This article surveys the major human rights documentation efforts, academic literature, relevant jurisprudence emanating from the international criminal tribunals, statements of United Nations entities and other states, the results of the State Department's recent empirical investigation, party and amicus curiae briefs filed before the International Criminal Court, and journalistic accounts of events in Myanmar, Bangladesh, and elsewhere in the region with an eye towards understanding the dynamics of violence against the Rohingya — deemed by many to be 'the most persecuted minority in the world'. The article layers the facts as we know them against established legal principles to conclude that a genocide is in fact underway in Myanmar through genocidal acts committed by discrete sets of actors (including various state organs, the Tatmadaw-Army, regional and local officials, and Rakhine civilians) and also by way of a genocide writ large against the Rohingya within Rakhine State involving the central authorities working in collusion with, and through, regional actors. This article closes with a discussion of the methodological question of the level of certainty that should be met before a non-judicial entity makes such a determination with reference to the various standards employed by commissions of inquiry and courts (both criminal and civil) that find themselves making analogous determinations.*

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## 1. Introduction

In August 2018, what appeared to be a draft statement to be delivered by United States (US) Secretary of State Mike Pompeo on the persecution of the Rohingya minority in Myanmar was leaked to the press.<sup>1</sup> The text suggests that the State Department had commissioned an empirical study of Rohingya refugees in Bangladesh and was considering whether there are grounds to believe that genocide has been, or is being, committed in Myanmar and whether the State Department should issue a statement to this effect. After outlining the concentrated violence committed to date, the disclosed document apparently includes bracketed text to the effect of: ‘hold for determination’. The leak, coupled with this intriguing placeholder, signal the existence of intense internal deliberations within the State Department as to whether to deploy the term ‘genocide’ in connection with the brutality in Myanmar. Ultimately, the State Department quietly uploaded to its website the report setting forth its findings without issuing any legal conclusion or public statement.<sup>2</sup>

These intramural discussions no doubt traverse an interrelated set of considerations. In addition to verifying underlying facts and debating the legal standards to apply, diplomats and government lawyers will need to grapple with the propriety of going on record with such a incriminatory conclusion, one with acute political and legal dimensions.<sup>3</sup> In addition to indelibly transforming US bilateral relationship with Myanmar — a state struggling with its long-overdue transition from authoritarianism — a positive determination on the genocide question will invite lobbying from human rights groups, concerned citizens, and other constituencies for a robust response that will also render it more difficult for the USA (and the international community) to avoid taking more active measures to address the situation.<sup>4</sup> This would include support for an investigation by the Prosecutor of the International Criminal Court (ICC). An ICC Pre-Trial Chamber has already authorized the Office of the Prosecutor (OTP) to open a preliminary examination into the situation on the basis of Bangladesh’s ratification of the Rome Statute.<sup>5</sup> This

- 1 N. Toosi, ‘Leaked Pompeo Statement Shows Debate Over “Genocide” Label for Myanmar’, *Politico*, 13 August 2018, available online at <https://www.politico.com/story/2018/08/13/mike-pompeo-state-department-genocide-myanmar-775270> (visited 21 January 2019).
- 2 U.S. Department of State, Documentation of Atrocities in Northern Rakhine State, August 2018, available online at <https://www.state.gov/j/drl/rls/286063.htm> (‘State Department Report’) (visited 21 January 2019). Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State*, September 2018 (compiling underlying data to State Department Report) (‘PILPG’).
- 3 A number of bureaus and offices are likely involved in these discussions, including the relevant regional desks (East Asia and Pacific Affairs (EAP) and South and Central Asian Affairs (SCA)), the Office of Global Criminal Justice (GCJ), the Bureau of Democracy, Human Rights and Labor (DRL), the Bureau for Intelligence and Research (INR), and the Legal Adviser’s Office (L).
- 4 R. Hamilton, *Fighting for Darfur: Public Action and the Struggle to Stop Genocide* (St. Martin’s Press, 2011) (discussing the impact of a genocide determination on citizen activism).
- 5 Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (ICC-RoC46(3)-01/18), Pre-Trial Chamber I, 6 September 2018. For an analysis of the

development comes on the heels of National Security Advisor John Bolton's incendiary remarks purporting to render the Court 'dead' to the USA.<sup>6</sup> The tension between these two policy positions — genuine concern for the plight of the Rohingya and Bolton's deep antipathy towards the Court — is already apparent in State Department communications.<sup>7</sup>

Inherent to making such a genocide determination is an additional meta-consideration: what is the operative standard of proof, if it can be called that? Courts tend to employ regimented and well-developed burdens of proof in the various types of cases that appear before them and at various stages of proceedings. Non-judicial entities — including governments, international fact-finding missions (FFMs) and non-governmental organizations (NGOs) — must undertake this exercise without clear guidelines. Each must establish an appropriately-rigorous threshold of certainty before making such a damning determination. The State Department is no different.

This article engages these issues in two parts. Section 2 of this article takes the State Department's exercise at face value and conducts an independent genocide determination. To do so, it surveys the major human rights documentation, relevant jurisprudence emanating from the international criminal tribunals, statements of United Nations entities and other states, the results of the State Department's recent empirical investigation, party and *amicus curiae* briefs filed before the ICC, the writings of academics who have worked on Myanmar or who have studied other historical genocides and journalistic accounts of events in Myanmar and Bangladesh — all with an eye towards understanding the dynamics of violence against the Rohingya, deemed by many to be 'the most persecuted minority in the world.'<sup>8</sup> The compiled evidence in the aggregate suggests that a genocide is in fact underway in Myanmar through genocidal acts committed by discrete sets of actors (including various state organs, the *Tatmadaw*-Army, regional and local officials and Rakhine

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Pre-Trial Chamber decision, especially with regard to the transborder implications of the crime of deportation, see P. Akhavan, 'The Radically Routine *Rohingya* Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute' in this issue of the *Journal*.

- 6 J. Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats', *Just Security*, 10 September 2018, available online at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/> (visited 21 January 2019).
- 7 Indeed, shortly after Bolton's incendiary remarks, the State Department spokeswoman, Heather Nauert, noted in a press briefing that the USA has 'very serious concerns' about the ability of Myanmar's judicial system to address these abuses. When pressed about whether the USA would support the ICC's investigation of the Rohingya matter, she stammered: 'U.S. Government ... I can tell you will take a very close look at what forum, what venue we think is most appropriate for handling these types of very sensitive cases.' See at <https://www.state.gov/r/pa/prs/dpb/2018/09/286027.htm>; B. Van Schaack, 'Trump vs. International Law: The Trump Administration and International Criminal Law', *Opinio Juris*, 10 September 2018, available online at <http://opiniojuris.org/2018/10/09/trump-vs-international-law-the-trump-administration-and-international-criminal-justice/> (visited 21 January 2019).
- 8 Amnesty International, *Who are the Rohingya and What is Happening in Myanmar?* 26 September 2017, available online at <https://www.amnesty.org.au/who-are-the-rohingya-refugees/> (visited 21 January 2019).

civilians) and also by way of a genocide writ large against the Rohingya within Rakhine State involving the central authorities working in collusion with, and through, these regional actors. This conclusion holds firm even under the International Court of Justice's (ICJ) controversial precedent around the attribution of direct state responsibility for the commission of genocide.<sup>9</sup> The events in Myanmar would easily satisfy the ICJ's more lenient standard for failing to prevent and punish the crime<sup>10</sup> and also likely its more stringent standard for finding direct state responsibility for the crime.<sup>11</sup> As the Court noted: "The obligation on each contracting State to prevent genocide is both normative and compelling."<sup>12</sup> All told, and in the words of Professor Azeem Ibrahim in his magisterial text on the subject, "[t]he charge of genocide is a serious one to make: the current situation in Myanmar fully justifies the use of this word."<sup>13</sup>

Given these facts in the public record, Section 3 considers the methodological questions of what level of proof should be required to make such a determination. It starts with a survey of the standards employed by courts (both criminal and civil) and commissions of inquiry that find themselves making analogous determinations. In reaching my own genocide conclusion in this academic context, I have operated under a 'clear and convincing' standard on the theory that it offers an appropriately heightened threshold given the gravity of the question presented. Such a test generally requires proof that is of a quality and quantity that leads to a conviction that the facts and conclusions at issue are highly probable, without necessarily fully negating all alternative explanations.<sup>14</sup> This standard, it should be noted, is higher than that required by most domestic and international courts for issuing an indictment against an identified individual. As such, lesser standards would also be appropriate for this exercise in other contexts.

9 See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment, ICJ Reports (2007) 43 ('2007 ICJ Genocide Judgment'). See A. Cassese, 'A Judicial Massacre: The International Court Has Set an Unrealistically High Standard of Proof for Finding Serbia Complicit in Genocide', *Guardian Unlimited*, 27 February 2007, available online at <https://www.theguardian.com/commentisfree/2007/feb/27/thejudicialmassacreofsrbr> (visited 21 January 2019).

10 2007 ICJ Genocide Judgment, *ibid.*, at § 432 ('... a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware or should normally have been aware, of the serious danger that acts of genocide would be committed'). See A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *European Journal of International Law (EJIL)* (2007) 695.

11 State responsibility for genocide exists when state organs commit genocide or when individuals or entities are acting on the state's 'instructions, or under its direction or control' commit genocide. 2007 ICJ Genocide Judgment, *supra* note 9, at §§ 385, 397. The ICJ determined that Serbia and Montenegro had not committed genocide in Bosnia and Herzegovina.

12 *Ibid.*, at § 427.

13 A. Ibrahim, *The Rohingyas: Inside Myanmar's Genocide* (rev. edn., C. Hurst, 2018), at 1.

14 See e.g. *Colorado v. New Mexico* 467 U.S. 310, 316 (1984) (finding that the party bearing the burden of proof must 'place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are "highly probable"').

A government might thus be justified in making a genocide determination under a lower threshold of proof with appropriate caveats.

Following this survey, this article briefly maps the different formulations with which a genocide determination may be made and collects the way in which other authoritative observers are characterizing the plight of this beleaguered community. This semantic heterogeneity reflects the fact that many observers (and the USA is not alone in its reticence) have been historically cautious about announcing the commission of genocide in unalloyed terms. Some observers fear that a genocide determination is somehow more technical and complex than other international criminal law or human rights allegations; others are no doubt concerned that such a conclusion will elicit heightened pressure to 'do something'.<sup>15</sup> At the same time, this restraint can generate sharp criticism if it appears that the term is being avoided for unprincipled reasons. Indeed, USA has been excoriated in the past for employing the term 'acts of genocide' in connection with events in Bosnia-Herzegovina and Rwanda.<sup>16</sup> Commentators focused on Myanmar have revealed similar preoccupations with semantics, at times couching their genocide conclusions in diffident terms. By contrast, these same observers exhibit less angst about accusing regimes and individuals with the commission of crimes against humanity or war crimes.

In closing, it should be noted that this article only touches upon the *a priori* question of why such a determination should be relevant to the USA or the international community's, policy towards Myanmar. For the record and as I have argued elsewhere with respect to Darfur — another situation in which the USA conducted a similar exercise in amassing empirical proof of genocide<sup>17</sup> — the international community's response to mass atrocities should not hinge on the question of whether or not the violence constitutes genocide.<sup>18</sup> At the point in time at which economic, political and military solutions to mass violence are being contemplated, debating legal semantics about whether violence rises to the level of genocide simply has no place. Indeed, 'the methodology necessary to determine the commission of genocide is inapt — and the surrounding discourse discordant — when people are being systematically killed and expelled from their homes through violence on a mass scale.'<sup>19</sup> What matters is that the level of violence and the risk to humanity has reached a certain threshold. Furthermore, genocide is a crime of intent and not of results. As such, it is not necessary to wait for a group to be destroyed in whole or in part before declaring a campaign of violence to be genocidal if the requisite intent can be evinced before the threat of wholesale extermination is realized. This foresight ensures that the preventative potential of such a

15 See S. Power, *A Problem from Hell: America in the Age of Genocide* (Basic Books, 2002).

16 D. Jehl, 'Officials Told to Avoid Calling Rwanda Killings "Genocide"', *New York Times*, 10 June 1994, available online at <https://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html> (visited 21 January 2019).

17 See S. Totten and E. Markusen (eds), *Genocide in Darfur: Investigating Atrocities in the Sudan* (Routledge, 2006) (discussing US Atrocities Documentation Team in Darfur).

18 See B. Van Schaack, 'Darfur and the Rhetoric of Genocide', 26 *Whittier Law Review* (2005) 1101.

19 *Ibid.*, at 1103.

determination can be harnessed.<sup>20</sup> If international law creates a right — or even a duty — to respond to massive rights violations, any operative threshold has long since been triggered in Myanmar.

## 2. Frameworks for Identifying Genocide

In undertaking a genocide analysis, most commentators and NGOs operate primarily within an international criminal law framework, using as their guide the three core elements of genocide as interpreted and elaborated upon by international jurisprudence. Following this methodology arguably offers the safest course for a non-judicial entity to make a genocide determination, because it is premised upon an uncontroversial standard that could support a criminal indictment. That said, this methodology is generally geared towards ascribing individual criminal responsibility on the part of discrete perpetrators, rather than undertaking a more collective or sociological determination that a genocide, writ large, is underway. Establishing whether an entire campaign of persecution is impelled by an intent to destroy a protected group, in whole or in part, might justify a different approach than that which would be undertaken in the penal context.

### A. *Individual v. State Responsibility*

By virtue of the terms of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), international law primarily identifies genocide as an international crime giving rise to individual criminal responsibility. When considering the situation in Myanmar, potential individual perpetrators include members of the regime leadership (at the national level), the architects of the violence within the military and security forces,<sup>21</sup> nationalist leaders within Rakhine State, extremist Buddhist monks including U Wirathu<sup>22</sup> (the spiritual leader of the radical 969 Buddhist Nationalist movement)<sup>23</sup> and ordinary Rakhine civilians.

20 The Genocide Convention obliges states parties to both punish and prevent the commission of the crime of genocide. Convention on the Prevention and Punishment of the Crime of Genocide Convention 12 January 1951, 78 U.N.T.S. 277 (1951), Art. 1: ‘The Contracting Parties confirm 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.’

21 See Amnesty International, *We Will Destroy Everything: Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar* (2018), available online at <https://www.amnestyusa.org/wp-content/uploads/2018/06/Amnesty-We-Will-Destroy-Everything.pdf> (visited 21 January 2019) (‘We Will Destroy Everything’) (tracing violence back to the Myanmar military, including its commander-in-chief).

22 H. Beech, ‘The Face of Buddhist Terror’, *Time*, 1 July 2013, available online at <http://content.time.com/time/magazine/article/0,9171,2146000,00.html> (visited 21 January 2019); Allard K. Lowenstein International Human Rights Clinic, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*, 11–12 October 2015, available online at <https://law.yale.edu/system/files/documents/pdf/Clinics/fortifyrights.pdf> (visited 21 January 2019).

23 Ibrahim, *supra* note 13, at 67 (discussing the 969 Movement’s advocacy of religious and ethnic purity and incitement to violence).

A number of exhaustively researched accounts record significant coordination between these various actors in executing violence against Rohingya communities, suggesting that any number of these individuals might be charged with genocide in a court with jurisdiction over these events.<sup>24</sup> Even if ascribing responsibility to officials in Nay Pyi Taw feels like a bridge too far, politics within Rakhine State are dominated by ethnically-oriented political parties (rather than the national parties) that advocate the exclusion of the Rohingya as part of their formal platform of action.<sup>25</sup> As such, politics within the region reveal ‘a set of dynamics different to [sic] the rest of the country’.<sup>26</sup> These local actors work in close coordination with local monasteries and the military, which retains a high degree of control over the local civilian administration.<sup>27</sup> ‘This gives the Buddhist extremists a much closer hold over the political process [in Rakhine] than they have elsewhere in Myanmar.’<sup>28</sup>

At the same time, the Genocide Convention also places obligations on states, which may be held responsible for violations of the treaty committed by state actors and, in some cases, by non-state actors under a state’s control or influence.<sup>29</sup> This attribution of state responsibility is an inquiry separate and apart from a determination of individual criminal responsibility. As such, some challenges present themselves in translating penal concepts (such as *mens rea*) into state responsibility for the purpose of identifying the existence of a genocide writ large untethered to any particular perpetrator’s personal responsibility.

### ***B. The Elements of Genocide and Applicable Forms of Responsibility***

Regardless of the nature of the responsible party, the genocide determination involves a consideration of three primary elements: (i) enumerated acts of violence; (ii) committed against a protected group; (iii) with the intent to destroy this group in whole or in part.<sup>30</sup> The Genocide Convention prohibits the direct commission of these acts as well as engaging in a conspiracy to commit genocide, publicly inciting others to commit genocide, attempting to commit genocide and complicity in genocide.<sup>31</sup> Jurisprudence confirms that genocide can

24 See *We Will Destroy Everything*, *supra* note 21; P. Green et al., *Countdown to Annihilation: Genocide in Myanmar* (International State Crimes Initiative, 2015), at 16.

25 Ibrahim, *supra* note 13, at 79–80.

26 *Ibid.*, at 79, 121.

27 *Ibid.*, at 80.

28 *Ibid.*

29 2007 ICJ Genocide Judgment, *supra* note 9, at § 396.

30 Genocide Convention, *supra* note 20, at Art. II. Myanmar ratified the treaty in 1956, although the prohibition against genocide is widely considered to constitute customary international law binding on all states. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 18 May 1951, ICJ Reports (1951) 15, at 23 (‘... the principles underlying the Convention are principles which are recognized by civilized nations as binding on a state even without any conventional obligation.’).

31 Genocide Convention, *supra* note 20, at Art. III.

also be committed as part of a joint criminal enterprise (JCE).<sup>32</sup> Likewise, commanders and other superiors can be convicted under theories of superior responsibility if they knew, or had reason to know, that their subordinates were committing genocide and they failed to undertake the necessary measures to prevent such acts or to punish the perpetrators.<sup>33</sup>

When it comes to violence against Rohingya Muslims in Myanmar, the first two elements of genocide are easily satisfied. As is often the case, the genocide determination hinges on whether there is adequate evidence of the surplus of intent inherent to the crime of genocide: it must be shown to the applicable standard of proof that either the regime in question intends to destroy the group, in whole or in part, or that a sufficient number of individual actors, or actors with appropriate seniority, are committing enumerated crimes with that specific intent.

### 1. Element (i): *The Rohingya Are a Protected Group*

The Genocide Convention defines genocide in terms of acts of violence against national, ethnic, racial or religious groups. The Rohingya constitute a protected religious group, being a Muslim minority in a predominantly Buddhist society. They could also be conceptualized as an ethnic group, given their distinctive cultural traditions and dialect, and as a racial group, given subjective perceptions among Myanmar society that the Rohingya constitute a different ‘race’ than the majority population.<sup>34</sup> In this regard, Fortify Rights and other observers have compiled comments by high-level Myanmar officials justifying policies of communal exclusion on the grounds that the Rohingya constitute a separate race.<sup>35</sup> As Ibrahim writes:

The repression of the Rohingyas is orchestrated, in part by those who believe there is no place in Myanmar for anyone who is not a Buddhist (and especially if they are Muslim), in part by ethnic extremists in other communities who want a racially pure state, and in part by the military regime, which is content to see a degree of unrest.<sup>36</sup>

32 Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016 (*‘Karadžić’*), § 570; Decision on Interlocutory Appeal, *Brđanin* (IT-99-36-A), Appeals Chamber, 19 March 2004, §§ 5–10 (holding that an individual can be convicted of participating in a JCE that results in the commission of genocide even without possessing genocidal intent so long as the commission of genocide was a natural and foreseeable consequence of the original JCE).

33 Judgment and Sentence, *Nahimana, Barayagwiza and Ngeze* (ICTR-99-52-T), Trial Chamber, 3 December 2003, §§ 976–977.

34 Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, § 70 (holding that group membership ‘is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction.’) (*‘Rutaganda’*). But see C. Kreß, ‘The International Court of Justice and the Elements of the Crime of Genocide’, 18 *EJIL* (2007) 619, at 623 (arguing that the ICJ rejected the ICTY’s notion of subjective group membership).

35 Fortify Rights, *‘They Gave Them Longswords’: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar* 92, July 2018 (*‘They Gave Them Longswords’*).

36 Ibrahim, *supra* note 13, at 3.



There is thus an intersectionality to this violence.

## 2. Element (ii): The Rohingya Have Experienced Acts of Violence That Can Constitute Genocide

### (a) The law

The Genocide Convention identifies five acts as constituting the *actus reus* of genocide: killing members of the group; causing serious bodily and mental harm to members of the group;<sup>37</sup> deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;<sup>38</sup> imposing measures intended to prevent birth within the group; and forcibly transferring children of the group to another group.<sup>39</sup> This constellation of prohibited conduct makes clear that genocide can occur without the wholesale mass killings of members of the group and through the commission of other forms of acute harm that fall short of extermination.<sup>40</sup> In this regard, the tribunals have developed the concept of ‘slow death,’<sup>41</sup> which involves the deliberate infliction of conditions of life upon a protected group that may not cause the immediate death of members of the group, but will eventually lead to that result if maintained over a period of time.<sup>42</sup> These adverse conditions of life thus act as

methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group, but which are, ultimately, aimed at their physical destruction. ... [T]he means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.<sup>43</sup>

Various forms of violence can contribute to the slow death of members of a protected group and its destruction in whole or in part. This would include forcible transfers or deportations, with all the attendant harm,<sup>44</sup> that can constitute

37 The ICC’s Elements of Crimes makes clear that ‘This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.’ Art. 6(b), n. 3, Elements of Crimes.

38 The term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services or the systematic expulsion of members of the group from their homes. *Ibid.*, at Art. 6(c), n. 4.

39 Genocide Convention, *supra* note 20, at Art. II.

40 Trial Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber, 17 January 2005, § 660 (recognizing that forcible transfer can constitute genocide if the ‘consequence is dissolution of the group’).

41 Trial Judgment, *Kayishema* (ICTR-95-1-T), Trial Chamber, 21 May 1999 (‘*Kayishema*’), § 116.

42 *Rutaganda*, *supra* note 34, at § 52; *Kayishema*, *ibid.*, at § 548 (requiring the imposition of harsh conditions of life over an extended period of time to infer the intention to destroy the group).

43 *Rutaganda*, *supra* note 34, at § 52 (citations omitted).

44 See Appeal Judgment, *Tolimir* (IT-05-88/2-A), Appeals Chamber, 8 April 2015, § 209 (‘A forcible transfer operation may ... “ensure the physical destruction” of the protected group by causing

either ‘serious bodily or mental harm’ or ‘conditions of life calculated to’ destroy the group.<sup>45</sup> To be sure, ‘the intent to displace is not equivalent to the intent to destroy’.<sup>46</sup> As the ICJ indicated in jurisprudence emerging out of the dissolution of the former Yugoslavia:

Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group and deportation or displacement of the members of a group, even if affected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the placement.<sup>47</sup>

Similarly, the ICTY (International Criminal Tribunal for the Former Yugoslavia) held that the mere dissolution of the group by virtue of its expulsion is not in and of itself sufficient to constitute genocide.<sup>48</sup> That said, the ICJ made clear that ethnic cleansing can constitute genocide if accompanied by the necessary intent and can be ‘indicative of the presence of a specific intent’ to commit genocide.<sup>49</sup> When people flee a jurisdiction in order to avoid persecution or other acts of violence (e.g. looting, arson or physical attacks), their movement is not truly ‘voluntary’ and the crimes of forcible transfer or deportation are implicated.

The International Criminal Tribunal for Rwanda (ICTR) has confirmed that rape and other forms of sexual violence can serve as predicate acts of genocide.<sup>50</sup> The theory is that these acts cause serious physical and mental harm and can destroy the victim ‘as an incremental step towards annihilating the group’.<sup>51</sup> Sexual violence may also constitute a measure to prevent births within a group or the transfer of children in patrilineal societies where rape is employed in an effort to impregnate the victim with a child who will not belong to the mother’s group. In this way, rape can be used to transmit a new identity to offspring and alter the ethnographic makeup of a community. Similarly, sexual violence may be a measure to prevent births where rape works to ostracize women from their communities. Rape and sexual assaults

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serious mental harm or leading to conditions of life calculated to bring about the group’s physical destruction, even if the group members are not transferred to places of execution.’)

45 International Commission of Jurists, *‘Intent to Destroy’ as a Special Element of the Crime of Genocide*, 24–25 May 2018 (‘Int’l Comm’n Jurists’).

46 *Ibid.*, at 27. As the ICJ noted, a proposal by Syria to include ‘measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ was not included as a distinct *actus reus* of genocide within the Genocide Convention. ICJ 2007 Genocide Judgment, *supra* note 9, at § 190; Kreß, *supra* note 34, at 624 n. 31.

47 ICJ 2007 Genocide Judgment, *supra* note 9, at § 190. Emphasis in original.

48 Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, § 519.

49 ICJ 2007 Genocide Judgment, *supra* note 9, at § 190.

50 Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998 (*Akayesu*), § 731 (‘These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.’).

51 Int’l Comm’n Jurists, *supra* note 45, at 7.

may also cause psychological damage that is cognizable as genocide.<sup>52</sup> Importantly, the ICTY has ruled that it does not preclude a finding of genocide if the men and women of a particular group are treated differently, with the women and children being allowed to survive, so long as the necessary intent is otherwise shown.<sup>53</sup>

Given the different enumerated *actus reus* of genocide, the international tribunals have emphasized the importance of examining the cluster of abuses suffered by members of the group and the collective impact of those actions on the survival of the group. This inclusive conception of genocide reflects the fact that eliminating the members of an entire race or religion, or a substantial part thereof, through outright extermination is difficult work. If that is the goal, it may be much easier to deprive people of their livelihoods, homes, medical care, humanitarian assistance, etc. and let nature take its course.<sup>54</sup> Implementing such a policy in Myanmar would enable the government to blame any subsequent deaths on the harsh environmental conditions or external factors and deflect attention away from a programme ultimately aimed at wholesale extermination.

#### (b) The facts

Genocidal acts — including mass killings (e.g. at Tula Toli) and acts leading to a slow death — have been committed against the Rohingya since the immediate crisis first unfolded and in previous periods of violence. The brutal events of 2017 mark the culmination of decades of state-sponsored discrimination and violence against the Rohingya taking many different forms. The most recent brutality must be viewed in the context of prior efforts to remove this population entirely from Rakhine State. Earlier attempts at ethnic cleansing have ‘failed’ in that members of the community have returned (sometimes under compulsion) to Myanmar after being purged, only to face heightened abuse. This protracted persecution — taking the form of legalized discrimination, physical segregation, infringements on births and marriages and physical violence — has ratcheted up sharply over the years. Professor Penny Green and colleagues from the International State Crime Initiative argue that the genocidal nature of violence in Myanmar has been ‘obscured by the gradual, multidimensional character of discriminatory and oppressive policies against the Rohingya, the historical unfolding of these policies over many decades, and the fact that they have fluctuated in intensity.’<sup>55</sup> Indeed, it is important to view events since August 2017 as part of a sustained progression whereby violence against the Rohingya has become normalized and measures short of mass extermination have significantly weakened the group —

52 *Akayesu*, *supra* note 50, at §§ 706–707, 731–733, 507–508.

53 Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004 (*‘Krstić’*), at §§ 593–599.

54 *Ibid.*, at 31 (noting that death by extermination is difficult to do and risks greater international censure than more deniable forms of harms that might lead to the group’s elimination).

55 Green et al., *supra* note 24, at 13.

through the erosion of its social, economic and civic foundations — even if they have not yet led to its complete destruction within Myanmar.<sup>56</sup> In crude terms, today's acute violence reflects a desire by many influential actors to 'finish the job' started decades earlier.<sup>57</sup>

Taking an historical approach to today's crisis, Zarni and Cowley pinpoint 1962 and the beginning of totalitarian rule within the then Burma as the date on which a national effort at ethnic erasure began.<sup>58</sup> Rakhine State is one of the poorest regions in the country and has been subjected to years of neglect. Although Rohingya and ethnic Rakhine communities (themselves an oppressed group) have enjoyed periods of harmony, the country's history has been punctuated by inter-communal violence dating back to the independence era. According to many observers, the national and local governments have cultivated these hostilities, in part to deflect criticism from their neglect of the region and in part to consolidate their political power. In any case, the authorities have consistently failed to intervene to prevent such sectarian violence or punish the perpetrators.

For many decades, the Rohingya minority has been subjected to discrimination, violations of their fundamental human rights and acts of persecution, including strict and discriminatory restrictions on their freedom of movement (with implications for their ability to pursue their livelihoods and gain access to education, water, food and sanitation),<sup>59</sup> the free exercise of their religion, equal access to healthcare and education and rights to marry and bear children. The latter include formal and informal restrictions on marriages and on the number of children a family may have.<sup>60</sup> To be sure, these latter legal strictures are arbitrarily and inconsistently enforced and can often be circumvented through the payment of bribes to officials; nonetheless, they exist on the books, they were inspired by spurious concerns about over-population among the Rohingya and they are disproportionately invoked against the Rohingya. The FFM report notes that the Rohingya are 'portrayed as an

56 See M. Zarni and A. Cowley, 'The Slow-Burning Genocide of Myanmar's Rohingya', 23 *Pacific Rim Law & Policy Journal* (2014) 683, at 688 (raising concerns about ahistorical accounts of the violence that focus on the inter-communal aspects as 'the dark side of transition [and] the political and economic openings that have occurred in Myanmar since 2010').

57 The FFM quotes the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, stating at the height of the operations, 'The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.' Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, § 35, UN Doc. A/HRC/39/64, 24 August 2018 ('FFM Report').

58 Zarni and Cowley, *supra* note 56, at 685, 691, 697.

59 FFM Report, *supra* note 57, at § 23.

60 Human Rights Watch (HRW), *Burma: Reject Discriminatory Population Bill*, 16 May 2015, available online at <https://www.hrw.org/news/2015/05/16/burma-reject-discriminatory-population-bill> (visited 21 January 2019) (urging government to reject 'birth spacing' bill drafted by ultra-nationalist monks that could allow forced contraception). Zarni and Cowley, *supra* note 56, at 706, 727–732 (noting attempts to control marriages and prevent births within the Rohingya).

existential threat that might “swallow other races” with their “incontrollable birth rates”.<sup>61</sup>

The Rohingya have experienced several rounds of ethnic cleansing in the past. The process of repatriating and resettling large groups of refugees has helped to lay the groundwork for demonstrably false accounts that the Rohingya are illegal migrants. These often-forcible repatriations have also facilitated the Rohingya’s civic expungement. For example, largescale violence in 1978 spurred tens of thousands of Rohingya to flee Myanmar. When they returned, they had been stripped of many of their citizenship rights or deleted from family household lists.<sup>62</sup> The 1982 Citizenship Law (which does not acknowledge the Rohingya as an officially-recognized ethnic minority) and a programme of ‘citizen verification’ followed, whereby most Rohingya were denied Myanmar citizenship, disenfranchised and effectively rendered stateless.<sup>63</sup> Zarni and Cowley argue that the Citizenship Law was promulgated in direct response to a bilateral agreement between Bangladesh and then-Burma to force the latter to repatriate those individuals who had fled prior pogroms.<sup>64</sup> Ibrahim observes that the Rohingya ‘witnessed the final destruction of their civic rights in Myanmar’ in the run up to the momentous 2015 elections, in part because there were virtually no Muslim candidates on the ballot.<sup>65</sup>

The odious Citizenship Law also operates as an ‘anchor’ for other discriminatory laws.<sup>66</sup> With its enactment, ‘[p]opular racism and the state’s racially grounded policies and law became mutually reinforcing.’<sup>67</sup> In 1994, Myanmar reportedly stopped issuing birth certificates to Rohingya children. Government officials and others in the country refuse to use the term ‘Rohingya’, preferring instead to call members of the community ‘Bengali’, a derogatory (and inaccurate) term implying that they are outsiders and unwelcome interlopers. Indeed, the Rohingya were excluded from an April 2014 census unless they registered as ‘Bengali.’<sup>68</sup> Rohingya merchants have also been subjected to economic embargos on the orders of local officials and radical monks.<sup>69</sup> These efforts at the ‘illegalization’ and expungement of the Rohingya contribute to ‘a frontal assault on the identity, culture, social foundation, and history of the Rohingya.’<sup>70</sup> As the FFM noted, ‘[t]he result is a

61 FFM Report, *supra* note 57, at § 25.

62 Zarni and Cowley, *supra* note 56, at 707–708. Every forcible repatriation reinforces this conflation. *Ibid.*, at 713.

63 *Ibid.*, at 697–700 (noting that the Citizenship Law was a remnant of independence and a nation-building process influenced by anti-Muslim policy advisers and intellectuals).

64 *Ibid.*, at 702.

65 Ibrahim, *supra* note 13, at 1, 115.

66 Zarni and Cowley, *supra* note 56, at 709.

67 *Ibid.*, at 700.

68 Green et al., *supra* note 24, at 8, 54–55. See also HRW, *Burma: Postpone Flawed Census to Avert Violence*, 28 March 2014, available online at <https://www.hrw.org/news/2014/03/28/burma-postpone-flawed-census-avert-violence> (visited 21 January 2019).

69 Ibrahim, *supra* note 13, at 69, 82 (discussing ‘Buy Buddhist’ campaigns).

70 Zarni and Cowley, *supra* note 56, at 684.

continuing situation of severe, systemic and institutionalised oppression from birth to death.<sup>71</sup>

Against this backdrop of protracted institutionalized discrimination, the Rohingya have increasingly been subjected to acts of physical intimidation and violence. Human rights groups have documented the cyclical and escalating commission of a full range of abuses, including extrajudicial killing, arbitrary detention, torture, disappearances, sexual violence and forcible displacement and deportation. This conduct intensified in 2012 when clashes broke out between ethnic Rakhine and Rohingya civilians, ostensibly in response to the alleged rape of a young Rakhine woman. Although the government attempted to portray these pogroms as stemming from spontaneous sectarianism, there is evidence that the violence was at least partially state-sanctioned.<sup>72</sup> Security forces reportedly helped to coordinate assaults and, with armed Rakhine civilians, jointly attacked Rohingya villages and civilians.<sup>73</sup> In other places, the military and police promised to protect the Rohingya but then vanished when violence broke out or simply stood by while the carnage unfolded around them.<sup>74</sup> Human Rights Watch reports that the Army dumped mutilated and 'hogtied' Rohingya victims outside of refugee camps as an overt threat to others.<sup>75</sup>

The government's involvement in these events has been justified under the guise of counter-terrorism, which provides a useful cover for genocidal violence. As the standard narrative recounts, the Arakan Rohingya Salvation Army (ARSA, formerly known as Harakah al-Yaqin) emerged in 2016. The group allegedly claimed responsibility for several attacks against police stations and border crossings in Rakhine State.<sup>76</sup> The current crisis followed ARSA's most recent attack, which occurred on or about 25 August 2017 against several government outposts. In response to these events, the government ordered the military to conduct 'clearance operations', ostensibly aimed at apprehending Rohingya militants. In reality, these operations resulted in the commission of further mass atrocities against civilians on an even more virulent scale. It

71 FFM Report, *supra* note 57, at § 20.

72 S. Kiersons, 'Burma: State Apparatus at the Center of Recent Violence and Persecution', *The Sentinel Project*, 22 December 2014, available online at <https://thesentinelproject.org/2014/12/22/burma-state-apparatus-at-the-center-of-recent-violence-and-persecution/> (visited 21 January 2019) (concluding that 72% of incidents were directly caused by the state, either because they involved state security forces or were otherwise connected to the government or military).

73 We Will Destroy Everything, *supra* note 21. See also Green et al., *supra* note 24, at 15 (determining that the state has coordinated with Rakhine ultra-nationalists and anti-Islamic monks to carry out a 'genocidal process against the Rohingya'). *Ibid.*, at 74.

74 Ibrahim, *supra* note 13, at 81, 84.

75 HRW, 'All You Can Do Is Pray': *Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*, 22 April 2013 ('All You Can Do Is Pray'), available online at <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims> (visited 21 January 2019).

76 International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, 15 December 2016, available online at <https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state> (visited 21 January 2019).

should be noted that some accounts posit that the ARSA attack of August 2017 served as a mere pretext to escalate violence by a government that had a well-planned genocidal campaign teed up and was waiting for the right moment to unleash it.<sup>77</sup> The ‘emergence of ARSA also fits neatly into the preferred narrative of the Myanmar state that it is facing a sustained terrorist threat to its very existence.’<sup>78</sup> At a minimum, as the FFM found, ‘the “Rohingya crisis”, has been used by the military to reaffirm itself as the protector of a nation under threat and further cement its political role.’<sup>79</sup> In addition, some observers question whether ARSA offers a credible threat to the government or has any genuine indigenous support among the Rohingya.

The bloodshed starting in 2017 was of a different order of magnitude in terms of the obvious degree of advanced preparation and the ferocity of the violence.<sup>80</sup> The evidence that these operations were pre-planned and premeditated is compelling. For example, ‘[p]rotective fences around Rohingya houses were removed [and] knives and other sharp implements were confiscated,’ apparently to eliminate obstacles to the anticipated attacks and means of self-defence.<sup>81</sup> Witnesses also reported a buildup of governmental weaponry in advance of the August attacks.<sup>82</sup> In any case, it is clear that authorities responded to ARSA’s actions with disproportionate force, working with police and local civilians to ‘unleash a campaign of violence that has been systematic, organized and ruthless.’<sup>83</sup> These operations involved opening fire on civilians as well as conducting house-by-house raids and arson attacks that left men, women and children dead, burned or maimed. In some cases, military members reportedly came through first followed by Rakhine civilians with more rudimentary weapons.

Soldiers and police routinely subjected women and girls (some as young as 5–7 years old) to sexual violence, including mass and gang rape.<sup>84</sup> They perpetrated these attacks in public, and victims were often killed or left for dead. The State Department’s report describes sexual violence as ‘endemic’; over 80% of those who witnessed rape or gang rape reported that the state forces

77 See *They Gave Them Longswords*, *supra* note 35.

78 Ibrahim, *supra* note 13, at 150.

79 FFM report, *supra* note 57, at § 14.

80 *They Gave Them Longswords*, *supra* note 35, at 12–13, 20 (reporting that the government ‘activated non-Rohingya civilian squads, some of whom the authorities previously armed and/or trained’ who ‘acted under the Myanmar military and policy’).

81 FFM Report, *supra* note 57, at § 45; PILPG, *supra* note 2, at 26–27.

82 PILPG, *supra* note 2, at 50.

83 Amnesty International, ‘*My World is Finished: Rohingya Targeted in Crimes Against Humanity in Myanmar*’, 24 October 2017, available online at <https://www.amnesty.org/download/Documents/ASA1672882017ENGLISH.PDF> (visited 21 January 2019).

84 HRW, *Burma: Security Forces Raped Rohingya Women, Girls*, 6 February 2017 (‘*Security Forces Raped*’), available online at <https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls> (visited 21 January 2019); HRW, *All of My Body Was Pain: Sexual Violence Against Rohingya Women and Girls in Burma* (2017), available online at <https://www.hrw.org/sites/default/files/reportpdf/burma1117.web.1.pdf> (visited 21 January 2019).

were involved, either acting alone or operating alongside non-Rohingya co-perpetrators.<sup>85</sup>

Based upon survey data drawn from refugee camps in Cox's Bazar, Médecins Sans Frontières (MSF) estimated that at least 6700 identifiable individuals were deliberately killed during the attacks in August 2017.<sup>86</sup> This survey was admittedly limited given access issues and selection biases — factors likely to render these figures under- rather than over-inclusive. The State Department study found that 80% of those surveyed had witnessed someone being killed, with 20% witnessing a mass killing event involving greater than one hundred victims.<sup>87</sup> Men and boys were often separated from the women and disappeared or executed.<sup>88</sup> Many victims were beaten excessively before being killed. The Office of the High Commissioner for Human Rights (OHCHR) has indicated that the August 2017 crackdown revealed a strategy to '[i]nstill deep and widespread fear and trauma — physical, emotional and psychological — in the Rohingya victims via acts of brutality.'<sup>89</sup> The cumulative physical damage to this group easily surpasses any gravity threshold inherent to the crime of genocide.

In addition to this interpersonal violence, government-led operations resulted in massive internal displacements, forcible population transfers (some effectuated under the pretext of 'protecting' people from violence), waves of refugee flows into Bangladesh and the confinement of many Rohingya in wretched and effectively permanent internment camps or 'ghettos' in Rakhine state.<sup>90</sup> The FFM described this latter phenomenon as amounting to an 'arbitrary deprivation of liberty'.<sup>91</sup> The armed and security forces, working with and through local actors, have razed entire villages, making it effectively impossible for Rohingya to return to their homes or to remain in Rakhine State. Indeed, there are accounts — drawn in part from satellite imagery — that villages are still being destroyed now to make way for massive open-air

85 State Department Report, *supra* note 2, at 14–15.

86 Médecins Sans Frontières, *No One Was Left: Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018).

87 PILPG, *supra* note 2, at 40–43 (compiling data on killings).

88 *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/37/70, 9 March 2018 ('Report of the Special Rapporteur'), § 46, available online at <https://reliefweb.int/sites/reliefweb.int/files/resources/A-HRC-37-70.pdf> (visited 21 January 2019); PILPG, *supra* note 2, at 22.

89 OHCHR, *Mission Report of OHCHR Rapid Response Mission to Cox's Bazar, Bangladesh*, 1 September 2017, available online at <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf> (visited 21 January 2019) ('OHCHR Report'), at 1.

90 HRW, *Burma: Government Plan Would Segregate Rohingya*, 3 October 2014, available online at <https://www.hrw.org/news/2014/10/03/burma-government-plan-would-segregate-rohingya> (visited 21 January 2019) (noting Rakhine State Action Plan to permanently relocate, encamp and segregate Rohingya); Zarni and Cowley, *supra* note 56, at 685, 706 (recounting that over 100,000 Rohingya continued to live in camp-like settings following the 2012 violence, which has resulted in permanent segregation).

91 FFM Report, *supra* note 57, at § 29.



repatriation camps.<sup>92</sup> That arsonists specifically targeted Rohingya homes for destruction — while ethnic Rakhine structures were left untouched — has also been confirmed by satellite imagery.<sup>93</sup> Such destruction occurred even after Myanmar claimed that ‘clearance operations’ had been halted<sup>94</sup> as well as in the immediate aftermath of Myanmar ratifying a refugee repatriation agreement with Bangladesh.<sup>95</sup> As a result of these massive movements of people, the Rohingya are now almost entirely and permanently segregated from other communities in Rakhine State and thus removed from opportunities for communal interactions, ‘fracturing the links between them and the Buddhist majority’,<sup>96</sup> ‘fuel[ing] Buddhist suspicions’ and leading to the ‘break-down in empathy between the two groups’.<sup>97</sup> The situation has been described as ‘a state of apartheid’.<sup>98</sup>

State authorities and other actors have looted Rohingya personal property and purposely destroyed mosques and Islamic schools. While attacks on the cultural artifacts or symbols of a group are not specifically enumerated as acts of genocide,<sup>99</sup> such conduct can constitute evidence of a semiotic effort to obliterate the historical memory of the group.<sup>100</sup> The Myanmar government has also blocked unfettered humanitarian and media access to affected areas, which has the effect of maximizing the harm to the group (through malnutrition and the lack of essential medical care) but also removing witnesses who

92 Amnesty International, *Myanmar: Remaking Rakhine State*, 12 March 2018, available online at <https://www.amnesty.org/download/Documents/ASA1680182018ENGLISH.PDF> (visited 21 January 2019).

93 HRW, *Burma: New Satellite Images Confirm Mass Destruction*, 17 October 2017, available online at <https://www.hrw.org/news/2017/10/17/burma-new-satellite-images-confirm-mass-destruction> (visited 21 January 2019) (noting that neighbouring Rakhine villages were untouched).

94 The FFM found that ‘[a]pproximately 80 per cent [of villages] were burned in the initial three weeks of the operations; a significant portion of which after the Government’s official end date of the “clearance operations”’. FFM Report, *supra* note 57, at § 42.

95 HRW, *Burma: 40 Rohingya Villages Burned Since October*, 17 December 2017, available online at <https://www.hrw.org/news/2017/12/17/burma-40-rohingya-villages-burned-october> (visited 21 January 2019) (detailing satellite imagery showing the systematic destruction of Rohingya villages).

96 Ibrahim, *supra* note 13.

97 *Ibid.*, at 89.

98 Amnesty International, *Myanmar: Rohingya Trapped in Dehumanising Apartheid Regime*, 21 November 2017, available online at <https://www.amnesty.org/en/latest/news/2017/11/myanmar-rohingya-trapped-in-dehumanising-apartheid-regime/> (visited 21 January 2019).

99 Krstić, *supra* note 53, at § 580 (‘an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate those elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide’). See generally L. Bilsky and R. Klagsbrun, ‘The Return of Cultural Genocide?’ 29 *EJIL* (2018) 373, at 373 (noting that acts of cultural genocide, while central to Raphael’s Lemkin’s original conceptualization of genocide, are not prohibited per se by the Genocide Convention).

100 Judgment, *Blagojević* (IT-02-60-T), Trial Chamber, 17 January 2005, § 659. See generally K. Hon, ‘Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC’ (2013), available online at <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1352&context=studentscholarship> (visited 21 January 2019).

might communicate with the outside world or verify the accounts of victims to the epistemic human rights community.

All told, over a million Rohingya have been forced out of, or have fled, Myanmar and are in refugee encampments in Bangladesh and elsewhere under circumstances in which it is clear that the intent is to expunge them permanently from Myanmar.<sup>101</sup> This marked the ‘fastest refugee outflow since the Rwandan genocide.’<sup>102</sup> To be sure, in 2012 and thereafter, thousands of Rohingya took flight without being forcibly deported *per se*. But these people have seen massacres before and so when violence resumed in 2017, they fled for their lives *en masse*. Under such threats of violence, the wholesale exodus of 2017 cannot be considered ‘voluntary’ by any measure.

Collectively, all international observers agree this violence clearly constitutes ethnic cleansing,<sup>103</sup> which has been defined as a practice used to render ‘an area ethnically homogenous by using force or intimidation to remove persons or given groups from the area.’<sup>104</sup> Although unlawful, ethnic cleansing is not an international crime in and of itself but rather an umbrella term used to describe a constellation of acts aimed at removing a discreet population from a particular geographic area through acts of violence or persecution.<sup>105</sup> The Myanmar government has begun to discuss repatriation, but the precise modalities of this process remain problematic given the degree of destruction in Rohingya neighbourhoods in Rakhine State and the unwillingness of the Rohingya to return without guarantees of citizenship rights.<sup>106</sup> As a result,

101 OHCHR, *Brutal Attacks on Rohingya Meant to Make their Return Almost Impossible*, 11 October 2017, §§ 1–3, available online at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221> (visited 21 January 2019).

102 *They Gave Them Longswords*, *supra* note 35, at 20. See also UN Office for the Coordination of Humanitarian Affairs (OCHA), *Rohingya Refugee Crisis*, available online at <https://www.unocha.org/rohingya-refugee-crisis> (visited 21 January 2019) (describing the crisis as ‘the fastest growing refugee crisis in the world’ with ‘the concentration of refugees in Cox’s Bazar ... among the densest in the world’).

103 UN High Commissioner for Human Rights, Opening Statement to the 36<sup>th</sup> Session of the Human Rights Council, 11 September 2011, available online at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E> (visited 21 January 2019) (describing events in Myanmar as a ‘textbook example of ethnic cleansing’). The then US Secretary of State Rex Tillerson also described these events as ‘ethnic cleansing’. R. Gramer, ‘Tillerson Finally Brands Myanmar Crisis “Ethnic Cleansing”’, *Foreign Policy*, 22 November 2017.

104 Interim Report by the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex I, UN Doc. A/35374, 10 February 1993, § 55.

105 Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc S/1994/674, 27 May 1994, §§ 3, 33, (defining ethnic cleansing as a ‘purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas’).

106 H. Ellis-Peterson et al., ‘Bangladesh Admits No Rohingya Willing to Take Repatriation Offer’, *The Guardian*, 15 November 2018, available online at <https://www.theguardian.com/world/2018/nov/15/rohingya-refugee-repatriations-bangladesh-myanmar> (visited 21 January 2019).

the process remains stalled.<sup>107</sup> There are indications that the government intends to seize territories formerly occupied by the Rohingya rather than return them to their Rohingya owners or residents once the displaced are repatriated.<sup>108</sup> The government's plan to house returnees in camp-like conditions (dubbed in Orwellian terms as 'model villages') far from their fields and fishing areas has drawn sharp criticism.<sup>109</sup> In particular, rights groups have argued that so-called Repatriation Centers are essentially concentration camps where Rohingya returnees, and even the internally displaced, are indefinitely detained in abject conditions with little change to their legal status within Myanmar.<sup>110</sup>

Multiple actors are responsible for this coordinated and cross-cutting violence. Reports indicate the overwhelming involvement of state military, police (including border guards) and security forces, either directly committing the predicate acts of genocide or supporting civilians or para-military actors committing such abuses. In addition, victims and witnesses report Rakhine villagers assisting, being armed by or being integrated into security forces (even to the point of being given formal uniforms).<sup>111</sup> At a minimum, state authorities did nothing to intervene when confronted with Rakhine civilians harming their Rohingya neighbours. Children were not spared in these attacks; indeed, it appears that they were often specifically targeted for special cruelties.<sup>112</sup>

In the face of allegations of state responsibility for these abuses, the government has consistently denied wrongdoing<sup>113</sup> and engaged in what amounts to a cover-up of mass atrocities,<sup>114</sup> including by attempting to hide mass graves

107 M. Safi, 'Rohingya Muslims' Repatriation to Myanmar Postponed', *The Guardian*, 22 January 2018, available online at <https://www.theguardian.com/world/2018/jan/22/rohingya-muslims-repatriation-back-to-myanmar-postponed> (visited 21 January 2019).

108 OHCHR, *supra* note 89, at 4 (indicating that according to the country's Natural Disaster Management Law, land that has been burned can escheat to the state).

109 See Burma Task Force, U.N. Criticizes Burma Plan to Resettle Rohingya in 'Camp-Like' Villages, 2 May 2017, available online at <https://www.burmataskforce.org/content/un-criticizes-burma-plan-resettle-rohingya-camp-villages> (visited 21 January 2019).

110 H. Ellis-Petersen, 'Myanmar and UN Announce Deal for Return of Rohingya', *The Guardian*, 31 May 2018, available online at <https://www.theguardian.com/global/2018/jun/01/myanmar-and-un-announce-deal-for-safe-return-of-rohingya> (visited 21 January 2019).

111 State Department Report, *supra* note 2, indicated that three-quarters of those surveyed had witnessed killing by the Army. *Ibid.*, at 7, 12.

112 Save the Children, *Horrors I will Never Forget: The Stories of Rohingya Children*, 17 November 2017, available online at <https://reliefweb.int/report/myanmar/horrors-i-will-never-forget-stories-rohingya-children> (visited 21 January 2019); PILPG, *supra* note 2, at 33–34.

113 O. Holmes, 'Myanmar Tells UN: "There is No Ethnic Cleansing and No Genocide" of Rohingya', *The Guardian*, 29 September 2017, available online at <https://www.theguardian.com/world/2017/sep/29/myanmar-un-ethnic-cleansing-genocide-rohingya> (visited 21 January 2019); *Tatmadaw True News Information Team*, available online at <https://www.facebook.com/Cincds/posts/1511217488999111> (visited 21 January 2019).

114 HRW, *Burma: Army Report Whitewashes Ethnic Cleansing*, 14 November 2017, available online at <https://www.hrw.org/news/2017/11/14/burma-army-report-whitewashes-ethnic-cleansing> (visited 21 January 2019). The Army's report claimed that there were 'no deaths of innocent people', although over 300 'terrorists' were killed. *Ibid.*

or mutilate dead bodies to prevent their identification.<sup>115</sup> Human rights experts and civil society groups calling attention to these abuses are accused of fabrication<sup>116</sup> or blocked from entering the country.<sup>117</sup> Even the official Rakhine Investigation Commission, convened after the 2012 violence,<sup>118</sup> denied many of the crimes documented by external human rights groups, although it did announce some measures towards reconciliation and peaceful coexistence.<sup>119</sup> When confronted with unassailable evidence of destruction, Myanmar authorities have consistently blamed 'extremist terrorists',<sup>120</sup> attributed any damage to spontaneous sectarian hostilities beyond their control or even alleged that the harm was self-inflicted by the Rohingya. In this regard, the Special Rapporteur on the Situation of Human Rights in Myanmar noted that the authorities claimed people 'would burn down their own houses ... because these houses were of poor quality; and by burning down their own houses, they can expect to get international actors to come in and help build them better houses.'<sup>121</sup> U Wirathu has argued that the Rohingya have burned their own houses to 'win a place at refugee camps run by aid agencies.'<sup>122</sup> Blaming the Rohingya for their own persecution 'has become the standard response of the Myanmar authorities.'<sup>123</sup>

The FFM and rights groups have identified numerous individuals associated with the Myanmar government who have been involved in the events described above, but so far virtually no one has been investigated or held accountable

115 'Myanmar's Government Denies Reports of Mass Graves, Massacre in Rakhine State', *Radio Free Asia*, 2 February 2018, available online at <https://www.rfa.org/english/news/myanmar/denial-02022018144402.html> (visited 21 January 2019).

116 W. Lone, 'Myanmar Rejects Allegations of Human Rights Abuses Against Rohingya', *Reuters*, 6 August 2017, available online at <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-rejects-allegations-of-human-rights-abuses-against-rohingya-idUSKBN1AMODU> (visited 21 January 2019).

117 See OHCHR, *Myanmar Refuses Access to UN Special Rapporteur*, 20 December 2017, available online at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22553> (visited 21 January 2019).

118 The FFM determined that none of the many investigative commissions established by the government to date 'meets the standard of an impartial, independent, effective and thorough human rights investigation'. FFM Report, *supra* note 57, at § 96.

119 *Final Report of Inquiry Commission on Sectarian Violence in Rakhine State*, 8 July 2013, available online at <http://www.burmalibrary.org/docs15/Rakhine.Commission.Report-en-red.pdf> (visited 21 January 2019). At the same time, its authors insisted upon using the term 'Bengali' in discussing the Rohingya. *Ibid.*, at ii.

120 Fortify Rights and US Holocaust Memorial Museum (Simon Skjodt Center for the Prevention of Genocide), *They Tried to Kill Us All: Atrocity Crimes Against Rohingya Muslims in Rakhine State in Myanmar* ('FR & SS Report'), at 21; available online at [https://www.fortifyrights.org/downloads/THEY\\_TRIED\\_TO\\_KILL\\_US\\_ALL\\_Atrocity\\_Crimes\\_against\\_Rohingya\\_Muslims\\_Nov\\_2017.pdf](https://www.fortifyrights.org/downloads/THEY_TRIED_TO_KILL_US_ALL_Atrocity_Crimes_against_Rohingya_Muslims_Nov_2017.pdf) (visited 21 January 2019).

121 End of Mission Statement by Special Rapporteur on the Situation of Human Rights in Myanmar, 20 January 2017, available online at <https://www.bnionline.net/en/news/mizzima/item/2662-un-releases-full-text-of-yanghee-lee-s-end-of-mission-statement.html> (visited 21 January 2019).

122 Ibrahim, *supra* note 13, at 85.

123 *Ibid.*, at 82.

for the 2012 raids or subsequent violence,<sup>124</sup> except members of the Rohingya group.<sup>125</sup> As a result, the state has in essence granted impunity to perpetrators of violence, whether they be state or non-state actors. Indeed, the journalists investigating the massacre in question have been detained for violating the country's Official Secrets Act.<sup>126</sup> These failures to acknowledge, prevent or punish abuses have only served to embolden armed actors and ethnic Rakhine residents to continue the violence.

It should be noted that the military and security forces of Myanmar have a long history of committing atrocities against disfavored ethnic minorities, particularly in the context of armed conflicts with Karen, Shan and Kachin communities and even the Kaman Muslims.<sup>127</sup> Until the emergence of ARSA, no armed resistance existed within the Rohingya community.<sup>128</sup> And while comparing oppression is an inherently fraught exercise, the deliberate targeting of the Rohingya is of a different order than seen in previous conflict contexts.<sup>129</sup> As Ibrahim notes, it is the sense that the Rohingya are alien interlopers that explains why 'the persecution of the Rohingya is now so much worse than that of other ethnic minorities'.<sup>130</sup>

### 3. Element (iii): Violent Actors at Multiple Levels are Operating with Specific Intent

#### (a) The law

The intent element is the hallmark of genocide and what distinguishes it from other international crimes, such as war crimes or crimes against humanity.<sup>131</sup> Genocide involves the intent to destroy the group in whole or in part, as such. Individual victims are then chosen by virtue of their membership in the targeted group.<sup>132</sup> To be clear, it is not necessary to show that the group was in fact destroyed or that the particular perpetrator intended to eliminate all

124 See also *They Gave Them Longswords*, *supra* note 35, at 14, 23–24, 131–134 (identifying responsible infantry and combat police battalions, superiors and officials). But see S. Naing and T.T. Aung, 'Seven Myanmar Soldiers Sentenced to 10 Years for Rohingya Massacre', *Reuters*, 10 April 2017, available online at <https://www.reuters.com/article/us-myanmar-rohingya-military/seven-myanmar-soldiers-sentenced-to-10-years-for-rohingya-massacre-idUSKBN1H-H2ZS> (visited 21 January 2019).

125 Zarni and Cowley, *supra* note 56, at 733–734 (noting many Rohingya men have been arrested after riots, leaving behind vulnerable female-headed households).

126 *Ibid.*

127 See Amnesty International, 'All the Civilians Suffer': Conflict, Displacement Abuse in Northern Myanmar (2017), available online at <https://www.amnestyusa.org/wp-content/uploads/2017/06/Myanmar-report-FINAL-VERSION.pdf> (visited 21 January 2019) (detailing abuses against civilians in northern Shan State).

128 Ibrahim, *supra* note 13, at 149.

129 Zarni and Cowley, *supra* note 56, at 712 ('the Rohingya have suffered disproportionately to other ethnic minorities').

130 Ibrahim, *supra* note 13, at 4.

131 The crime against humanity of persecution also carries an aggravated criminal intent. See Int'l Comm'n Jurists, *supra* note 45, at 12–16.

132 Judgment, *Niyitegeka* (ICTR-96-14), Appeals Chamber, 9 July 2004, § 53.

members of the group from human society. That said, most commentators agree that the intent must be to destroy a substantial part of the group.<sup>133</sup> This captures the idea of genocide as a mass atrocity crime that impacts the overall survival of the group.<sup>134</sup> At the same time, qualitative factors can satisfy any substantiality requirement. In *Krstić*, for example, the ICTY determined that Bosnian Muslims in Srebrenica were ‘emblematic’ of the protected group as a whole.<sup>135</sup> The killing of 8000 men and boys would ‘inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica’ and thus, ‘eliminat[e] even the residual possibility that the Muslim community in the area could reconstitute itself’.<sup>136</sup>

So far, when it comes to convicting principals of genocide, the international criminal tribunals have resisted academic arguments advocating a lower intent requirement based upon knowledge that the commission of enumerated acts will result in the destruction of a group.<sup>137</sup> At the same time, it is well established that persons, and by analogy states, can be presumed to intend the natural, probable and foreseeable consequences of their conduct.<sup>138</sup> In addition, individuals may be convicted of various forms of complicity in genocide with a showing that they knew that the principal perpetrators were acting with genocidal intent and knowingly contributed to that course of conduct. A similar standard applies to state complicity<sup>139</sup> and superior responsibility. As such, a country-wide genocide determination may be appropriate where key actors are driven by genocidal intent and others act with the knowledge that

133 See ICJ 2007 Genocide Judgment, *supra* note 9, at § 198 (holding that the part of the group targeted ‘must be significant enough to have an impact on the group as a whole’); Int’l Comm’n Jurists, *supra* note 45, at 7. US law, for example, requires a showing that the defendant acted with the intent to destroy the group ‘in whole or in substantial part’, which reflects an understanding to this effect adopted at the time the USA ratified the Genocide Convention. See 18 U.S.C. § 1091(a).

134 Office of the Special Adviser on the Prevention of Genocide, Analysis Framework, n. 1, available online at <http://www.un.org/ar/preventgenocide/adviser/pdf/osapg.analysis.framework.pdf> (visited 21 January 2019).

135 *Krstić*, *supra* note 53, at § 12 (finding that the part of the group that was targeted was ‘emblematic ... or essential to [the group’s] survival’).

136 *Ibid.* at § 31.

137 See A. Greenawalt, ‘Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation’, 99 *Columbia Law Review* (1999) 2259; J. Clark, ‘Elucidating the *Dolus Specialis*: An Analysis of the ICTY Jurisprudence on Genocidal Intent’, 26 *Criminal Law Forum* (2015) 516.

138 *Commonwealth v. Ely* 388 Mass. 69, 75–76 (1983) (upholding jury instruction to the effect that ‘it is reasonable to infer that persons ordinarily intend all of the natural and probable and ordinary consequences of their acts knowingly done or knowingly omitted’); V. Lowe, ‘Responsibility for the Conduct of Other States’, 101 *Japanese Journal of International Law* (2002), 1, at 5.

139 Art. 16 of the ILC’s draft Articles on State Responsibility indicate that state responsibility exists when a ‘State which aids or assists another State in the commission of an internationally wrongful act ... does so with knowledge of the circumstances of the internationally wrongful act.’ Draft Articles on Responsibility for Internationally Wrongful Acts, with Commentaries (2001), at 65, available online at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9.6.2001.pdf> (visited 21 January 2019).

they are contributing to a genocide intended by others or fail to prevent or punish abuses by their subordinates.

The tribunals have generally sought evidence of an intent to physically destroy the group, in whole or in part. That said, it has been argued that although the enumerated *actus reus* of genocide all involve physical harm to the group, the intent requirement could be satisfied by a showing that the perpetrator intended to bring about the sociological dissolution of the group. As Judge Mohamed Shahabuddeen argued in partial dissent in *Krstić*: 'It is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the reach of the Convention ... provided that that intent is attached to a listed act.'<sup>140</sup> Indeed, the US genocide statute seems to contemplate such an outcome as falling within the genocide paradigm. In connection with the intent to destroy a 'substantial part' of the group, the statute requires a showing that the number of deaths is such 'that the destruction or loss of that part [of the protected group] would cause the destruction of the group as a viable entity within the nation of which such a group is a part'.<sup>141</sup>

In some cases, such as in Nazi Germany or with respect to the Hutu Power movement in Rwanda, a perpetrator or regime will articulate an unequivocal genocidal intent in a policy platform or self-incriminating statement. The Islamic State, for example, undertook a deliberative theological inquiry that led to express articulations of an intent to destroy the Yezidi people in the imagined caliphate, because the Yezidi faith could not be reconciled with the Islamic State's radical brand of Sunni Islam.<sup>142</sup> Such 'explicit manifestations of criminal intent are, for obvious reasons, often rare',<sup>143</sup> however.

Absent a confession of intent or revealed genocidal policy, the intent to destroy a protected group must usually be inferred. The courts and commentators have identified a host of relevant factors that would support a finding that a regime or set of perpetrators are acting with genocidal intent rather than with merely a discriminatory *animus* or with the intention of removing members of the group from a particular area without necessarily seeking to destroy the group. Some of these factors, not surprisingly, involve quantitative evaluations of the scale of violence. Others, however, are concerned more with the qualitative aspects of the factual matrix. All told, the combined effect of a deliberate course of conduct should be considered in inferring genocidal intent.<sup>144</sup>

140 Partial Dissenting Opinion by Judge Shahabuddeen, *Krstić*, *supra* note 53, §§ 49–54.

141 18 U.S.C. § 1093(8) (defining 'substantial part').

142 See N. Kikoler, 'There is No Humanity': *The Genocidal Crimes of ISIS*, USHMM, 1 May 2016, available online at <https://www.ushmm.org/information/about-the-museum/museum-publications/memory-and-action/there-is-no-humanity> (visited 21 January 2019); Human Rights Council, 'They Came to Destroy': ISIS Crimes Against the Yezidis, UN Independent International Commission of Inquiry, UN Doc. A/HRC/32/CRP.2, 15 June 2016, available online at <http://www.refworld.org/docid/57679c324.html> (visited 21 January 2019).

143 Judgment, *Kayishema and Ruzindana* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 159.

144 *Karadžić*, *supra* note 32, at § 95 (holding that genocidal intent can be inferred from '[t]he combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at

Factors that commentators and courts have been deemed relevant in this regard include:

- The general context of the violence, including the scale of the atrocities, number of victims, the repetition of culpable acts, and gravity of the harm caused;
- The use of gratuitous violence that would be excessive in relation to military necessity or to accomplish objectives other than the destruction of the group;
- The targeting of all members of the group without distinction (to age, gender, involvement in opposition activities or ability to harm or threaten the perpetrators);
- The targeting of the group's leadership in order to weaken the group but also remove individuals who could raise the alarm or engage with the international community;
- A history of other forms of discrimination or persecutory acts against members of the same protected group;
- The detrimental effect and long-term impact of the violence in terms of the future survival of the group;
- The methodical and systemic nature of the attacks;
- The implication of multiple levels of a chain of command in the attacks;
- The degree of planning and preparation behind the attacks;
- Attempts to cover up the crime and grant impunity to perpetrators;
- Attempts to bar humanitarian assistance to the victim group;
- The fact that members of other disfavoured groups are spared or subjected to less destructive forms of violence;
- The utterance of derogatory language or the issuance of propaganda, targeted to members of the group;
- Potential motives of the perpetrators in terms of competition for resources or territory;
- The existence of a political doctrine consistent with genocidal intent; and
- Attacks on cultural or religious property or symbols associated with the group.<sup>145</sup>

Neither premeditation<sup>146</sup> nor the existence of a formal plan is strictly required to prove genocide.<sup>147</sup> Rather, a genocidal plan may 'crystallise and

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undermining what is considered to be the foundation of the group'). See FFM Report, *supra* note 57, at § 1415 (discussing inference of intent).

145 Int'l Comm'n Jurists, *supra* note 45, at 17–18, 22 (citing cases).

146 *Ibid.*, at 6.

147 *Ibid.*, at 21 (noting that genocide might de facto require a set of concerted and coordinated actions undertaken by a multiplicity of actors or an organization). But see P. Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' 18 *EJIL* (2007) 631 (arguing that while the crime of genocide can be committed without a state genocidal policy, a state's international responsibility presupposes such a policy).



develop as actions are set in train and undertaken by the perpetrators'.<sup>148</sup> That said, the existence of both may facilitate the commission of the crime and provide incontestable evidence of an intent to commit genocide.

Further, the concept of intent must be distinguished from that of motive, which is the ulterior objective that drives a perpetrator to commit a crime.<sup>149</sup> A number of motives may undergird a genocidal policy, including the desire to obtain the property or territory of a protected group.<sup>150</sup> While proving an individual's motive is not necessary for a conviction, identifying the operative motive(s) may help to shed light on whether an individual or group is acting with the intent to destroy the group in whole or in part.

In making a genocide determination such as the one under contemplation, the intent of a number of different actors may be relevant, including the government as a whole if it has adopted a collective genocidal intention, members of the central authorities who may be designing a nationwide genocidal campaign or the rank-and-file who are implementing a campaign of persecution. Proving the 'intent' of a collective and inanimate entity — such as a regime, political party, state organ or organization — requires a slightly different exercise as compared with proving individual *mens rea*.<sup>151</sup> Legal entities, like states, cannot form an intent in the sense of a natural person, given that they are an amalgamation of many different institutions and actors. At a minimum, such a genocide determination would be justified if it could be shown that a state or an organization had developed, and was implementing, a clear or formal plan or policy to destroy a protected group in whole or in part. However, proof of a formal policy to eliminate a group is a sufficient, but not necessary, precondition to accusing a regime of committing, or being complicit in, genocide.<sup>152</sup> As such, it may be necessary to ascribe intent to a state by virtue of the intentions of key agents, organs, and instrumentalities.<sup>153</sup>

148 Judgment, *Katanga* (ICC-01/04-01/07), Trial Chamber, 7 March 2014, §§ 1108–1110; Judgment, *Gombo* (ICC-01/05-01/08), Trial Chamber, 21 March 2016, §§ 159–160.

149 Judgment, *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, 9 July 2004 (noting that the drafters of the Genocide Convention chose not to enumerate a list of motives and determined that a genocide conviction is possible where 'the perpetrator was also driven by other motivations that are legally irrelevant in this context').

150 International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General Pursuant to S.C. Res. 1564*, 25 January 2005, § 493.

151 See Kreß, *supra* note 34, at 622 n. 20 (noting that the ICJ recognized that a 'higher authority' could possess genocidal intent, including a battalion, paramilitary organization, sub-national political entity, or a state itself).

152 See ICJ 2007 Genocide Judgment, *supra* note 9, at § 376 (noting that it might find 'intent on the part of the Respondent [state], either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent').

153 *Ibid.*, § 371 (looking to the intentions of key officials to determine state intent).

The Rome Statute definition of crimes against humanity requires evidence of a state or organizational policy.<sup>154</sup> As a matter of proof, the same factors that can prove the existence of a policy to commit crimes against humanity can be relevant to proving a state's responsibility for genocide.<sup>155</sup> Drawing upon this jurisprudence, a state or organizational policy to commit genocide may be inferred from a number of factors, including government involvement in the violence or in disarming the victims, the use of public resources, the centralization of power and degree of coordination in the attacks, the militarization of the territory where the protected group resides, and legislation discriminating against the group.<sup>156</sup> Also relevant is the state's active promotion of the attack, a 'deliberate failure to take action, which is consciously aimed at encouraging the attack', or the failure to prevent violence when the state has advanced knowledge and the practical ability to intervene or prosecute the offenders.<sup>157</sup> Proof of preparatory acts by state authorities also undercuts defensive arguments that violence is a spontaneous uprising or the work of low-level locals.<sup>158</sup>

The ICJ, in adjudicating claims brought under the Genocide Convention by Bosnia and Herzegovina against Serbia and Montenegro, undertook to identify the aims of a 'higher authority' rather than the intent of particular individuals.<sup>159</sup> Ultimately, it determined that with the exception of events at Srebrenica (already determined to constitute genocide by the ICTY),<sup>160</sup> it had not been conclusively proven that the Respondent formed a concerted plan with Bosnian Serbs to commit genocide or that the pattern of conduct 'could only point to' the existence of genocidal intent.<sup>161</sup> As such, the ICJ declined to hold Serbia and Montenegro responsible for the commission of, or complicity in, genocide in Bosnia, although it did find Serbia responsible for failing to prevent the genocide committed in Srebrenica by the Bosnian Serb Army and for failing to punish the perpetrators. The finding on the failure to prevent hinges on the ICJ's determination that Serbia was in a position to exercise influence over the Bosnian Serbs.<sup>162</sup> This more limited outcome is not without its

154 The definition of 'attack' is defined in terms of the existence of a state or organizational policy to commit the attack. Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf.183/9, Art. 7(2)(a) (entered into force 1 July 2002).

155 See T. Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya', 43 *George Washington International Law Review* (2011) 1.

156 See FR & SS Report, *supra* note 120, at 14.

157 ICC Elements of Crimes, at Art. 7(3) ICCSt.: 'Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.' See *Karadžić*, *supra* note 32, at § 5830 (inferring intent to commit genocide from the defendant's failure to halt the violence).

158 See United Nations, *Framework of Analysis for Atrocity Crimes* (2014) 16.

159 ICJ 2007 Genocide Judgment, *supra* note 9, at §§ 277, 319.

160 Judgment, *Krstić* (ICTY-98-33-T), Trial Chamber, 2 August 2001.

161 ICJ 2007 Genocide Judgment, *supra* note 9, at §§ 370–376.

162 *Ibid.*, § 434. See M. Milanović, 'State Responsibility for Genocide: A Follow-Up', 18 *EJIL* (2007) 669 (critiquing the ICJ's failure to find Serbian complicity in genocide).

detractors, and the judgment has been somewhat impugned by the emergence of new evidence of Serbian involvement in events in neighbouring Bosnia.<sup>163</sup>

In addition, if individual leaders (*de jure* or *de facto*, national or regional) with the ability to deploy troops, security forces or armed actors possess the necessary intent, then such a determination would also be appropriate, even if some individual subordinates were not aware that they were participating in a genocidal campaign. Finally, a genocide finding might be justified if sufficient numbers of the rank-and-file, or local community members, had engaged or were engaging, in violence against a protected group with genocidal intent, even if the central authorities do not necessarily share this intent, choose to look the other way, subtly encourage the conduct or benefit from the results. Indeed, if multiple individual acts of genocide are occurring against a protected group at the hands of different actors, then a determination that a full-fledged genocide was underway might be warranted, even absent a formal policy or uniform patterns of violence throughout a particular society.

Any of these scenarios would be sufficient to undergird a generalized determination by the State Department that a genocide is underway in Myanmar against a protected group. What matters for the purpose of making a determination that genocide writ large is underway is that someone or some group of actors with power and control over the events in question, and the ability to destroy the group in whole or in part, is acting with genocidal intent. It matters not whether all relevant actors within a chain of command or collective criminal enterprise share that intent.

#### (b) The facts

Turning to the facts, there is some indication that the government prepared a formal and written policy to destroy the Rohingya. Supposedly leaked documents from Myanmar suggest that an extermination plan may have been adopted as early as in 1988. The memorandum in question appears to outline a series of 'slow death' strategies, including denial of citizenship rights, restrictions on reproduction, confinement to abject settlements, banning Rohingya education, restrictions on land ownership, forced conversions to Buddhism, etc. The final element of the purported policy could be interpreted to cut both ways when it states: 'mass killing of the Muslim is to be avoided in order to not invite the attention of the Muslim countries.'<sup>164</sup> Extremist monks created their own manifesto.<sup>165</sup>

163 F. Brodlija, 'The Emergence of Evidence Opens the Door for Another Lawsuit by Bosnia and Herzegovina Against Serbia', *Jurist*, 6 February 2017, available online at <https://www.jurist.org/commentary/2017/02/Fahira-Brodlija-herzegovina-and-serbia/> (visited 21 January 2019).

164 Green et al., *supra* note 24, at 36.

165 *All You Can Do Is Pray*, *supra* note 75 (discussing 12-point statement issued by monks in Rathedaung Township calling for people to discriminate against, persecute and ethnically cleanse the Rohingya).

Separate and apart from this document, whose authenticity cannot be verified, Fortify Rights has identified elements of a political doctrine emanating from the central authorities, and echoed by the state government, that is fundamentally intolerant of the Rohingya and aimed at their permanent exclusion from society.<sup>166</sup> The Fortify Rights/Simon-Skjodt report indicates that the violence was ‘perpetrated as part of an attack in line with a state policy that was either in place at the time of the attacks or crystalized during the attacks.’<sup>167</sup> Even absent a formal policy, the violence has been described by a team deployed by the OHCHR as ‘well-organised, coordinated and systematic,’<sup>168</sup> a view shared by many NGOs. For example, Amnesty International has painstakingly traced much of the 2017 violence to the Myanmar military, which reinforced its presence in Rakhine State in the weeks leading up to 25 August 2017.

It is difficult to imagine a set of facts that would better support such an inference of genocidal intent on the part of government officials and private actors. All the factors that have been identified by authoritative commentators and tribunals to date to infer genocidal intent are present in Myanmar. As the FFM recently noted: ‘The crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts.’<sup>169</sup>

The sheer scale of the violence suggests the operation of genocidal intent. There is no need to parse ‘substantiality’ when it comes to attacks on the Rohingya; the entire population is at risk with the exception of a tiny diaspora outside the region. Surveys conducted of summary executions are admittedly limited given the lack of access to victims, sampling barriers, the use of clandestine mass graves and the destruction of bodies.<sup>170</sup> Nonetheless, MSF — which at one point was expelled from the country — has recorded more almost 7000 summary executions in one area alone.<sup>171</sup> Thousands more deaths from disease, exposure, the deprivation of healthcare and humanitarian aid and the perils of flight remain uncounted. There is good data that of the approximately 1 million Rohingya once residing peaceably in Rakhine state, over 900,000 have fled in the face of violence — or threatened violence — or been forcibly expelled since 2012.<sup>172</sup>

166 See *They Gave Them Longswords*, *supra* note 35, at 93.

167 FR & SS Report, *supra* note 120, at 13–14.

168 OHCHR Report, *supra* note 89.

169 FFM Report, *supra* note 57, at § 85.

170 E. Stoakes, ‘Myanmar Government “Bulldozing Rohingya Mass Grave to Hide Evidence”’, *The Guardian*, 19 February 2018, available online at <https://www.theguardian.com/global-development/2018/feb/19/myanmar-government-bulldozing-rohingya-mass-grave-hide-evidence> (visited 21 January 2019).

171 Médecins Sans Frontières, *MSF Surveys Estimate That Least 6,700 Rohingya Were Killed During the Attacks in Myanmar*, 12 December 2017, available online at <https://www.msf.org/myanmarbangladesh-msf-surveys-estimate-least-6700-rohingya-were-killed-during-attacks-myanmar> (visited 21 January 2019).

172 OCHA, *supra* note 102 (estimating that there are 908K refugees in Bangladesh alone); UNHCR, Rohingya Emergency, <http://www.unhcr.org/en-us/rohingya-emergency.html> (visited 21 January 2019) (noting that over 723,000 have fled since August 2017 with more than 40% under the age of 12 years).

The gratuitous and brutal nature of the violence also suggests that the intent was not simply to run the Rohingya out of town, or eliminate an armed insurgency, but rather to destroy the group entirely. Indeed, the micro-level dynamics of violence by individual soldiers, security personnel and Rakhine civilians reveals a degree of savagery consistent with an intent to commit genocide. The fact that babies and children were specifically targeted — in horrific ways — lends further support that the objective is to destroy the group.<sup>173</sup> The degree of violence is inconsistent with an intent merely to engage in ethnic cleansing. Indeed, even as Rohingya were fleeing, they were pursued and subjected to further attacks.<sup>174</sup> There are also accounts that the military laid anti-personnel landmines along the refugee escape routes and at the border,<sup>175</sup> triggering a formal protest from Bangladesh.<sup>176</sup>

Over the years, the Myanmar government has tolerated, and broadcast through state-run media, strong anti-Rohingya rhetoric. Such hate speech emanates from state actors, xenophobic and racialized political parties<sup>177</sup> and influential ultra-nationalist monks, among others.<sup>178</sup> This rhetoric contains 'a dangerous mix of racism, xenophobia and Islamophobia' and a narrative of dehumanization that excludes the Rohingya from 'Rakhine and Myanmar's "universe of moral obligation"'.<sup>179</sup> The anti-Rohingya rhetoric is bolstered by anti-immigrant rhetoric, which reinforces false beliefs that the Rohingya immigrated unlawfully from Bangladesh.<sup>180</sup> These virulent statements, amplified

173 See G. Goodwin-Gill and J. Pobjoy, 'Joint Legal Opinion on the Government of Myanmar's Compliance with the Convention on the Rights of the Child in the Context of the Treatment of Rohingya Children Following the Events of 25 August 2017', 12 June 2018, available online at <https://resourcecentre.savethechildren.net/node/13627/pdf/joint.legal.opinion.--myanmar.pdf> (visited 21 January 2019).

174 PILPG, *supra* note 2, at 47 (recounting attacks on fleeing Rohingya).

175 HRW, *Burma: Landmines Deadly for Fleeing Rohingya*, 23 September 2017, <https://www.hrw.org/news/2017/09/23/burma-landmines-deadly-fleeing-rohingya> (visited 21 January 2019).

176 H. Beech and A. Ramzy, 'Refugees' Flight and Land Mines Spur Bangladesh Protest to Myanmar', *New York Times*, 6 September 2017, available online at <https://www.nytimes.com/2017/09/06/world/americas/bangladesh-rohingya-land-mines.html> (visited 21 January 2019).

177 A major source of incitement to violence is the Arakan National Party (previously known as the Rakhine Nationalities Development Party), which seeks to promote the rights and interests of Rakhine people in Rakhine State. See A. Ibrahim, 'Who is Instigating the Violence Against the Rohingya in Myanmar?', *The Blog, Huffington Post*, 16 July 2015, available online at <https://www.huffingtonpost.com/azeem-ibrahim/who-is-instigating-the-vib.7810972.html> (visited 21 January 2019).

178 A. Kuhn, 'Are Buddhist Monks Involved in Myanmar's Violence?', *NPR*, 17 May 2013, available online at <https://www.npr.org/sections/parallels/2013/05/17/182904712/Are-Buddhist-Monks-Involved-In-Myanmars-Violence> (visited 21 January 2019). See FFM Report, *supra* note 57, at §§ 1423–1424.

179 Green et al., *supra* note 24, at 20. See generally K. Anderson, *The Enemy Next Door: Hate Speech in Burma*, The Sentinel Project, 17 October 2014, available online at <https://thesentinel-project.org/2014/10/17/the-enemy-next-door-hate-speech-in-burma/> (visited 21 January 2019).

180 Zarni and Cowley, *supra* note 56, at 704 (noting the existence of a 'virulent strain of twofold racism that is both anti-Muslim and anti-immigration').

by social media platforms, have helped to create, nurture and spread a climate of ethnic hatred. In addition to this prevailing discourse, Myanmar officials are on record making genocidal comments,<sup>181</sup> and victims regularly report being insulted on an ethnic or religious basis during attacks.<sup>182</sup> Even President Thein's Facebook page (in a post that has since been deleted) warned that 'Rohingyas from other countries are coming into the country. Since our Military has got the news in advance, we will eradicate them until the end! I believe we're already doing it.'<sup>183</sup> A report by Reuters and the Human Rights Center at Berkeley found more than 1000 posts on Facebook attacking the Rohingya.<sup>184</sup> These manifestations of harm are all indicative of the existence of a pervasive and entrenched genocidal intent as well as a form of mental harm perpetrated on the group.

Much of the most recent violence was preceded by media propaganda and religious manifestos that vilified and demonized the Rohingya.<sup>185</sup> These statements often include preposterous claims that the Rohingya plan to exterminate the ethnic Rakhine, thus reinforcing Buddhist perceptions of a Muslim danger and justifying violence in 'self-defense'.<sup>186</sup> Indeed, thought leaders in Myanmar have abused the historical record 'to construct a narrative in which mass murder becomes desirable or even imperative'.<sup>187</sup> All told, the Rohingya are cast as 'the enemy within of choice'<sup>188</sup> and 'an existential threat to Buddhist culture'.<sup>189</sup> This dehumanization appears as a key step in many lists of genocide risk factors because it helps to 'overcome[] the normal human revulsion against murder'.<sup>190</sup>

In addition to targeting ordinary Rohingya based upon their identities, perpetrators have also specifically targeted Rohingya cultural leaders and intellectuals through summary execution, disappearances and arbitrary detention.<sup>191</sup>

181 *Ibid.*, at 683 (compiling quotes from officials). See also <https://www.maungzarni.net/en> (same) (visited 21 January 2019).

182 *Security Forces Raped*, *supra* note 84; PILPG, *supra* note 2, at 31–32 (describing racial, ethnic and religious epithets).

183 Ibrahim, *supra* note 13, at 83.

184 S. Stecklow, 'Inside Facebook's Myanmar Operation Hatebook: A Reuters Special Report', *Reuters*, 15 August 2018, available online at <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> (visited 21 January 2019). As the FFM noted, 'for most users Facebook is the internet'. FFM Report, *supra* note 57, at § 74.

185 *They Gave Them Longswords*, *supra* note 35, at 95 (discussing derogatory pamphlets circulated by monks).

186 *Ibid.* (recounting monks' association statement that 'The Arakanese people must understand that Bengalis want to destroy the land of Arakan, are eating Arakan rice and plan to exterminate Arakanese people and use their money to buy weapons to kill Arakanese people').

187 Ibrahim, *supra* note 13, at 101.

188 *Ibid.*, at 144.

189 FR & SS Report, *supra* note 120, at 2.

190 G. Stanton, *The Ten Stages of Genocide*, Genocide Watch, available online at <http://www.genocidewatch.org/genocide/tenstagesofgenocide.html> (visited 21 January 2019).

191 See OHCHR, *supra* note 89, at 1 (indicating that the Myanmar crackdown revealed a strategy to target 'teachers, the cultural and religious leadership and other people of influence in the Rohingya community in an effort to diminish Rohingya history, culture and knowledge' and

NGOs working with victims have been described as ‘traitors’ and ‘enemies’,<sup>192</sup> and humanitarian aid has been restricted in Rakhine State, thus magnifying the harm to victims, disabling international support systems and removing witnesses to the atrocities.<sup>193</sup>

The most compelling counterargument that might bring pause is that the actors responsible for the multifaceted harm to the Rohingya are ‘only’ committing an extreme campaign of ethnic cleansing in an effort to expel the Rohingya population from the country. In this way, ethnic cleansing has perversely ‘become a defense to genocide.’<sup>194</sup> To be sure, not every interaction between members of the Rohingya community and their persecutors results in death; sometimes victims are subjected to lesser forms of harm or are allowed to flee. This alternative hypothesis is perhaps conceivable, but it has become less and less plausible as signs of genocidal intent accumulate over the years, particularly when this evidence is aggregated and filtered through the factors customarily invoked to infer and prove genocidal intent. Indeed, there is jurisprudence to the effect that examples of ‘forewent opportunities’ to kill members of the targeted protected group do not necessarily negate a finding of genocidal intent.<sup>195</sup> Thus, if there are other indices of the intent to destroy the group in whole or in part, the fact that not every potential victim is killed or abused should not be a bar to a finding of genocide. Any policy is necessarily executed by individuals who may retain considerable discretion in choosing the means of implementation. As a result, particular occurrences in isolation might suggest one intent, but quite another when events are viewed as a whole.

All told, even absent a written genocide policy, it is difficult to imagine more factors with which to infer the exercise of genocidal intent at multiple organizational levels within Myanmar. This intent finds expression in local actors in Rakhine State, within the regional and central authorities and among influential thought leaders who are crucial to inspiring, sustaining and committing the violence. Governmental actors are fully integrated into these campaigns of violence. Human rights reports demonstrate that the military and security forces operate according to strict reporting requirements, which would ensure that the central authorities were aware of events in Rakhine State.<sup>196</sup> Together, these observations belie any claims that civilian harm was the result of a spontaneous upwelling of ancient sectarian hatreds or even a mere collateral consequence of an armed conflict or counter-insurgency campaign against ARSA.

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[a]rrest and arbitrarily detain Rohingya opinion-makers, leaders and cultural and religious personalities’).

192 Lowenstein International Human Rights Clinic, *supra* note 22, at 55.

193 *They Gave Them Longswords*, *supra* note 35, at 16.

194 J. Sweeney, ‘Twenty Years after Srebrenica, Ethnic Cleansing Has Become a Defence to Genocide’, *The Conversation*, 9 July 2016, available online at <https://theconversation.com/twenty-years-after-srebrenica-ethnic-cleansing-has-become-a-defence-to-genocide-44376> (visited 21 January 2019).

195 See Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 71.

196 We Will Destroy Everything, *supra* note 21, at 14.

Together, credible reports show a protected group being subjected to a range of genocidal acts — mass killings, physical and mental harm, adverse conditions of life and barriers to procreation — by individuals and entities operating with genocidal intent, thus satisfying all three elements of the framework established by the Genocide Convention and international criminal law. This evidence would be sufficient to convict individual actors of genocide were their individual *mens rea* proven in a court of law. It is also sufficient to make a determination that a genocide writ large is underway in Myanmar, pursuant to almost all of the available standards of proof as discussed below.

### 3. The Threshold of Evidence

Inherent to the State Department's inquiry is the question of what evidentiary standard, level of certainty, or threshold should be applied in articulating a genocide determination outside of a court of law. Whereas courts employ well-developed — and, in some cases, legally-mandated — burdens of proof at various stages of their proceedings, there is no required protocol for non-judicial inquiries. Since a quasi-legal determination by a state or multilateral entity is of a different order than an exercise of ascribing individual criminal responsibility, a distinctive or hybrid approach may be warranted.<sup>197</sup> Non-judicial entities undertaking this exercise do occasionally articulate their choice in connection with their public statements in order to signal the degree of confidence they have in their conclusions and leave open a measure of uncertainty. In other cases, however, the standard employed remains opaque.

#### A. *International Tribunals*

Starting with judicial standards, it seems clear that it should not be necessary for a non-judicial entity to be satisfied that it has proof 'beyond a reasonable doubt' that any one individual or the regime itself has committed genocide before making a genocide determination about a particular state or government, because the purpose of the inquiry in question is not to adjudicate individual criminal responsibility or ascribe punishment to a perpetrator. That said, because of the contentious and provocative nature of such a determination, it may be prudent to adhere to a standard that exceeds the 'preponderance of the evidence' standard that would apply in a civil tort suit.<sup>198</sup> On balance, for the purposes of a non-judicial genocide inquiry, it would be appropriate to employ a threshold of certainty similar to that which would apply during a pre-conviction phase of a criminal process.

197 See L. Sunga, 'How Can UN Special Procedures Sharpen ICC Fact Finding?' 15 *International Journal of Human Rights* (2011) 187.

198 *Doe v. Karadžić*, Judgment, 93 Civ. 878 (S.D.N.Y. 4 October 2000), available online at <https://ccrjustice.org/sites/default/files/assets/files/Chapter%2021.pdf> (civil suit for genocide under the Alien Tort Statute) (visited 21 January 2019).



At the ICC, for example, multiple standards apply as the criminal prosecution unfolds, such as, when the Prosecutor or the Court must decide whether to open/authorize an investigation (requiring a reasonable basis to proceed)<sup>199</sup> or to issue an arrest warrant (requiring reasonable grounds to believe the person committed a crime).<sup>200</sup> In the ICC proceedings involving President Al-Bashir of Sudan, for example, a Pre-Trial Chamber (PTC) originally did not find that there were reasonable grounds to believe that the defendant had committed genocide, rationalizing that the existence of genocidal intent was one of several reasonable conclusions available given the evidence in the record at the time.<sup>201</sup> On appeal, however, the Appeals Chamber determined that the PTC had adopted too high a standard for the arrest warrant phase.<sup>202</sup> On remand, the PTC concluded that one reasonable conclusion to be drawn from the existing record was that genocide occurred in Darfur and issued a second arrest warrant charging Bashir with genocide.<sup>203</sup> Although the ICC has not yet addressed this issue, the ICTY has ruled that genocidal intent must be the only reasonable inference to be drawn from the evidence in order to convict an individual of the crime.<sup>204</sup>

In civil suits involving state responsibility before international bodies, by contrast, courts have been cagey about articulating the operative burden of proof.<sup>205</sup> Indeed, the Inter-American Court of Human Rights has observed that '[t]he standards of proof are less formal in an international legal proceeding than in a domestic one.'<sup>206</sup> In *Velasquez Rodriguez v. Honduras*, the Court suggested that a heightened standard was appropriate in light of the profound nature of the allegations at issue:

The Court cannot ignore the special seriousness of finding that a State Party to the [Inter-American] Convention [on Human Rights] has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which ... is capable of establishing the truth of the allegations in a convincing manner.<sup>207</sup>

199 Art. 15(3), 53(1) ICCSt. (articulating standard for opening an investigation).

200 Art. 58(1) ICCSt.

201 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009, § 159.

202 Judgment on the Appeal of the Prosecutor Against the 'Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir', *Al Bashir* (ICC-02/05-01/09-OA), Appeals Chamber, 3 February 2010.

203 Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-95), Pre-Trial Chamber I, 12 July 2010.

204 *Karadžić*, *supra* note 32, at § 2592.

205 See P. Tzeng, 'Recent Developments: Proving Genocide: The High Standards of the International Court of Justice', 40 *Yale Journal of International Law* (2015) 419, 419–420 (noting that in keeping with the civil law tradition, the ICJ has refrained from articulating consistent standards of proof in favour of more 'flexible terminology').

206 *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, § 126 (1988).

207 *Ibid.*, at § 129.

This approaches an interim standard of ‘clear and convincing evidence.’<sup>208</sup>

Likewise, in the case of *Bosnia-Herzegovina v. Serbia & Montenegro*, which involved genocide allegations, the ICJ rejected the balance of the probabilities standard advocated by the Applicant but did not embrace the Respondent’s proposal that the Court adopt a beyond-a-reasonable-doubt standard given the highly sensitive and stigmatizing nature of the allegations.<sup>209</sup> Without attaching these labels, the ICJ agreed that a heightened standard was appropriate:

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. ... The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.<sup>210</sup>

The ICJ conceded that intent can be inferred, but only when it is ‘the only inference that could reasonably be drawn from the acts in question.’<sup>211</sup>

### B. Commissions of Inquiry

Commissions of inquiry (COIs), FFMs, truth commissions and other investigative bodies charged with determining the facts and circumstances of instances of mass violence offer a more useful analogy to the Department of State’s present endeavor. COIs tend to apply idiosyncratic standards of proof, either based upon the commissioners’ preferences or as detailed in their formal mandates or terms of reference.<sup>212</sup> Something akin to a sliding scale is often in view, starting with reasonable suspicion (when other conclusions are possible), to a balance of the probabilities (when it is more likely than not that something occurred), to clear and convincing evidence (when there is a high degree of confidence that something occurred but it is not necessarily the only conclusion), to overwhelming evidence (when the evidence is conclusive, highly convincing and not susceptible to other interpretations). When the nature of their inquiry is more limited (establishing facts and circumstances), a lower

208 This standard requires the production of ‘a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear conviction of the truth of the precise facts in issue.’ New Jersey, Model Civil Jury Charges, Charge 1.19, *Burden of Proof—Clear and Convincing Evidence*, available online at <https://www.njcourts.gov/attorneys/assets/civilcharges/1.19.pdf?cacheID=GYZeg9> (visited 21 January 2019).

209 ICJ 2007 Genocide Judgment, *supra* note 9, at § 208.

210 *Ibid.*, at § 209.

211 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports (2015) 3, at § 148 (‘... in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question’). The ICJ determined that no genocide occurred in Croatia.

212 See S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Acad. of Int’l Humanitarian Law and Human Rights, available online at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf> (visited 21 January 2019).

threshold is often applied. By contrast, when they are attributing responsibility to individuals or groups, COIs tend to invoke a heightened standard (but still less than that required for criminal conviction).<sup>213</sup> The articulation of different standards may also indicate the degree of confidence felt in any particular determination. For example, some findings of the Salvadoran Truth Commission were supported by 'overwhelming evidence', others by 'substantial evidence' and still others by 'sufficient evidence' (where more evidence supported a particularly finding than contradicted it).<sup>214</sup> The Democratic Republic of Congo Mapping Project (1993–2003) presented information satisfying a 'reasonable suspicion' standard.<sup>215</sup> Many modern COIs have gravitated to this 'reasonable grounds to believe' standard.<sup>216</sup>

Perhaps most authoritative for the State Department's purposes, the FFM devoted to Myanmar applied a reasonable grounds standard of proof for factual findings: 'This standard was met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred.'<sup>217</sup> When it comes to genocide, the FFM determined that all other inferences were unreasonable.<sup>218</sup> In so determining, it disaggregated the relevant actors and distinguished between the civilian and military leadership. It parsed the statements of particular individuals as evidence of state intent<sup>219</sup> and concluded that identified military leaders should be investigated for genocide: 'given these considerations on the inference of genocidal intent, ... there is sufficient information to warrant the investigation and prosecution of senior officials in the Tatmadaw chain of command, so that a competent court can determine their liability for genocide in relation to the situation in

213 See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/S17/2/Add.1, November 2011, §§ 5–6.

214 'From Madness to Hope; The 12-Year War in El Salvador: Report on the Commission on the Truth for El Salvador', 15 March 1993, at 24, available online at <http://www.usip.org/publications/truth-commission-el-salvador> (visited 21 January 2019).

215 Democratic Republic of the Congo, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003*, June 2010 (draft), available online at [http://www.genocidewatch.org/images/DRC10.06.xx.Report\\_DraftDemocraticRepublicoftheCongo.1993-2003.pdf](http://www.genocidewatch.org/images/DRC10.06.xx.Report_DraftDemocraticRepublicoftheCongo.1993-2003.pdf) (visited 21 January 2019). For several case studies of different standards employed, see Wilkinson, *supra* note 212, at 26.

216 See also Human Rights Council, *Report of the United Nations Independent Investigation on Burundi (UNIIB) Established Pursuant to Human Rights Council Resolution S-24/1*, UN Doc. A/HRC/33/37, 20 September 2016.

217 FFM Report, *supra* note 57, at § 6.

218 *Ibid.*, at § 86 ("Having given careful consideration to other possible inferences regarding intent, the Mission considers that these can be discounted as unreasonable.").

219 Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2, 17 September 2018, at §§ 1415, 1422.

Rakhine State.<sup>220</sup> It also confirmed that crimes against humanity and war crimes have been committed.<sup>221</sup>

Many NGOs have adopted a similar standard in making their determinations. For example, Fortify Rights has concluded that ‘there are “reasonable grounds” to believe that Myanmar Army, Myanmar Police Force and non-Rohingya civilian perpetrators committed acts that constitute genocide and crimes against humanity’ and the ‘evidence collected ... demonstrates reasonable grounds to believe that [these actors] acted with genocidal intent to destroy the Rohingya in whole or in part.’<sup>222</sup> Operating under different — or unarticulated — burdens of proof, other credible observers have applied the term ‘genocide’ to the situation in Myanmar, although they have employed different formulations that convey varying degrees of confidence and definitiveness. A few academic commentators,<sup>223</sup> journalists<sup>224</sup> and civil society organizations<sup>225</sup> have opined that a full-fledged genocide is underway; others will qualify this conclusion slightly by identifying the commission of ‘acts of genocide’,<sup>226</sup> the same term that caused so much grief when employed by the US in connection with the war in the former Yugoslavia and the genocide in Rwanda. Or, they will indicate that the situation bears ‘the hallmarks of genocide’,<sup>227</sup> is ‘tantamount to genocide’ or that there is ‘mounting evidence of genocide’<sup>228</sup> or ‘indicators of genocide’. The metaphor of a ‘slow burning’ genocide is also common.<sup>229</sup> Still more will describe Myanmar as an incipient genocide,

220 FFM Report, *supra* note 57, at § 87.

221 *Ibid.*, at §§ 88–89. See also *ibid.*, at § 1441 (concluding that the ‘factors allowing the inference of genocidal intent are present’).

222 *They Gave Them Longswords*, *supra* note 35, at 21, 82.

223 See K. Cronin-Furman, ‘Calling a Genocide a Genocide’, *Slate*, 31 October 2017, available online at <http://www.slate.com/articles/news.and.politics/foreigners/2017/10/the.word.genocide.is.overused.but.it.applies.to.what.s.happening.to.the.html> (visited 21 January 2019).

224 D. Clark, ‘Inside the Rohingya Refugee Camps, Traumatized Exiles Ask Why the World Won’t Call the Humanitarian Crisis Genocide?’ *Post Magazine*, 16 January 2018, available online at <https://www.scmp.com/magazines/post-magazine/long-reads/article/2128432/inside-rohingya-refugee-camps-traumatized-exiles> (visited 21 January 2019).

225 The Permanent Peoples’ Tribunal, a network of scholars and experts, concluded that the government has been implementing a policy of genocide in Rakhine State. ‘Tribunal Finds Myanmar Guilty of Genocide Against Rohingya’, *Radio Free Asia*, 22 September 2017, available online at <https://www.rfa.org/english/news/myanmar/tribunal-09222017162250.html> (visited 21 January 2019).

226 ‘UN: Myanmar Should Be Investigated for Crimes Against Rohingya’, *Al-Jazeera*, 9 March 2018, available online at <https://www.aljazeera.com/news/2018/03/myanmar-investigated-crimes-rohingya-180309105233347.html> (visited 21 January 2019) (recounting statement of former UN High Commissioner for Human Rights Prince Zeid bin Raad Zeid al-Husseini).

227 Report of the Special Rapporteur, *supra* note 88, at § 65.

228 FR & SS Report, *supra* note 120.

229 A. Powell, ‘The Threat to Burma’s Minorities’, *The Harvard Gazette*, 7 November 2014, available online at <https://news.harvard.edu/gazette/story/2014/11/burma-genocide/> (visited 21 January 2019) (reproducing statement by Amartya Sen); Zarni and Cowley, *supra* note 56, at 686–687 (describing a ‘slow-burning genocide’—‘one that has taken place over the past thirty-five years and continues today via similar processes and instruments of terror and destruction’).

using descriptors such as ‘on the brink of’, ‘at risk of’, ‘unfolding’ or warning that the Rohingya ‘face the threat of genocide’.<sup>230</sup> Others focus on the fact that it would be for a criminal tribunal to prove the existence of genocidal intent but confirm, with some circularity, that if this intent were definitively proven, the situation would constitute a genocide.<sup>231</sup>

Of particular relevance to the State Department’s determination is a recent report by the US Holocaust Memorial Museum, a quasi-governmental entity, that found ‘compelling evidence’ that genocide was committed against the Rohingya in 2017 (and maybe earlier).<sup>232</sup> This determination follows upon a report in 2015 warning that the preconditions for genocide were evident.<sup>233</sup> Although the State Department would not be bound by this conclusion, the Museum’s conclusions carry particular weight.

The disciplines of sociology and political science offer alternative frameworks for identifying the commission of genocide that prove helpful in this regard.<sup>234</sup> Although every genocide has its own logic, genocide studies academics have identified pre-genocide stages and risk factors that help to confirm whether a genocide is incipient, being contemplated or fully underway.<sup>235</sup> Strikingly, the situation in Myanmar — given its authoritarian government, its history of ethnic conflict and the degree of targeted violence — would be deemed genocidal or pre-genocidal under all of these rubrics.<sup>236</sup> For example, the Early Warning Project has listed Myanmar as the country at highest risk for genocide.<sup>237</sup> On the basis of its own staged analysis, the Sentinel Project

230 United to End Genocide, ‘What’s Happening in Burma?’, available online at <http://endgenocide.org/conflict-areas/burma/> (visited 21 January 2019) (describing the Rohingya as ‘a people at risk of genocide’).

231 Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on His Visit to Bangladesh to Assess the Situation of Rohingya Refugees from Myanmar, 12 March 2018, available online at <https://www.un.org/sg/en/content/sg/note-correspondents/2018-03-12/note-correspondents-statement-adama-dieng-united-nations> (visited 21 January 2019).

232 U.S. Holocaust Memorial Museum, *Museum Finds Compelling Evidence Genocide was Committed Against Rohingya, Warns of Continued Threat*, 3 December 2018, available online at <https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa> (visited 21 January 2019).

233 U.S. Holocaust Memorial Museum, “‘They want us all to go away’: Early Warning Signs of Genocide in Burma”, March 2015, available online at <https://www.ushmm.org/m/pdfs/20150505-Burma-Report.pdf> (visited 21 January 2019).

234 See e.g. H. Fein, ‘Genocide: A Sociological Perspective’, 38 *Current Sociology* (1990) 1; Stanton, *supra* note 190; D. Feierstein, *Genocide as a Social Practice: Reorganizing Society under the Nazis and Argentina’s Military Juntas* (Rutgers University Press, 2014).

235 See also J. Waller, ‘Risk Factors for Genocide’, available online at [https://en.wikipedia.org/wiki/Risk\\_factors\\_for\\_genocide](https://en.wikipedia.org/wiki/Risk_factors_for_genocide) (visited 21 January 2019).

236 See B. Harff, ‘Assessing the Risk of Genocide and Politicide’, in M.G. Marshall and T.R. Gurr (eds), *Peace & Conflict* (Center for International Development and Conflict Management, 2005) 101.

237 See Early Warning Project, <http://www.earlywarningproject.com/2017/09/25/wisdom-of-the-crowds-tackles-atrocity-risk> (visited 21 January 2019); T. Khin, ‘Risk of Mass Atrocities and Policies of Persecution in Burma’, 16 July 2015, available online at <https://www.earlywarningproject.org/2015/07/16/policies-of-persecution-in-burma> (visited 21 January 2019).

concluded in 2013 that the country was in a state of genocide emergency.<sup>238</sup> Similarly, United to End Genocide has warned: ‘Nowhere in the world are there more known precursors to genocide than in Burma today.’<sup>239</sup> Unfortunately, many of these assessments have not been updated since the current conflagration.

#### 4. Conclusion

There is no question that the Rohingya are a community that has been effectively destroyed and is at risk of being entirely eliminated from the mosaic of humankind. Given the information in the record, including its own rigorous investigation, the US Government should declare this to be the case and respond accordingly, before it is too late. The rest of the international community should dispense with legal semantics and focus on how to save lives. To be sure, a genocide determination by the USA would get out ahead of other states, which — with few exceptions<sup>240</sup> — have not gone on record in this regard. That said, the conclusion that a genocide is underway in Myanmar is consistent with other authoritative accounts and conclusions, including the FFM, non-governmental organizations working in the region and academic commentators.

International criminal law contains no express hierarchy of international crimes and aficionados of the field often strive to emphasize the equality of its prohibitions.<sup>241</sup> That said, jurists reveal their true attitudes at the time of sentencing, with individuals charged with genocide receiving more serious sentences given the surplus of intent associated with the crime.<sup>242</sup> The fact that

238 The Sentinel Project for Genocide Prevention, *Burma Risk Assessment*, September 2013, available online at <https://thesentinelproject.org/wp-content/uploads/2013/09/Risk-Assessment-Burma-September-2013.pdf> (visited 21 January 2019). See *ibid.*, at 3 (‘While virtually all of the elements of the genocidal process are present in Burma, it is too early to determine whether genocide itself is currently occurring.’).

239 T.H. Andrews and D. Sullivan, *Marching to Genocide in Burma*, United to End Genocide, 24 March 2014, 3, available online at <http://endgenocide.org/wp-content/uploads/2014/03/marching-to-genocide-in-burma.pdf> (visited 21 January 2019).

240 An Organization of Islamic Cooperation envoy to Myanmar has called for UN intervention to avoid genocide. J. Sipalan and E. Harris, ‘OIC Envoy Calls for U.N. Intervention to Avoid Genocide of Rohingya Muslims’, *Reuters*, 17 January 2017, available online at <https://uk.reuters.com/article/uk-myanmar-rohingya-oic-idUKKBN1520C5> (visited 21 January 2019); ‘Malaysia PM: Myanmar Leader must Stop Rohingya “Genocide”’, *Iran Daily*, 20 August 2018, available online at <http://www.iran-daily.com/News/173194.html> (visited 21 January 2019).

241 A.R.J. Murray, ‘Does International Criminal Law Still Require a “Crime of Crimes”? A Comparative Review of Genocide and Crimes against Humanity’, 3 *Goettingen Journal of International Law* (2011) 589 (arguing for the redundancy of the prohibition against genocide).

242 Judgment and Sentence, *Kambanda* (ICTR-97-23-S), Trial Chamber, 4 September 1998, § 16 (calling genocide the ‘crime of crimes’). See generally M. Frulli, ‘Are Crimes Against Humanity More Serious Than War Crimes?’, 12 *EJIL* (2001) 329 (compiling evidence that international criminal law treats crimes against humanity (including genocide) more seriously than war crimes).

the State Department, and other observers for that matter, continue to debate the application of the genocide prohibitions attests to the continuing power of this concept — among victims' groups and political actors alike.<sup>243</sup>

243 M.J. Kelly, 'Genocide—The Power of a Label', 40 *Case Western Reserve Journal of International Law* (2007–8) 147 (noting that observers regularly agonize over deploying the genocide label).