

“DOCUMENTING ATROCITY CRIMES COMMITTED AGAINST THE ROHINGYA, ACCOUNTABILITY AND NEXT STEPS”—AN OVERVIEW OF THE CONFERENCE HELD BY THE PUBLIC INTERNATIONAL LAW AND POLICY GROUP (PILPG)

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Introduction

The PILPG conference was held on 21 February 2019 at the Vrije Universiteit Amsterdam. The objective of the conference was to present the factual findings and legal analysis of PILPG’s documentation of the atrocity crimes committed against the Rohingya in Myanmar’s Rakhine State. PILPG is a global pro bono law firm with the headquarters in Washington D.C. PILPG recently conducted an unprecedented and comprehensive human rights investigation mission in the refugee camps and settlement areas in Eastern Bangladesh.

The purpose of the investigation was to provide ‘an accurate accounting of the patterns of abuse and atrocity crimes perpetrated against the Rohingya in the Rakhine State and to help in policy recommendations related to accountability in Myanmar.’¹ The PILPG documentation report was based upon 1,024 interviews in 34 different refugee camps along the Bangladesh-Myanmar border. It was conducted by 18 investigators from 11 different countries with prior experiences in Darfur and South Sudan investigation missions.

This commentary is a brief overview of the speakers’ presentations, which focused on the factual findings and legal analysis of the escalated abuses and violence perpetrated against the Rohingya since October 2016.

Opening Remarks

Dr. Marieke de Hoon² gave the opening remarks. Firstly, she introduced how PILPG is engaged in documenting various conflicts around the world and most recently conducted the Rohingya documentation project. She acknowledged the investigators, participants and experts of the documentation project who were present to talk about their findings and field experiences. She then gave a brief overview of the Rohingya situation and the crimes that have been committed against them. She emphasized the importance of pursuing accountability and planning the next steps to solve the crisis.

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¹ Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State (2018), at: <https://www.publicinternationallawandpolicygroup.org/rohingya-report> (accessed on 04 March 2019).

² Dr. Marieke de Hoon is the Director and Senior Counsel of PILPG Netherlands Office and an Assistant Professor of International Law and International Criminal Justice at the Vrije Universiteit Amsterdam.

Dr. Joris van Wijk³ gave his words of welcome. He briefly introduced CICJ as a research centre dedicated to the interdisciplinary study and debate of issues related to international crimes and human rights violations. The CICJ regularly publishes studies and organizes seminars that bring together academics and practitioners to discuss issues of international criminal justice. Dr. van Wijk highlighted the growing interest in the Netherlands to learn more about the current situation of Rohingya in Myanmar and the role of Bangladesh. According to him, this interest illustrates two things: (1) legal professionals, academics, activists, and students in the Netherlands have not forgotten about Rohingya – there is a sincere interest in learning more about the atrocities they have faced and discussing which measures can be taken to hold perpetrators accountable; and (2) PILPG’s reputation as an expert organization on matters of international law and the value that is given to the study.

Keynote Address

Maung Tun Khin,⁴ a Rohingya human rights advocate, gave a keynote speech about the historical context and the current situation of the Rohingya population from the Rakhine state. Like the rest of the Rohingya, he was stripped of his citizenship and fled the country when he was 17. Following the 1948 independence, the Rohingya used to have rights like other ethnic groups in Burma. However, the 1982 Citizenship Act in Myanmar officially stripped the Rohingya of their liberty, and their civil and political rights. Their freedom of movement was curtailed, and they were not allowed to move from one village to another without obtaining a pass. The denial of their existence, identity, education, right to have children, medical treatment, the blockage of humanitarian aid, and mass killings continued for many years. In a recent census, the Rohingya population were not accounted for and they were subsequently barred from voting in the 2015 election. In 2017, thousands of Rohingya refugees fled to the border of Bangladesh after episodes of massive slaughter, rape, and systematic human rights violations.

Mr. Tun Khin shared his experience after spending a month in the refugee camps in Bangladesh, where he interviewed victims and heard horrendous stories. He shared his thoughts on behalf of the Rohingya people: how they want to gain their rights back, seek justice for the atrocious crimes committed against them, and see the perpetrators held accountable and tried at the International Criminal Court. His organization has been advocating for the return of Rohingya’s rights but unfortunately, they have not seen much action from the international community. When speaking about repatriation, he emphasized the importance of ending the cycle of human rights abuse and violence against the Rohingya people. He called upon the international community to ensure the restoration of their rights. He also urged Myanmar authorities to end their systematic efforts to destroy Rohingya communities, open prison camps where Rohingya men are illegally detained, and restoring their citizenship including all rights associated with it. He contended that there must be justice for the crimes committed against the Rohingya by the Myanmar security forces. He further pointed out that if those responsible are not held accountable, they will feel emboldened to commit the same violations again. Mr. Tun Khin then acknowledged the timeliness of PILPG’s extensive documentation on the Rohingya situation.

³ Dr. Joris van Wijk is the Director of the Center of International Criminal Justice (CICJ) and an Assistant Professor of the master programme International Crimes, Conflict and Criminology at the Vrije Universiteit Amsterdam.

⁴ Maung Tun Khin is the Founder and President of the Burmese Rohingya Organisation in the UK. He is also a freelance professional researcher and consultant in Myanmar.

Documenting Atrocity Crimes Committed against the Rohingya in Myanmar's Rakhine State: Factual Findings and Legal Analysis

Dr. Paul Williams,⁵ the Co-founder and President of PILPG and a co-author of the report, served as the moderator for the panel presentations. He gave a brief introduction and presented the outline of the program, beginning with a panel presentation with the investigators and legal experts on the work that was undertaken by PILPG in the refugee camps. The conversation centred on the documentation report and aimed to further elaborate and detail the situation described by Maung Tun Khin – both from the perspective of what happened and the narratives of the refugees – as well as what this means in international law.

PILPG collaborated with the U.S. Department of State in spearheading the human rights documentation mission. Dr. Williams also acknowledged the substantial pro bono support, in the form of legal analysis that PILPG received from different partners and non-government organizations. This support helped PILPG conduct a qualitative analysis of each interview transcript, input those findings into a database, and draft a qualitative and legal analysis of the factual findings.

Dr. Williams introduced the first panel of speakers, who proceeded with their presentations accordingly.

Neha Bhatia⁶ is the methodology expert of PILPG's investigative team. She made sure that everything was on track, maintained the integrity of the project, and guaranteed that the report had statistical rigor. In her panel presentation, she provided details on the methodology PILPG used, how it was developed, how it was implemented, and some of the challenges associated with their random sampling technique.

The goal of the documentation project was to provide accurate and significant accounting of atrocities committed against the Rohingya in the Rakhine State. The methodology was built upon previous investigation missions conducted in Darfur and South Sudan. The mission's target was to collect over 1000 interviews from a representative random sample of the refugees all throughout the refugee camps and settlement areas in Eastern Bangladesh. The methodology team, consisted of experts from PILPG and the U.S. Department of State, was careful to include gender balance among the investigators and interpreters – at least one woman was assigned to each team. Gender sensitivity was also emphasized in the interviewing process. The interviews were carried out with the assistance of 18 interpreters who were trained by an International Criminal Court Interpretation Specialist during the preparation phase.

The methodology PILPG applied was a combination of classical survey with standard questionnaires and techniques in international criminal investigations. To avoid hearsay and interview fatigue, the goal was to document only first-hand experiences of respondents – what they personally experienced and witnessed.

⁵ Dr. Paul Williams is a Rebecca I. Grazier Professor of Law and International Relations in the American University. He is also the Co-founder and President of PILPG, the pro bono law firm that undertook the documentation mission detailed in the Factual Findings and Data Analysis Report. Dr. Williams is also a co-author of the report.

⁶ Neha Bhatia is the Program Associate of the Bangladesh Documentation, Burma, and Syria projects of the PILPG. She was also a former Intake and Logistics Coordinator at the International Refugee Assistance Project.

The representative sample was drawn from the Rohingya population in 34 refugee camps, including informal settlements. Randomized walk patterns were used to identify households and respondents. The investigators took every left turn from the main road to ensure that they have access to households located far from the main road. The first house was randomly picked based on the day of the week and every third house was chosen successively. Informed consent was obtained prior to the interviews. Birthday tables were used to determine the members in the selected households. To ensure that not all respondents are predominantly older male of the family, any member of the selected household who is at least 18 years old can be interviewed. The investigation resulted a total of 1024 individual interviews, over 15,000 coded pages of documentation, and 13,000 coded atrocity crimes.

Michael Stefanovic,⁷ is the former Director of Investigations for the United Nations (UN) and a former Resident Investigator on several UN missions in Africa. He also served earlier in the Darfur investigation. His talk focused on the patterns of serious violations that occurred from 2012 to 2017. The interviews revealed years-long patterns of escalating persecution of the Rohingya people compared to other ethnic minorities. Reports showed that violence escalated first in 2012 and then in 2016. Sporadic violence intensified into major attacks in 2017, leading to the large exodus of Rohingya refugees. These attacks were predominantly perpetrated by the Myanmar police and military forces.

The widespread and systematic patterns of violence exclusively targeting the Rohingya during this period include: (1) extensive curfews were implemented from 6:00 in the evening until 8:00 the next morning - breaching curfew entailed serious consequences like being tortured, killed, or disappearance; (2) confiscation of Rohingya lands and properties to be used as government establishments; (3) restricted access to food and livelihood - for instance, prohibiting Rohingya fishermen from fishing; (4) rampant extortion and forced labour wherein local villagers are coerced to build military camps, being subjected to poor labour conditions; and (5) restrictions on marriage, family, births, and practice of religion.

Mr. Stefanovic also shared his impressions throughout the investigation mission. It struck him how quickly the teams were able to collect accounts of killings, torture, and sexual crimes despite the use of random sampling techniques. Based on his experience on previous missions, it was unusual to establish high prevalence of this form of crimes using a randomized technique unless it was happening on a very large scale. He also pointed out that the pattern of barbarous acts, such as genital mutilation and gang rape in front of villagers, are reminiscent of the Japanese atrocities during the Second World War.

Larissa Wakim,⁸ in her personal capacity, discussed the patterns of escalating violence and violations in 2016 prior to the massive attacks in 2017. The investigation confirmed that the scale and severity of mass violence and human rights abuses against Rohingya escalated at the start of the Myanmar military's "clearing operation"—in response to the purported attacks committed by Arkan Rohingya Salvation Army (ARSA) against the state security forces in October 2016. The forms of escalating violence and deprivation included: (1) regular raids and searches of Rohingya

⁷ Michael Stefanovic is the Investigation Consultant and advisor at Fulcrum Chambers. He previously worked as: the Director of investigations at the United Nations; Manager of External Investigations at World Bank; Chief Resident Investigator at the UN Peacekeeping Missions in Africa; and as former Investigator at the UN International Criminal Tribunal for the former Yugoslavia.

⁸ Larissa Wakim is a member of the New Zealand Immigration and Protection Tribunal. She formerly worked as Investigator and Deputy Team Leader at the International Criminal Court- Office of the Prosecutor. She was a former Visiting Research Scholar at the University of Michigan Law School. She was also an investigator on the Investigation Mission.

villages; (2) attacks against women, children, and the elderly; (3) interrogation and torture; (4) humiliation and degrading treatments; (5) mass detentions, disappearances, and killings of civilians; (6) increased presence of military and police forces in and around the villages; (7) monitoring Rohingya civilians; (8) seizing anything that resembles a weapon and other valuable properties; and (9) removal of barriers and fences surrounding the villages.

Patrols in Rohingya villages increased around this period. According to Ms. Wakim, the military patrols and village visits became daily, often occurring several times during the day. The state's armed forces were looking for sympathizers of the ARSA. There was a significant increase of military presence: more troops were being deployed, more military prisons were built, trucks were loaded with weapons and ammunitions, and there were frequent movement of helicopters in the area.

The military would often target, arrest, and detain young Rohingya men despite lack of sufficient grounds. Terrified of being picked up and detained, men fled from their villages to hide. This left women vulnerable to rape and abuse. The documentation mission found that sexual abuse, rape, and gang rape were rampant during these raids.

Ms. Wakim also pointed out that the removal of barricades and fences allowed the military to attack the villages from all directions. Moreover, facilities such as toilets and bathrooms were destroyed by the military, thus contributing to a more miserable existence for the Rohingya. Sleep deprivation was also widespread among the victims, as they have been hyper vigilant and waiting for the next patrol or attack to happen. This further diminished their well-being. According to the report, the scale of military presence and responses were compelling evidence of systematic planning.

Kyle Wood,⁹ an Assistant Attorney General, discussed patterns in the major attacks that occurred between August and September 2017. He personally interviewed 54 refugees in the camp – to his surprise almost no one would refuse to be interviewed. The attacks were pre-planned and usually start around 3 or 4 in the morning on Fridays. The timing was designed to catch them off guard and the attacks were executed simultaneously in different villages across the northern Rakhine State. Based on the personal accounts of the victims, the soldiers would shoot at anything that moved and their brutality extended to children, women, and elderly. The military would often surround the villages in U-formation, so the only way to escape was towards Bangladesh. Clearly, the attacks were designed not to capture terrorists but to push the villagers out so they would never return. The attacks were also accompanied with racial, ethnical, and religious epithets— which made clear that the Rohingya people were the identified targets. Non-Rohingya civilians were also reported to have been armed by the military and participated in burning houses, pillaging, and murdering. There were also multiple accounts of attacks on Rohingya who were fleeing to Bangladesh.

The investigation mission documented a high level of brutality during the attacks. There were many instances of mutilation, including beheadings, dismembered body parts, castration, and prolonged deaths resulting from bleeding. Many of these gruesome attacks took place in public so as to instil more fear and terror in the Rohingya population.

⁹ Kyle Wood is an Assistant Attorney General and Anti-human Trafficking and Child Exploitation Coordinator at Washington State Office of the Attorney General. He has 8 years experience as former Appeals Counsel and Legal Officer in the UN International Criminal Tribunal for the Former Yugoslavia and also at the UN International Residual Mechanism for Criminal Tribunals.

Danny Fullerton,¹⁰ the program manager of the Bangladesh documentation, discussed whether there are reasonable grounds to believe that crimes against humanity have been committed in Myanmar. He summarized how the PILPG investigation team reached a unanimous finding based on the documented information obtained from the 1,024 interviews and its legal analysis. According to Mr. Fullerton, the team reviewed 15,000 pages of documentation and coded each human rights violation. This data was inputted into a centralized database. The investigators looked for patterns, conducted the factual analysis, and established the specific crimes that have been committed. At the same time, they also examined the elements of the specific crimes they were evaluating, including the elements of crimes against humanity and murder, and elements of genocidal intent. One of the challenges of this process was determining how to distinguish between ‘intent to displace’ and ‘intent to destroy’. The investigative team concluded that there was genocidal intent based on the patterns that emerged in the factual findings, including long-term persecution and abuse against the Rohingya people.

In conducting its legal analysis, the investigative team assessed whether there were reasonable grounds to believe that international crimes have been committed against the Rohingya people. Mr. Fullerton explained that at this stage of investigation, the main goal was to set strong preliminary indications that international crimes have indeed been committed, and that this did not require the identification of individual perpetrators for criminal investigation. Furthermore, the reasonable grounds to believe standard, which is lower than the criminal burden of proof of beyond reasonable doubt, has also been consistently applied in the ICC preliminary investigations and the UN fact finding missions.

Under the Rome Statute of the International Criminal Court,¹¹ acts such as murder, torture, rape, deportation, and persecution are tantamount to crimes against humanity when committed as part of a widespread or systematic attack against civilian population and with knowledge of the attack. Under international law, there are two steps for determining whether a crime against humanity has been committed: (1) the contextual elements of crimes against humanity must be satisfied; and (2) the prohibited acts or crimes committed must be established.

The documentation report established that the factual findings exceeded the reasonable ground to believe standard. With respect to the contextual elements: (1) the attacks were spread across the Rakhine State; (2) the attacks were determined to have been directed against a civilian population, specifically, the Rohingya. The pattern of the attacks showed the existence of a larger organizational policy at play in coordinating the activities over period of days. Based on the speed, chronology, widespread and systematic nature of the attacks carried out by the military forces, PILPG’s investigative team found that there were reasonable grounds to believe that crimes against humanity were committed against the Rohingya.

Jonathan Worboys,¹² a PILPG Senior Peace Fellow and co-author of the report, engaged in the question of whether genocide and/or war crimes were committed against the Rohingya in the Rakhine State. Genocide is an international crime that can be committed both in times of peace

¹⁰ Danny Fullerton is the Program Manager and Counsel of the Burma, Bangladesh Documentation, and Sudan projects at PILPG. He is a former Law Clerk to the Office of the General Counsel in U.S. International Trade Commission. He was also the program manager of the Investigation Mission and co-author of the Report.

¹¹ International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, at: <https://www.refworld.org/docid/4ff5dd7d2.html> (accessed on 04 March 2019).

¹² Jonathan Worboys is a Barrister at Henderson Chambers and a Visiting Lecturer in Public International Law in King’s College London. He was a former Assistant Legal Adviser at the Foreign and Commonwealth Office.

and in times of war. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.’¹³

To prove that genocide took place, one must show that: (1) a protected group was targeted; (2) the prohibited acts were committed against persons belonging to the protected group; and (3) there was genocidal intent to destroy the protected group in whole or in part. In the case at hand, the Rohingya people are recognized by the UN committees as a protected ethnic group. Furthermore, some of the underlying prohibited acts committed include mass killings, serious mental harm, torture, sexual violence, burning of villages, and deliberate physical destruction. According to Mr. Worboys, the key question – of whether there was the genocidal intent to destroy in whole or in part a protected group – remains difficult to answer at this stage of investigation and analysis. However, there is sufficient evidence to conclude that there are reasonable grounds to believe that genocide was committed against the Rohingya in the Rakhine State. Further investigation focused on establishing the mental element of the crime of genocide and identifying the perpetrators is still needed.

On the other hand, war crimes are serious violations of international humanitarian law. War crimes can only take place in the context of either an international or internal armed conflict. The report is not necessarily looking at conflict-related crimes, however, the factual findings showed that there are also reasonable grounds to believe that war crimes were committed in Myanmar in relation to the widespread abuses and violence committed against the Rohingya. Thus, further criminal investigation is required to establish the existence of internal armed conflict.

Peace and Justice for the Rohingya? Moderated Panel Discussion on Accountability and Next Steps

Dr. Maaïke Matelski,¹⁴ a Postdoctoral Researcher at Radboud University Nijmegen, talked about the broader context that contributed to these crimes and how the rest of Myanmar view the Rohingya. According to Dr. Matelski, Myanmar’s armed forces have been committing atrocities against ethnic minorities for decades. The Rohingya are one of several Muslim minorities in Myanmar. Ethnic conflicts have been prevalent since the country’s independence. The legacy of violence, the propaganda, the breakdown of the judicial order, and the divide and conquer tactics used by the army led different ethnic and/or religious groups to turn against each other. This socio-political environment had shaped the nationalist mindset of the Burmese people, which clearly distinguishes between the majority and minority populations. Each ethnic/religious group feels violated and victimized in different ways.

¹³ 6 Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (1948).

¹⁴ Dr. Maaïke Matelski is a Postdoctoral Researcher at the Radboud University Nijmegen. She was a former Lecturer at Vrije Universiteit Amsterdam. She was also a former Board Member of the Dutch Foundation for Peace Studies.

Despite these long-standing ethnic divisions, there are no reports about the crimes committed by the military against other minority groups aside from the Rohingya. What sets the Rohingya apart from the other minority groups - and what has captured the attention of the international community - is the severity and barbarity of the crimes committed against them. In her concluding remarks, Dr. Matelski stressed the importance of taking a holistic approach and identifying crimes committed by Myanmar's armed forces against other ethnic minority groups.

Dr. Marieke de Hoon returned to address the big questions. What is justice for the Rohingya, and what do they want? What's next in terms of accountability? Clearly, the Rohingya seeks justice and accountability for the crimes committed. She emphasized that if the international community chooses not to focus on the situation in Myanmar, it raises the question of whether or not there is truly an international legal order.

According to Dr. de Hoon, there has been a lot of discussion in the last few decades about ending impunity and upholding international criminal justice. There has been a widespread and systematic violence committed against the Rohingya people in the absence of UN intervention. Justice means that those responsible for these crimes should be accountable. The ICC is currently at the stage of preliminary investigation. She stressed the importance of having this conversation in order not to raise false expectations among the victims who already suffered. Achieving accountability requires a willingness on the part of society to look at their past and try to address it themselves. Unfortunately, domestic prosecution is unlikely in Myanmar and difficult for Bangladesh to carry out.

However, as Dr. de Hoon pointed out, criminal accountability is not the only form of justice that can be served. Other than accountability, there are various forms of transitional justice such as truth-telling, reparations, and redesigning the way the government is structured. While these aspects are all very important in order to prevent such atrocious crimes from happening again—they are unlikely to occur at the moment.

Another possibility is to look into the options available at the International Court of Justice. Since genocide has allegedly been committed, it is important to consider whether it is possible to hold the state of Myanmar - a party to the Genocide Convention - accountable under the jurisdiction of the ICJ. In Dr. de Hoon's opinion, this is a viable option for prosecution, given that accountability on the state level is usually not that hard to prove. In addition, any state party to the Genocide Convention may sue Myanmar for violating the treaty.

Dr. de Hoon concluded by highlighting the importance of recognizing the extent of the atrocities committed in Myanmar and trying to help the Rohingya based on what they want to prioritize. Most importantly, she reminded the audience that despite the importance of the status of the case before the ICC, the Rohingya will need much more from the international community to move on from the horrors they have experienced.

The panel discussion was wrapped up with a Q&A session wherein most questions centered on the specific elements of the crimes committed and how can the international community contribute to raise awareness and alleviate the Rohingya crisis.

ASEAN and the Rohingya Crisis

PILPG's unprecedented and extensive investigation report on the atrocity crimes committed against the Rohingya is timely and very significant. It can supplement the current preliminary

investigations conducted by the ICC. The documentation report raises awareness about the urgent need for the international community to act upon the situation. Moreover, it is also relevant to examine how the Association of Southeast Asian Nations (ASEAN) can take an active role in the Rohingya crisis. What are the possible implications of such role given the non-intervention principle in the region? How can this be implemented considering the fact that only two out of ten ASEAN countries ratified the Refugee Convention? At this point in writing, a collective regional response has yet to be seen and is certainly warranted.