

Justice for the Rohingya: The Role of Canada

An international virtual roundtable of experts

21 May 2020

Summary Report

Co-hosted by:

Honourable Marilou McPhedran, Independent Senator, Parliament of Canada
Faculty of Law University of Victoria
Centre for Asia-Pacific Initiatives (CAPI), University of Victoria
Human Rights Research and Education Centre (HRREC), University of Ottawa

Report edited by:

Catherine Morris, CAPI Associate and roundtable convenor



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Human Rights
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and
Education
Centre

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21 May 2020

Co-hosted by:

Honourable Marilou McPhedran, Independent Senator, Parliament of Canada
Faculty of Law University of Victoria
Centre for Asia-Pacific Initiatives (CAPI), University of Victoria, as part of CAPI's Roundtable
Series on Southeast Asia in Global Context
Human Rights Research and Education Centre (HRREC), University of Ottawa

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Introduction and key observations

Purpose, method and overview

This report summarizes the discussions of invited academic, government and civil society experts at a virtual international roundtable discussion held on 21 May 2020. The purpose of the online roundtable was to create a forum for exploration of key roles for Canada towards justice for the Rohingya through informed exchange of expert knowledge on international law and international human rights dimensions of the situation, including the current case brought by The Gambia in the International Court of Justice (ICJ).¹

For purposes of the roundtable, panellists and participants were invited to define the term “justice” broadly to include recognition and respect for internationally protected human rights including truth, accountability, reparation and other restorative measures, guarantees of non-repetition, prevention of impunity, and other remedies for individuals and groups subjected to violations of their fundamental human rights. The overall focus was on possibilities for justice for the Rohingya within the context of contemporary international relations, particularly in terms of roles for individual States and also the “international community” as a whole. The specific focus was on possibilities for Canadian action and leadership, within the time frame of options such as the ICJ case.

The event was convened under a slightly modified version of the Chatham House Rule. When a meeting, or part thereof, is held under the Chatham House Rule, “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”² For purposes of the roundtable, the Chatham House Rule was modified to include the names of the following moderators, invited speakers, panellists or featured discussants named in the agenda circulated in advance:

- **Honourable Marilou McPhedran**, Independent Senator, Parliament of Canada;
- **Her Excellency Jacqueline O’Neill**, Ambassador for Women, Peace, and Security, Canada;
- **Honourable Bob Rae**, Special Envoy on Humanitarian and Refugee Issues, appointed by the Prime Minister of Canada;
- **Prof. Payam Akhavan**, Member of the Permanent Court of Arbitration, The Hague; Faculty of Law, McGill University; Counsel for The Gambia at the ICJ in the case of *The Gambia v. Myanmar*;
- **Prof. Yanghee Lee**, United Nations (UN) Special Rapporteur on the situation of human rights in Myanmar (May 2014 to 30 April 2020);
- **Prof. Susan Breau, Dean**, Faculty of Law, University of Victoria, Canada;
- **Prof. Christine Chinkin**, Emerita Professor of International Law, London School of Economics, UK;

¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), International Court of Justice, Application instituted 11 November 2019, available at: <https://www.icj-cij.org/en/case/178>.

² Chatham House, Chatham House Rule, available at <https://www.chathamhouse.org/chatham-house-rule>.

- **Prof. Victor V. Ramraj**, Faculty of Law and Director, Centre for Asia Pacific Initiatives, University of Victoria, Canada;
- **Prof. John Packer**, Associate Professor of Law, Director of the Human Rights Research and Education Centre (HRREC) & Neuberger-Jesin Professor of International Conflict Resolution, University of Ottawa, Canada;
- **Ms. Razia Sultana**, Chairperson, Rohingya Women’s Welfare Society, Cox’s Bazar, Bangladesh;
- **Ms. Wai Wai Nu**, Rohingya/Burmese founder, Women’s Peace Network, Yangon, Myanmar;
- **Ms. Akila Radhakrishnan**, President, Global Justice Center, New York, USA;
- **Ms. Mavic Cabrera Balleza**, Founder and Chief Executive Officer, Global Network of Women Peacebuilders, New York, USA.

In addition to the above-named speakers, a number of experts and key decision makers were invited to participate in the roundtable discussions. At least 79 participants joined the roundtable from several locations in Canada, the United States, the United Kingdom, Bangladesh, South Korea, and Australia. Participants included academics with expertise in international law, international human rights, or other relevant fields; present and former officials of the United Nations (UN), Canadian government; and civil society representatives from several locations around the world.

The agenda of the roundtable comprised two topics as they relate to the situation of the Rohingya:

1. Goals for Canada: Challenges and options;
2. Sexual violence as a core element of the genocide.

There was no electronic recording of the roundtable; this summary report was developed with assistance of hand-written notes by three rapporteurs. All explanatory footnotes and references have been added by the editor.

Key observations

The following is an overview of key observations made by the academic, government and civil society experts who participated in the roundtable.

Canada must take immediate, robust action on justice for the Rohingya

The experts who spoke at the roundtable were unified in their calls that Canada put into practice robust, concrete actions using a holistic approach and ensuring that the victims are at the centre.

The situation for the Rohingya has not improved – it has deteriorated

Several speakers emphasized that Myanmar continues in routine violations of international humanitarian law and human rights law against the Rohingya as well as other minorities in Myanmar. The situation of Rohingya in Myanmar has not improved since the “clearance operations” in 2017. Myanmar is obstructing humanitarian aid to Internally Displaced Persons

(IDP) camps. Myanmar's "draconian" laws that discriminate against the Rohingya remain intact. Impunity for sexual violence by military personnel continues. Escalated conflict includes missile, drone, and artillery attacks by Myanmar. These attacks have severely injured Rohingya youths, boys, and girls.³

Canada has the necessary legal and policy framework for robust, holistic intervention

A number of speakers referred to or illuminated the following Canadian legal and policy framework for addressing questions of justice for the Rohingya:

- International law obligations to the entire international community, including the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention),⁴ which requires all Contracting Parties to prevent genocide and hold perpetrators accountable;
- Canada's strategy on Myanmar and Bangladesh⁵ with its focus on:
 - humanitarian responses,
 - encouragement of positive political developments in Myanmar,
 - accountability for crimes, and
 - enhancing international cooperation;
- Canada's 2017-2022 National Action Plan on Women, Peace, and Security (WPS), under which Myanmar is a priority country;
- Canada's Feminist International Assistance Policy (FIAP), which in the context of the situation of the Rohingya, has its focus on humanitarian aid and transformational peace processes to engage women – half the population.

³ See "Students injured in shelling at school in Myanmar's Rakhine state," *Aljazeera*, 14 February 2020, available at: <https://www.aljazeera.com/news/2020/02/students-injured-shelling-school-myanmar-rakhine-state-200214063635803.html>; Note that civilian adults have also been killed or injured. See "Myanmar Artillery Shells Kill 8 Civilians in Rakhine, as War Displaced Face Food Shortages," RFA, 13 April 2020, available at: <https://www.rfa.org/english/news/myanmar/artillery-shells-04132020211029.html>.

⁴ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html>. The Convention Article I and II provides that:

Article I

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.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

⁵ Government of Canada, "Canada's Strategy to Respond to the Rohingya Crisis in Myanmar and Bangladesh," available at: https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/strat-rohingya.aspx?lang=eng.

Canada's previous actions have included:

- Parliamentary motions adopted unanimously by both chambers of Parliament in 2018 recognizing the crimes against the Rohingya as genocide.⁶
- Appointment by Canada's Prime Minister of a Special Envoy, Honourable Bob Rae, who in April 2018 issued a report recommending Canada's actions concerning the Rohingya.⁷

Justice for the Rohingya requires holistic conceptions of justice

The experts emphasized a holistic approach to justice for the Rohingya, including but not limited to processes such as the current dispute in the International Court of Justice (ICJ) and the situation under investigation by the International Criminal Court (ICC). One expert pointed out that conceptions of "justice" must not be limited to accountability processes but must also include political justice, social justice, and economic justice. Legal perspectives must include not only retributive justice but restorative approaches including reparations such as return to homelands, restitution of properties, compensation, and guarantees of non-repetition. In the case of the Rohingya, crucial elements of justice include recognition of the group as well as inclusion of the perspectives of the victims, particularly women. This is particularly relevant in judicial processes such as that of the ICJ where the Rohingya, as a non-State group and as individuals, have no official legal standing.

⁶ In 2017, two motions were made by Parliament declaring that the crimes against the Rohingya constitute genocide. One motion was made by the House of Commons, see Parliament of Canada, Journals, No. 322, Thursday, September 20, 2018, 10:00 a.m., Motions, available at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-322/journals>. The motion passed as follows:

By unanimous consent, it was resolved, — That the House: (a) endorse the findings of the UN Fact Finding Mission on Myanmar that crimes against humanity have been committed by the Myanmar military against the Rohingya and other ethnic minorities and that these horrific acts were sanctioned at the highest levels of the Myanmar military chain of command; (b) recognize that these crimes against the Rohingya constitute a genocide; (c) welcome the recent decision of the International Criminal Court that it has jurisdiction over the forced deportation of members of the Rohingya people from Myanmar to Bangladesh; (d) call on the UN Security Council to refer the situation in Myanmar to the International Criminal Court; and (e) call for the senior officials in the Myanmar military chain of command to be investigated and prosecuted for the crime of genocide.

The Senate of Canada also adopted a motion recognizing the crimes against the Rohingya as genocide. Senate of Canada, Motion to Revoke the Honorary Citizenship Bestowed on Aung San Suu Kyi Adopted, 2 October 2018, available at: https://sencanada.ca/en/content/sen/chamber/421/debates/232db_2018-10-02-e.

⁷ Honourable Bob Rae, "Tell them we're human" What Canada and the world can do about the Rohingya crisis, April 2018, available at: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crises/rep_sem-rap_esm.aspx?lang=eng. The report recommended that Canada take measures in four areas, including addressing the humanitarian crisis in Myanmar and Bangladesh; continued engagement with Myanmar, stress that of Myanmar's activities must conform with international law; funding efforts toward accountability of those responsible for crimes against humanity; and effective coordination of international efforts. In March 2020, Bob Rae was appointed as the Prime Minister's special envoy on humanitarian and refugee issues. See <https://pm.gc.ca/en/news/news-releases/2020/03/10/prime-minister-announces-special-envoy-humanitarian-and-refugee>.

Canada has legal responsibility to take strong action at the International Court of Justice (ICJ)

With specific reference to the ICJ, the experts discussed three options for intervention by Canada:⁸

- Canada could bring its own application against Myanmar under the *Statute of the International Court of Justice* (Statute of the ICJ)⁹ and the express provisions of the Genocide Convention (notably Article IX).¹⁰ If Canada made an application, the Court would most likely join the application to the current case of *The Gambia v. Myanmar*.¹¹ This approach would allow Canada to ensure that all relevant legal issues and evidence are introduced and argued, including evidence that sexual violence and other gender-based actions have been central to Myanmar's genocidal strategies and crimes against the Rohingya.
- Canada could seek leave of the Court to intervene in the current action in the case of *The Gambia v. Myanmar* under Article 62 of the Statute of the ICJ on interpretation of the legal issues and on the evidence, demonstrating that Canada has a legal interest in the case.
- Canada could intervene as of right under Article 63 of the Statute of the ICJ. Such an intervention would be limited to issues of interpretation of the Genocide Convention.

The international law experts present at the roundtable were unified in their emphasis that Canada has international law responsibilities to the whole international community to take prompt, strong measures to prevent genocide and ensure the punishment of perpetrators of genocide. One expert emphasised that nothing precludes Canada from bringing forward a case to the ICJ as *The Gambia* did. Another expert expressed concern that a co-application or an intervention under Article 62 would create delay and complexity for collection of evidence as well as for legal argument. There was consensus that gender-based sexual violence and other gender-based atrocities have been central to perpetrators' plans and actions deployed in the

⁸ *Editor's note:* Due to time constraints, full discussion of the procedural implications, strengths, and weaknesses of these options was not possible. Since the date of the roundtable, several named panellists at the roundtable have provided more detailed analysis. See, e.g., Professor John Packer's summary and analysis of options for Canada's intervention into the ICJ, in "The Rohingya Genocide Is Far from Just a Dispute between The Gambia and Myanmar: Time for Canada to Join," Centre for International Policy Studies, 3 June 2020, available at: <https://www.cips-cepi.ca/2020/06/03/the-rohingya-genocide-is-far-from-just-a-dispute-between-the-gambia-and-myanmar-time-for-canada-to-join/>.

⁹ United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: <https://www.refworld.org/docid/3deb4b9c0.html>.

¹⁰ Genocide Convention, *supra* note 4.

¹¹ Note that lack of time during the roundtable meant that potential interventions by The Netherlands and the Maldives were mentioned but not discussed. The Netherlands reportedly has been considering an intervention in the case and on 9 December 2019 issued a joint statement with Canada expressing "their intention to jointly explore all options to support and assist The Gambia in these efforts." See the joint statement at: <https://www.government.nl/documents/diplomatic-statements/2019/12/09/joint-statement-of-canada-and-the-kingdom-of-the-netherlands>. The Maldives is planning an intervention in the case, the specific nature of which was not known at the time of the roundtable or the drafting of this report. See Ministry of Foreign Affairs, Republic of Maldives, "The Republic of Maldives to file declaration of intervention in support of the Rohingya people, at the International Court of Justice," 25 February 2020, available at: <https://www.foreign.gov.mv/index.php/en/mediacentre/news/5483-the-republic-of-maldives-to-file-declaration-of-intervention-in-support-of-the-rohingya-people.-at-the-international-court-of-justice>.

genocide against the Rohingya. Experts emphasized the importance that a fulsome case be presented to the Court on the full range of issues and evidence of genocidal actions and intent, including, in particular, on issues related to gender-based methods of genocide that have not been raised to date during the current ICJ case.

Gender-based violence is at the core of the genocide and must be central to justice processes

The roundtable featured a panel on gender-based violence as a core element of the genocide against the Rohingya. Speakers emphasized that international courts¹² have recognized sexual violence as a deliberate tactic of war, and not just an “unfortunate side-effect,” an “add-on” or a “women’s issue.” In planning and inflicting genocidal acts, perpetrators rely on gender dimensions of the targeted group, including social roles assigned to women and men, and cultural attitudes and gender stereotypes prevalent within the group. Thus, perpetrators plan and inflict genocidal acts differently on women, men, and transgender people. Speakers stated that arguments should be made to the ICJ that go beyond the Court’s current recognition of sexual violence as constituting acts of genocide within Article II (b), (c), and (d) of the Genocide Convention. Rather, the Court should be presented with arguments showing:

- how sexual violence is related to the wider concept of gender-based violence that is grounded in gender-based inequalities;
- how gender-based violence is deployed broadly in the various manifestations of genocide;
- the current continuation of genocide through ongoing sexual exploitation, trafficking, child marriage, and enforced disappearances;
- how gender-based analysis can be used to argue for transformative reparation to address gender inequalities and to guarantee non-repetition, using jurisprudence, e.g., of the Inter-American Court of Human Rights, and by amplifying relief and recovery pillars of the UN Security Council’s Women, Peace, and Security Agenda;¹³
- that the needs of survivors, including their economic and social rights, are central to reparations and guarantees of non-repetition.

Humanitarian issues: Refugees and Internally Displaced Persons (IDPs)

A number of participants raised concerns or questions about alleviation of humanitarian needs, including of Rohingya people in Myanmar and refugees in Bangladesh for education, health care, protection of women and children from trafficking, conditions of return to Myanmar, including elimination of land mines along the border.

¹² Several speakers referred to the landmark case in the International Criminal Tribunal for Rwanda (ICTR) against Jean-Paul Akayesu, in which the Court determined that rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims.” *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 731, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html>.

¹³ Peace Women, About Women, Peace and Security in the Security Council: Women, Peace and Security Agenda, n.d., available at: <https://www.peacewomen.org/security-council/WPS-in-SC-Council>.

Summary of opening remarks

The moderator opened the meeting by welcoming participants, articulating the terms of reference of the discussion according to a modified Chatham House Rule,¹⁴ and introducing three opening speakers.

The first speaker framed the discussion on the concept of Women, Peace, and Security (WPS),¹⁵ which guides Canada's official strategy on Myanmar and Bangladesh.¹⁶ Canada's responses have addressed questions of justice for Rohingya people, including during the COVID-19 crisis. The concept of WPS is centred on the idea that the only way to achieve full and enduring human security is to ensure that those most affected by policies or decisions have a voice in their creation. Those affected are viewed not only as recipients of aid or protection but also are included in decision making at all levels. Under Canada's National Action Plan (NAP), Myanmar is one of thirteen priority countries. Canada's Feminist International Assistance Policy (FIAP), in the context of the situation of the Rohingya, has two broad aims: First, meeting basic needs through humanitarian aid, and second, through transformational policy that seeks to support long term resolution and meaningful peace in processes that engage women—over half the population.

In practice, these Canadian policies involve support for women's engagement in roles serving on refugee camp management committees, as community mediators in the camps, and as advisors to the UN and non-governmental organizations (NGOs) on decisions regarding the refugees. Canada's policy also involves supporting women in Myanmar to run for office at various levels of government, encouraging women's participation in national reconciliation efforts, and in the pursuit of justice including for sexual violence. The speaker emphasized that justice for Rohingya people is incomplete if Myanmar's government fails to ensure accountability for systematic, orchestrated atrocities against Rohingya women and girls. Is it now recognized by international courts¹⁷ that sexual violence is not an unfortunate side-effect of war but an active and deliberate tactic. The speaker emphasized that sexual and gender-based violence is not inherently a "women's issue" but affects all people, not just women and girls.

A second opening speaker framed the discussion in terms of the importance of careful listening, consultation, and learning in light of what is happening in Rohingya refugee camps in Cox's Bazar, Bangladesh, as well as in northern Myanmar, including Rakhine State.

A third opening speaker noted and affirmed Canada's support for Rohingya people, noting that Canada is one of the few countries with a relevant NAP by which Canada commits itself to

¹⁴ See the Introduction above, page 1. The Chatham House Rule states: "participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." *Supra* note 2.

¹⁵ Government of Canada, Canada's National Action Plan on Women, Peace and Security (2017-2022), available at: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/gender_equality-egalite_des_genres/cnap_wps-pnac_fps.aspx?lang=eng.

¹⁶ Government of Canada, "Canada's Strategy to Respond to the Rohingya Crisis in Myanmar and Bangladesh," available at: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/strat-rohingya.aspx?lang=eng.

¹⁷ See, e.g. Akayesu, *supra* note 12.

seeking an end to the disproportionate and particular impacts of armed conflict on women and girls. Canada's feminist foreign policy and solidarity with the Rohingya provides the foundation for Canada to deliver on its commitment to Rohingya people by backing The Gambia in its case at the International Court of Justice (ICJ) and ensuring that victims of sexual and gender-based crimes receive justice.

This speaker noted that Bangladesh has received more than a million Rohingya refugees when other countries have neglected them and disallowed them from entering their territories. However, Bangladesh has imposed internet blockages and telephone restrictions in Rohingya refugee camps, obstructing humanitarian aid. By May 2020, the "nightmare" of COVID-19 had arrived in the camps,¹⁸ resulting in further difficulties in obtaining supplies. Bangladesh announced that it would not accept any more Rohingya refugees, and has arrested people who have been stranded on boats at sea and sent them into quarantine in Bangladesh for an unknown period of time.¹⁹

The speaker emphasized that the whole international community has the responsibility to protect not only the Rohingya but also other minority ethnic groups within Myanmar.

Summary of discussion 1: Goals for Canada: Challenges and options

Questions guiding the discussion

Prior to the roundtable, the following questions were posed to panellists and participants to guide the discussion:

- What would be the most impactful way for Canada to contribute to achieving justice for the Rohingya?
- What would be the most effective contribution Canada could make to achieving justice under the Genocide Convention?
- By which concrete means can Canada assist the Rohingya – particularly women – in having a direct and effective voice for justice?

Summary of discussion

Panellists' remarks

No improvement in conditions of the Rohingya: Escalation of conflict in Myanmar

The first speaker on this panel commended Canada for "holding the torch for justice for the Rohingya." The speaker noted that the date of the roundtable, 21 May 2020, marked 1,000 days since the beginning of Myanmar's clearance operations on 25 August 2017, and that the conditions of the Rohingya have not improved since then. The situation in Rakhine is that of escalated conflict, and there is daily information of missile attacks, air drone attacks, and

¹⁸ The first diagnoses of COVID-19 were reported on 14 May 2020. Coronavirus: Two Rohingya test positive in refugee camp, BBC, 14 May 2020, available at: <https://www.bbc.com/news/world-asia-52669299>.

¹⁹ Bangladesh: Cyclone Endangers Rohingya on Silt Island: Refugees Allege Torture, Limited Health Care, Food on Bhasan Char, Human Rights Watch, 20 May 2020, available at: <https://www.hrw.org/news/2020/05/21/bangladesh-cyclone-endangers-rohingya-silt-island>.

abduction of children in Rakhine State. In addition, other ethnic minorities in Myanmar are now experiencing what Rohingya people experienced in 2016 and 2017; hundreds of houses have been burnt, people have been abducted, bodies have been found decapitated, and parts of people's bodies have been burned in fires.

There are reports of Rohingya youths, boys, and girls with severe injuries due to the use of artillery. The military unit recently arrested fifteen who were severely injured and released half of them. Heavy rain and storms due to the cyclone in central and northern Rakhine has affected Internally Displaced Persons (IDP) camps.²⁰

Humanitarian aid has been hindered. On 10 January 2019, the Rakhine State government instructed the international humanitarian organizations to suspend all activities except for the World Food Program (WFP) and the International Committee of the Red Cross (ICRC) in five townships affected by conflict. This order has been continued indefinitely and is a violation of international humanitarian law.²¹ Myanmar has not protected human rights; human rights violations continue to occur routinely, and Myanmar stands accused of the most serious crimes under international law. Myanmar's draconian laws remain intact, stifling free expression and exchange of information. While commending Canada's effort thus far, the speaker urged Canada and the international community to support the ongoing international accountability initiatives and ensure that victims are placed at the centre of all these efforts.

The case of The Gambia vs. Myanmar at the International Court of Justice

Another panellist discussed the case of *The Gambia v. Myanmar* in the International Court of Justice (ICJ or "the Court").²² The speaker noted the importance of attendance by representatives of the Rohingya community at the December 2019 ICJ hearing on provisional measures. Three members of the women's peace organization, Shanti Mohila,²³ from Kutupalong refugee camp in

²⁰ Cyclone Amphan Brings Heavy Rain, Destruction to India, Bangladesh, VOA, 20 May 2020, available at <https://www.voanews.com/south-central-asia/cyclone-amphan-brings-heavy-rain-destruction-india-bangladesh>.

²¹ Human Rights Council, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar," A/HRC/42/CRP.5, 16 September 2019, para. 404, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf, at note 929, citing Nyan Lynn Aung "Aid groups barred from Rakhine conflict zones" (The Myanmar Times, 14 January 2019). In the following discussions in Rakhine State Parliament on 2 May and 10 May 2019, it was mentioned that on 10 January 2019, the Rakhine State Government has directed an order to ban humanitarian and development aids, except ICRC and WFP: <https://www.facebook.com/rakhinestateneews/posts/1283046778499832>; <https://www.facebook.com/rakhinestateneews/posts/1288319534639223>. Also see "Myanmar: UN expert expresses alarm at escalating conflict, calls for civilian protection", UN News, 18 January 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24089&LangID=E>.

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), International Court of Justice, Application instituted 11 November 2019, available at: <https://www.icj-cij.org/en/case/178>.

²³ Shanti Mohila (meaning "Peace Women"), started in 2017, comprises several hundred women survivors living in Rohingya refugee camps in Bangladesh who joined together to send unified messages to the international community. Three representatives from Shanti Mohila, Hamida Khatun, Hasina Begum, and Yousuf Ali, travelled to The Hague, supported by the UK organization Legal Action Worldwide (LAW). In 2019, LAW assisted representatives of Shanti Mohila to attend the UN Human Rights Council in Geneva where Hamida Khatun's statement was read. See "Statement of Rohingya peace advocate, Hamida Khatun," Joint Statement of Lawyers' Rights Watch Canada (LRWC) and International Service for Human Rights (ISHR), 11 March 2019, available at: <https://www.lrwc.org/myanmar-oral-statement-to-40th-session-of-the-un-human-rights-council-statement-of-rohingya-peace-advocate-hamida-khatun-joint-statement-of-lrwc-and-ishr/>.

Bangladesh, travelled to The Hague for the hearing. The speaker noted that the perseverance and participation of survivors has been important in the pursuit of justice in that case.

The speaker also noted that the ICJ's unanimous judgment in its order for provisional measures²⁴ was unexpected, and this unanimity has sent an important message to Myanmar. Myanmar's first report to the ICJ on its compliance with the order of the Court was due on 23 May 2020. The memorial²⁵ of The Gambia setting out the facts and law is due on 23 October 2020; the Court provided an extension of three months on its original deadline of 23 July 2020. The speaker perceived that the original, short, six-month deadline, could be a signal that the Court wishes to address the case quickly. The speaker indicated that there has been significant progress in gathering evidence, including possible witness testimony in addition to what has already been gathered by other efforts and mechanisms.²⁶ However, the current circumstances in the refugee camps make it difficult to obtain testimony.

The speaker emphasized that evidence is the essence of the case no matter how creative one's legal theories, and that the ICJ will require clear and convincing proof of genocidal acts. At the provisional measures stage of the proceedings, it is sufficient to have a plausible case. The burden of proof during the merits stage of the case is significantly higher, which necessitates considerably more work gathering evidence.²⁷ Three pillars inform the gathering of the evidence, with the overarching imperative of establishing a genocidal intention for commission of the prohibited acts:

- Killing with genocidal intent is the most straightforward;
- Crimes of sexual violence are also integral to the theory of genocide. Since the judgment of the International Criminal Tribunal for Rwanda (ICTR) in the Akayesu case,²⁸ there is clear jurisprudence to the effect that sexual violence, when committed with genocidal intention, falls within Article II, paragraph (b) of the Genocide Convention (causing

²⁴ International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*): Order, 23 January 2020, available at <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

²⁵ The ICJ written proceedings include "memorials" and "counter-memorials" of the parties. See Statute of the ICJ Article 43, *supra* note 9.

²⁶ Other mechanisms include the UN Independent International Fact-Finding Mission on Myanmar (IIFMM). See the IIFMM's reports at: <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>.

²⁷ *Editor's note*: The Statute of the ICJ, *supra* note 9, does not provide a uniform standard of proof. Article 53, of the Statute of the ICJ, provides: "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim" but that "the claim must be 'well founded in fact and law'." In the 2015 case of *Croatia v. Serbia*, the ICJ stated that: "As regards the standard of proof, the Court, citing its previous case law, recalls that claims against a State involving charges of exceptional gravity, as in the present case, must be proved by evidence that is fully conclusive, and emphasizes that it must be fully convinced that allegations made in the proceedings 'that the crime of genocide or the other acts enumerated in Article III of the Convention have been committed' have been clearly established" (emphasis added). Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Summary of the Judgment of 3 February 2015, available at: <https://www.icj-cij.org/files/case-related/118/18450.pdf>.

²⁸ Akayesu, *supra* note 12.

serious bodily or mental harm).²⁹ Evidence gathered so far showed widespread sexual violence not only against women and girls but also against men and boys;

- The third category, paragraph (c) centres on imposing conditions of life calculated to bring about destruction of the group in whole or in part, primarily instances of starvation, exposure, and denial of medical care.

Several States may be intervening under Article 63 of the Statute of the ICJ.³⁰ As States parties to the Genocide Convention, it is their right to do so. Canada and The Netherlands, among other governments, are seriously considering such interventions on important points of law including the issue of sexual violence as an element of the crime of genocide. Another question relates to the evidentiary weight of the findings of the UN Independent International Fact-Finding Mission on Myanmar (IIFMM)³¹ as well as the findings of other mandates such as that of Prof. Yanghee Lee (the UN Special Rapporteur on the situation of human rights in Myanmar from 2014 to 30 April 2020).³²

The necessity of a broad conception of justice: Recognition, inclusion and repair

A third panellist suggested taking a step back from a narrow conception of justice found in specific procedures such as the ICJ case or the limited notion that accountability constitutes justice. Justice is a much broader idea. If we proceed from the perspective of the victims and their calls for justice, we might reflect on what that might comprise and how it might be pursued. Justice has many dimensions, noted this speaker, including, but not limited to legal justice, political justice, social justice, or economic justice. A legal perspective includes commutative justice, restorative justice, retributive justice, and distributive justice. The speaker noted that the claims of the Rohingya go back decades, and that the situation of Rohingya has not improved but has continued to deteriorate. What would constitute justice in this case?

²⁹ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, Vol. 78, p. 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html>. Article II states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

³⁰ Statute of the ICJ, *supra* note 9. Article 63 states:

- 1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
- 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

³¹ UN Independent International Fact-Finding Mission on Myanmar (IIFMM) as <https://www.ohchr.org/en/hrbodies/hrc/myanmariffm/pages/index.aspx>

³² Prof. Yanghee Lee was the Special Rapporteur on the situation of human rights in Myanmar from 1 May 2014 to 30 April 2020. Her reports and press releases are found at: <https://www.ohchr.org/en/hrbodies/sp/countriesmandates/mm/pages/srmyanmar.aspx>.

The first element of justice is recognition, according to this speaker. The UN Declaration on the Rights of Minorities³³ expresses the right of a group to exist. This is also implicit in the Genocide Convention in its reference to the crime of genocide as the intention to destroy the group “as such.”³⁴ In its 23 January 2020 decision, the ICJ acknowledged the existence of the Rohingya as a group to be protected under the Genocide Convention.

For the Rohingya, recognition must be given concrete expression through inclusion. It is a fundamental principle of social justice, minority rights, and international law that persons have the right to participate in matters that affect them. The speaker noted challenges to the element of inclusion for the Rohingya not only in Myanmar itself but also in forums and processes of international justice. For example, under the Genocide Convention and in the case at the ICJ, the victims themselves are not parties. They have no standing in the Court notwithstanding efforts of The Gambia to bring three individuals representing the Rohingya to the court proceedings. In terms of the Genocide Convention the Rohingya, as a group, have no legal standing. This is problematic even for the ICJ’s review of Myanmar’s reports under the provisional measures, because those reports are not public and are not subject to scrutiny unless governments like Canada press the Court for disclosure. If recognition is primordial, and inclusion or participation are attendant, we might then ask where are the voices of the Rohingya? Even among Rohingya advocates present at this roundtable, there is a range of voices of Rohingya who, directly or indirectly, need to be given not only facility but also capacity to articulate their concerns and positions so that they can be heard. This is not only a right, but also part of recognition (and attendant engagement) that is a fundamental element of justice.

This speaker noted that another crucial aspect of justice is repair. If we look at the claims of the Rohingya, even regarding the ICJ case, they do not want a hollow victory. While they do want to see a judgment favourable to them, what follows from that is repair, which could include restitution such as return to their homeland and return of their properties. Where this is not possible, the equivalent compensation should be given. They need to be made whole as far as possible. This is far and beyond what has been discussed by the Independent Investigative Mechanism for Myanmar (IIMM),³⁵ but this is a crucial issue.

In terms of the topic of the panel, “challenges and options,” the speaker noted some obvious challenges. For example, the UN and other institutions are evidently dysfunctional. It has been repeatedly demonstrated that the UN Security Council is presently not “fit for purpose.” While the ICJ in the case of the Rohingya was prepared to be forthcoming and helpful, its procedures are “20th or even 19th century in character.” The COVID-19 pandemic has added to the

³³ UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135, Article 1, available at: <https://www.refworld.org/docid/3ae6b38d0.html>.

³⁴ Genocide Convention, Article II, *supra* note 4.

³⁵ UN Independent Investigative Mechanism for Myanmar (IIMM), see: <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>. The IIMM (or Myanmar Mechanism) was established by the Human Rights Council in September 2018 and became operational on 30 August 2019. Its mandate is to collect evidence of the most serious international crimes and violations of international law and prepare files for criminal prosecution, making use of the information handed over to it by the IIFFMM, which mandate ended in September 2019 after turning over its information to the IIMM.

challenges. These facts need to be taken into account for a realistic assessment of what is possible and which strategy might be pursued.

Regarding the question of what Canada can do, this speaker emphasised that it is important to avoid the reductionist idea that equates justice with accountability. The focus must not be exclusively on the commission of genocide. Even when considering the Genocide Convention it is important to emphasise that the Convention is not just about the acts set out in Article II.³⁶ The treaty, in its conception, is fundamentally about prevention of genocide. The Rohingya need to see a vision that addresses prevention. The speaker stated that Canada can help in this regard not only by possibly intervening under Article 63, whether alone or with others, but also by potentially taking other actions. “There is nothing that precludes Canada from bringing forward a case to the ICJ as The Gambia did.”

The speaker emphasised that this situation raises a fundamental question, not only regarding the Rohingya, but also about the rules-based international order. The Genocide Convention and other human rights issues are not only about the victims, they are about the state of the world. It has been argued that Canada should step up; Canada not only can do so, but it also is well placed to lead. In the view of the speaker, Canada would be welcomed by many in the international community to lead diplomatically and politically by taking bold steps and directing funding to those who can benefit, including the Rohingya.

Participants’ discussion

The moderator opened up the discussion to other participants. One participant put a question to the panellists on issues of justice and accountability related to access to health care, particularly access of women to reproductive health care, limited health care facilities, and restrictive living conditions. Can these issues be woven into issues of justice and accountability? Also, can Canada get involved in ways that go beyond simply funding other countries’ efforts?

In response, one speaker indicated that the issue of reproductive health care in Cox’s Bazar, Bangladesh, has been raised with the Bangladesh government along with education, livelihood, and job opportunities. There has also been an internet shutdown in the camps by Bangladesh as well as significant violence in the camps. Some Rohingya refugees have also been displaced on the island of Bhasan Char.³⁷ However, reproductive health in Bangladesh may not fall into the ambit of the ICJ case, as this is happening outside Myanmar. This is a matter on which Canada could take the lead in terms of global action.

This speaker noted that denial of food and services to Rohingya is also taking place within Myanmar, and there are many reports about the malnutrition of Rohingya children. The World Food Program (Wfp) reported this issue to Myanmar authorities in 2016; this information

³⁶ Genocide Convention, *supra* note 4.

³⁷ Concerns raised after Rohingya quarantined on Bangladeshi island: HRW says relocation of 29 Rohingya to flood-prone Bhasan Char island without access to aid poses risk to refugees, Al Jazeera, 5 May 2020, available at: <https://www.aljazeera.com/news/2020/05/concerns-raised-rohingya-quarantined-bangladeshi-island-200505105338183.html>; OHCHR, Oral statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 40th session of the Human Rights Council, 11 March 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24299&LangID=E>.

reached Aung San Suu Kyi. Withholding of food to IDP camps in Myanmar has taken place for years, and continues to take place. The cutting of humanitarian aid and denial of services means severe shortages of rice and lack of medical services, which are key for Rohingya people's survival. Consequently, the situation within Myanmar has happened not only in the past but also continues to this day. These issues could be included in The Gambia's case in the ICJ.

Another speaker added that the procedures of the ICJ are quite restrictive, and that the ICJ is not a human rights court but a court for settlement of (mainly bilateral) disputes. However, at this point the ICJ is the "best beachhead for accountability." It is recognized that this case is not going to solve all the problems of the Rohingya; however, it creates a political space that can then be used to expand the campaign for restoration of the human rights of the Rohingya more broadly. The ICJ has rules of confidentiality; written submissions are made public only at the time of the oral hearing on the merits, which may be three years away. The withholding of medical treatment for Rohingya people during the COVID-19 pandemic is an issue to be raised by The Gambia's legal team. There is evidence, but it is more difficult to obtain than evidence of killing and sexual violence against significant number of the Rohingya population. It is difficult to gain access to evidence of forcible displacement of people to places they cannot escape, with the intention of starving them to death. The problem is access to the evidence, including witnesses, to other genocidal acts beyond the more obvious ones.

Another participant endorsed a holistic view of the situation of the Rohingya in terms of recognition and giving a higher position to Rohingya voices. The speaker stressed the importance of recognizing the political nature of the struggle and the need for political solutions not only to address the intolerable conditions in the camps in Bangladesh, but also in Rakhine State where it is very difficult to get access to reliable information. Canada's assistance policy must go beyond the narrow or particular four corners of accountability procedures and must include advocacy with the government of Bangladesh and other actors and agencies. It is important to pursue accountability, justice, and a political resolution in the broadest context. There are ways in which Canada can and should intervene in the ICJ proceedings in The Hague, but there are also many other ways in which Canada should lead.

One participant raised two points, noting that the ICJ court documents contain a declaration of the Myanmar ad hoc judge that he was not entirely convinced of the evidence concerning genocidal intent.³⁸ The focus of The Gambia was on evidence of specific acts rather than on evidence of intent. A second point was that the IIFFMM, for the first time in a UN report, talked about sexual violence against transgender persons. This was not included in The Gambia's case during the provisional measures phase. The participant wondered whether the issue of sexual violence against transgender persons would be included during the merits stage of the proceedings.

³⁸ See International Court of Justice, Declaration of Judge Ad Hoc Kress, 23 January 2020, available at <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>. Judge Ad Hoc Kress stated "the Court has applied a low plausibility standard with respect to the question of genocidal intent" and had "not proceeded to anything close to a detailed examination of the question of genocidal intent." He went on to say that "even on the basis of the low standard applied by the Court in this case, it is not entirely without hesitation that I have come to the conclusion that the materials provided by The Gambia so far are sufficient to enable the Court to conclude that the plausibility test was met with respect to the question of genocidal intent" (para. 5).

A panellist responded that the emphasis is on genocidal intent in light of which specific acts become genocidal acts. Thus, there is no strict separation between the nature of the acts and the genocidal intention. Regarding the sexual violence against transgender persons, the panellist noted that the reports of the IIFFMM have been submitted to the Court as evidence. What is contained in those reports would necessarily be considered by the Court. The question will become how important that specific issue is to establish the overall case.

Another participant, referring to the ICJ's limited jurisdiction, raised the question of the possibilities for wider justice through the investigation launched by the International Criminal Court (ICC) in November 2019.³⁹ A panellist responded by stating that the scope of the ICC prosecutor's investigation includes the crime of persecution,⁴⁰ which could be fruitful. However, a limitation of the ICC is its jurisdiction to try individuals, which means the ICC would need to arrest someone, as the ICC cannot proceed against a suspect in absentia. Even if the case is successful and an accused person is found guilty, the forum of the ICC provides no prospect of reparations for the Rohingya.

Another participant raised the point that the scope of interventions under Article 63 of the Statute of the ICJ are limited to questions related to the construction (interpretation) of the Genocide Convention, and raised the possibility of intervention by other countries, such as Canada and The Netherlands, under Article 62, which might allow for a broader scope of intervention not only on the interpretation of provisions of the Convention, but also on the evidence with respect to application of the Convention to the case. Article 62 requires that the intervenor show that it has legal interest in the case.

One of the panellists responded with a concern that interventions by third States under Article 62 would complicate and delay the proceedings. Also, if third States were to join as co-applicants with The Gambia, this would result in joinder and delay, because each of those cases would require submission of a memorial setting out in full both the legal arguments and the evidence. The speaker emphasized that the cases are essentially about evidence; gathering that evidence is time-consuming and labour-intensive. By contrast, under Article 63, the construction of the Convention can be interpreted broadly and could arguably include evidentiary issues, rather than the evidence itself. The speaker stated that these issues require a longer discussion.

³⁹ International Criminal Court, "ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar," ICC-CPI-20191114-PR1495, Press release, 14 November 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>. Also see the full decision at International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019, Pre-Trial Chamber III, Decision, available at: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/19-27>.

⁴⁰ The ICC Prosecutor sought and received authorization from the Pre-Trial Chamber (PTC) of the ICC to open an investigation into the crimes of deportation and persecution on ethnic or religious grounds (article 7(1) (d) and 7(1)(h) of the Rome Statute of the ICC). See ICC, "ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar," Press release, ICC, 14 November 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>. See the PTC's Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/19-27>.

One participant posed several questions gathered from Rohingya people in Canada and Bangladesh. First was a question on how to coordinate and streamline Canadian actions by various sectors, including lawyers, humanitarian actors, activists, and NGOs. A second question was sent by a student in Cox's Bazar who noted that Rohingya refugees in Bangladesh are being "denied basic education; trapped in cramped, unsanitary conditions; women and girls are victims of human trafficking and in fear of rape; and youth [face] an uncertain path ahead." Noting that Canada is exceptional among the major countries that help refugees, the student's question was: "What kind of education opportunities we can expect from Canadian institutions and the Government of Canada for the refugee students particularly for the youth before we miss out on years of education, before poverty gives way to criminal activity, before a region is destabilized?" A third question noted that several hundred Rohingya "now call Canada home, but the oceans between do little to distance them from the suffering of family and friends" now in other countries, and asked whether Canada was considering resettlement of "some of the most vulnerable Rohingya refugees from different countries that allow refugees exit visas."

One of the panellists responded to these questions pointing out that Canada could provide direct support for Rohingya people. The persecution of Rohingya has gone on for generations, and Rohingya people have been dispersed around the world. There is a need for Canadian leadership on policies and programs to support reunification of Rohingya people, education, and mobilization of Rohingya youths from around the world, beginning with those in Canada, and bringing others to Canada. Canadian leadership needs to be more robust. There is a need for direct funding to local communities. While Canada is now supporting The Gambia in its case in the ICJ, Canada could do much more to operationalize a holistic approach. When asked for more elaboration, the panellist referred to Canada's leadership in pushing resolutions through Parliament,⁴¹ and stated that Canadian leadership needs to be proactive, not only in terms of diplomacy, but also in supporting civil society groups and NGOs (particularly Rohingya groups) through provision of funding.

Additional comments provided in writing to all participants during the roundtable

Due to time constraints, not all roundtable participants wishing to make oral comments were able to do so. One such participant provided a written comment capable of being seen on the online platform by all participants. The participant reminded Canadian officials of the framework of the Ottawa Convention (Mine Ban Treaty).⁴² Landmines were laid on the border with Bangladesh at the time of the most recent outflow of Rohingya and afterwards. Until the issue of landmine use is addressed, resettlement will not be possible. Canada is respected internationally for the Ottawa Convention, and Bangladesh is a State party, but Canada did not support Bangladesh when they stated that landmines had been laid on their border by Myanmar. The participant urged Canada to

⁴¹ This is a reference to two Parliamentary motions, *supra* note 6.

⁴² United Nations, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997 (Ottawa Convention), available at: <https://www.refworld.org/docid/3ae6b3ad0.html>.

use every opportunity, including at Myanmar's upcoming Universal Periodic Review at the Human Rights Council,⁴³ to encourage Myanmar to join the Ottawa Convention.

Summary of discussion 2: Sexual violence as a core element of the genocide

Questions guiding the discussion

Prior to the roundtable, the following questions were posed to panellists and participants to guide the discussion:

- What are the options for a fulsome gendered analysis and feminist approach to be incorporated in application of the Genocide Convention in respect of the Rohingya?
- Who would be best placed to compose and deliver analysis/es of sexual violence suffered by the Rohingya in the context of, or constituting, the genocide?
- What could be, and should be, Canada's specific role in respect of sexual violence and genocide (in general and in the particular terms of the experience of the Rohingya)?

Summary of discussion

Panellists' remarks

Sexual violence as a critical tool in the commission of genocide

The first panellist expressed appreciation for the initiatives of the Canadian government and its commitments for accountability and justice for the Rohingya. The panellist pointed out that the use of sexual violence as a critical tool to humiliate and terrorize the Rohingya started decades ago.⁴⁴ The speaker recounted a personal memory during the 1990s, at age nine years, of hearing the rape of a woman in their village. The speaker recalled the family's crying and sense of shame following the rape. At that time, the military was known to often rape women from the village. The speaker stated that this practice has been normal for decades, and that when the military are raping individuals, they usually choose the young and beautiful ones in the village. Then they torture the men in front of the families and the village. This has been one of the ways the Burmese military has successfully destroyed Rohingya communities. Sexual violence is one of the tools they use.⁴⁵ The speaker noted that Rohingya communities are quite conservative when it comes to gender, sexual orientation, and even sex education. As a result, rape is a huge trauma for the whole community and for individuals, including survivors. To avoid shame, families and women and girls will choose to leave the communities on dangerous boats. On their way to other countries, women and girls are often at risk of sexual slavery by traffickers. Recent news stories have reported on rape and abuse of women on boats and highlight the vulnerability of women.⁴⁶

⁴³ UN Human Rights Council, Universal Periodic Review – Myanmar, upcoming in January-February 2021, to be available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/MMindex.aspx>. At the time of drafting this report, the date of the upcoming UPR was scheduled for January-February 2021 (postponed from November 2020 due to the COVID-19 pandemic).

⁴⁴ UN Human Rights Council, Situation of human rights of Rohingya Muslim minority and other minorities in Myanmar, A/HRC/43/18, 27 January 2020, para. 13, 24, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session43/Documents/A_HRC_43_18.DOCX.

⁴⁵ Sexual violence is also used against men and boys and transgender persons. *Ibid*, para. 24.

⁴⁶ “Amid COVID-19 pandemic, thousands stranded in Bay of Bengal ‘unable to come ashore’,” UN News, 6 May 2020, available at: <https://news.un.org/en/story/2020/05/1063402>; Caleb Quinley, “Why Rohingya women and girls

The 2016 and 2017 clearance operations comprised the worst violence the Rohingya people had experienced over the decades. The physical and mental impacts of sexual and gender-based violence are severe for survivors and their communities. The speaker noted that even during the time of the ICJ case, the practice of sexual violence by the Burmese military continues.

The speaker recounted speaking with survivors of rape in the Kutupalong camps in Bangladesh in 2018. The speaker quoted one victim saying,

I feel like my blood is boiling, and there is pain everywhere when I think of the four soldiers that raped me and their faces. I don't know how to live here. I am seen as a rape survivor. I want to die sometimes, but I also feel that I wouldn't be able to close my eyes if I don't get justice. I want justice and my dignity back.

The speaker said, "Sometimes it is unbearable to listen to understand the feelings and listen to their voices."

The speaker called for a stronger gender lens on how sexual violence has been used to perpetrate the crime of genocide. The ICJ needs a broader and more comprehensive analysis of the terrible suffering of women and survivors of sexual violence, given their extreme trauma, the circumstances of the rape, how it was perpetrated, and the increased vulnerability and other consequences for the victims.

The speaker recommended that Canada advocate for a binding UN Security Council resolution regarding Myanmar's implementation of the provisional measures order, including a focus on sexual and gender-based violence. The speaker also called on Canada to join the genocide case in the ICJ with The Gambia.

Gender-based analysis goes beyond analysis of gender-based violence

A second panellist stated that her views are informed by the work of the Global Justice Centre (GJC) in New York, an international human rights organization to advance gender equality through the rule of law. The GJC's projects on accountability for gender-based violence at the international level set out how gender-based analyses need to be used to undergird the legal framework for genocide.⁴⁷

The speaker noted that sexual violence is an integral part of the Myanmar security forces' genocidal campaign against the Rohingya. The military has long used rape as a weapon of war and oppression. During the clearance operations in Rakhine state, Rohingya women and girls were targeted for particularly brutal killing, sexual violence, rape, and torture. Rape and sexual violence were widespread, pervasive, and often conducted in public. Many women were gang

are risking dangerous smuggling routes: 'There is no military that can kill me here'," The New Humanitarian, 16 January 2020, available at: <https://www.thenewhumanitarian.org/news/2020/1/16/Rohingya-trafficking-refugees-forced-marriage>.

⁴⁷ Global Justice Center, *Beyond Killing: Gender, Genocide & Obligations under International Law*, GJC, December 2018, available at: <http://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf>; Global Justice Center, *Discrimination to Destruction: A Legal Analysis of Gender Crimes against the Rohingya*, GJC, September 2018, available at: http://globaljusticecenter.net/files/Discrimination_to_Destruction.pdf

raped. Eighty percent (80%) of the rapes documented by IIFFMM⁴⁸ were gang rapes, accompanied by other acts of violence, humiliation, and cruelty. It was these acts that led the IIFFMM to conclude that gender-based violence was the hallmark of the operations against the Rohingya and to infer the military's genocidal intent. Gender-based crimes and consequences were not limited to acts of sexual violence and rape but also extend to other genocidal acts. For example, Rohingya women and girls were often murdered by being burnt alive or butchered with knives usually used for slaughtering animals.⁴⁹ A full gender analysis informs the manner by which atrocities occurred; it is unduly limiting to equate gendered analysis with analysis of sexual and gender-based violence. It is important to understand why male and female members of groups are targeted in various ways. For example, men and older boys are targeted on the basis of their gender roles in society, such as the leaders of homes or as combatants. Women and girls are targeted based on their societal roles as mothers, wives, and keepers of the community. Violence against women and girls fed into misogynous societal and economic implications of being women and girls. This type of analysis is needed to help the Rohingya move forward, and at the foundations and centre of funding and human rights efforts, including Canadian and international responses.

Regarding the ICJ case, this panellist stated that it is essential that the case frame sexual violence as an act of genocide. There is also an imperative and an opportunity to go much further. The Akayesu case⁵⁰ broke new ground by recognizing sexual violence as an act of genocide, specifically that of causing grievous bodily and mental harm. That precedent is now accepted as a part of the court view of how we understand the legal parameters of genocide. There is an opportunity in the current ICJ case to go beyond the idea of sexual violence as constituting genocide pursuant to Article II (a) and II (b) of the Convention. A gendered analysis can also be applied to acts of killing, imposing severe conditions of life, and acts to prevent births. There is also an opportunity to strengthen the argument on genocidal intent by looking not only at physical destruction but also biological destruction.⁵¹ While the commission of genocide is at the

⁴⁸ Human Rights Council, Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts, A/HRC/42/CRP.4, 22 August 2019, Para. 14, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/sexualviolence/A_HRC_CRP_4.docx.

⁴⁹ This statement is explained further in a GJC report as follows:

“... the OHCHR gathered testimonies from witnesses whose female family members were killed when their throats were slit by long knives that are usually used for slaughtering livestock. For instance, one 14-year-old girl saw her two sisters killed in a knife attack: ‘When my two sisters, 8 and 10 years old, were running away from the house, having seen the military come, they were killed. They were not shot dead, but slaughtered with knives.’ The OHCHR also collected testimonies about entire families, including elderly and disabled people, being forced and locked into homes that were set on fire. These latter examples—killings by stabbing/slashing and burning—mirror methods usually reserved for destroying objects and property like animals, crops, or building structures. Choosing these means as those fit for murdering women shows the perceived lower status of Rohingya women and girls—akin to animals or objects—in the eyes of their murderers” (emphasis added).

Discrimination to Destruction: A Legal Analysis of Gender Crimes Against the Rohingya, September 2018, p. 50, available at: <https://globaljusticecenter.net/files/Discrimination-to-Destruction.pdf>, citing OHCHR, “Report of OHCHR mission to Bangladesh,” at 16, 23, 3 February 2017, available at: <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>.

⁵⁰ Akayesu, *supra* note 12.

⁵¹ Raphael Lemkin's original construction of the crime of genocide included what he referred to as “biological genocide,” which included “separation of families, sterilization, destruction of foetus.” The element of genocidal intent has been recognized as requiring intention to destroy the group physically or biologically. See the Akayesu

core of the ICJ case, the case of The Gambia is broader, including Myanmar's failure to prevent and punish genocide, and failure to enact the necessary legislation to give effect to the Genocide Convention. Applying a full gendered analysis to this case could be transformative in the context of the Rohingya, where the genocide is predicated on decades of systematic discrimination and policies.

The speaker concluded by calling on The Gambia to incorporate a gendered analysis into its case. The speaker also pointed out that by understanding the limitations of what may be presented in the principal case of The Gambia, there is space for States like Canada to intervene in the ICJ case to present a much more robust analysis. This would not only help the Rohingya but also could set precedent for future applications.

Words are not enough: A call for action

The third panellist began by stating that in the ongoing genocide, words are not enough for the Rohingya. It is time to act. The speaker noted that after the Holocaust, people used the words "never again." Now, in the 21st century, it is time to put these words into action. It is time for justice for the Rohingya community. The speaker re-emphasized that rape has been a central component of the genocidal campaign by Myanmar's military and security forces. Rohingya women and girls and men and boys have suffered unspeakable sexual violence. The speaker expressed appreciation to Canada for supporting the work of a Rohingya news agency to document the sexual violence and for supporting groups in other parts of Myanmar.

The speaker expressed hope that victims of genocide and gender-based crime receive the justice they deserve in The Gambia's case at the ICJ, and the hope that Canada would take a step further and formally issue a full supporting argument in the case, focussed on the issue of sexual violence.

The speaker also noted that millions of dollars of foreign aid have been given to the Government of Myanmar for its COVID-19 response. Myanmar has been promised about two billion dollars in aid for COVID-19 economic recovery⁵² even while it is still carrying out gross human rights violations against its people, "pushing thousands of villagers into the arms of the pandemic." Foreign embassies have been silent about the Myanmar military's abuses after the ICJ indicated provisional measures in the genocide case against Myanmar. The Canadian embassy in Yangon was the only embassy to issue a public statement on its Facebook page welcoming the ICJ ruling. Other statements by the EU and UN embassies were more cautious and welcomed the report of the Myanmar government's Independent Commission of Enquiry (ICOE), which only found evidence of individual criminal responsibility of war crimes, not genocide, and found no

case, *supra* note 12, in which the Trial Chamber of the ICTR construed genocide as including "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages" (see paras. 507 and 508). For discussion, see Global Justice Center, *Beyond Killing: Gender, Genocide & Obligations under International Law*, GJC, December 2018, available at: <http://www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf>.

⁵² Thiha Ko Ko, "Govt expects COVID-19 response plan to cost \$2 billion," *Myanmar Times*, 11 May 2020, available at: <https://www.mmtimes.com/news/government-expects-2-billion-international-aid-covid-19-response-plan.html>.

evidence of rape.⁵³ The speaker called on the international community and the UN Special Rapporteur to support the domestic prosecution of security personnel for individual war crimes.

The speaker recommended that Canada:

- formally issue a supporting argument in the ICJ case, with focus on the issue of sexual violence;
- continue to provide humanitarian aid to the Rohingya people in Bangladesh and to all refugees and IDPs at Myanmar borders until there is genuine peace and it is safe for them to return home;
- continue supporting independent civil society groups particularly women's groups in Myanmar who are exposed to ongoing crimes including sexual violence by Myanmar security forces;
- take the lead in imposing strong diplomatic and economic sanctions against Myanmar towards ending the ongoing genocide and towards lasting peace and justice.

Advance ICJ interpretation of the Genocide Convention: Gender-based analysis is central, not an add-on

The fourth panellist built on several points made by the previous panellist. First, there is the issue of intervention under either Article 62 or 63 of the Statute of the ICJ. This panellist pointed out that the Court has long said that the Genocide Convention creates obligations owed to the entire international community. The Court has also said that the prevention of genocide is an important part of international law obligations, and, as one of the speakers in the first panel stated, it is an issue of international justice.

Article 63 gives the right to States to intervene in this case where the construction of the Genocide Convention is concerned. The speaker emphasized that “the fact of gender” is integral to genocide and therefore integral to the interpretation of the Genocide Convention. The speaker pointed out that gender is not listed in the 1948 Genocide Convention; understanding of the complexity and multilayered character of genocide has evolved since 1948. Like all human rights instruments, the Convention should be interpreted in such a way as to emphasize its dynamic and its living nature. This situation provides the opportunity for Canada to enhance these insights on the character of genocide.

This speaker also stated that gender analysis of the Genocide Convention is not an add-on. It is not a luxury. It is central to understanding the process of genocide. The process of genocide was outlined in the report of Canada's special envoy, Bob Rae. Gender is integral to all the stages his report outlined. Identity is core to all stages of genocide or the planned stages of genocide, but this is not limited only to group identity. It also relates to how the members of the group relate to each other. So, the perpetrators of genocide rely on the gender dimensions of the group: the roles assigned socially to women and men, the cultural attitudes and gender stereotypes within the targeted group, as well as those of the perpetrator. The perpetrator uses this knowledge to plan

⁵³ Office of the President, Republic of the Union of Myanmar, Executive Summary of Independent Commission of Enquiry-ICOE Final Report: Executive Summary, 21 January 2020, available at: <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/01/21/id-9838>. The full report has not been released, although some annexes have been placed on the ICOE website at: <https://www.president-office.gov.mm/?q=briefing-room%2Fnews%2F2020%2F01%2F25%2Fid-16155&fbclid=IwAR17amR392m7A3fjhUdR2Hjfwc88Zwgq31cuMzvvYZp7ZUnmsUKguTm3gyM>.

each step in the process to target women and men differently, to inflict deliberately genocidal acts differently upon women and men, knowing the long and short term consequences of those acts for individuals and the group, and to more effectively and holistically achieve their objectives of destruction.

The ICJ has done little more than to recognize that the commission of sexual violence throughout the alleged genocide could constitute the actus reus of genocide within Article II (b), (c), and (d) of the Genocide Convention. What the Court has not done is relate sexual violence to the wider concept of gender-based violence that is grounded in inequalities and gender relations, nor has the court undertaken any analysis of how sexual violence is called to all the different manifestations of genocide. More is revealed by examining how these acts interact with each other in the totality of the process of genocide and how gender is relevant (not just sexual violence). Gender-based analysis would also make possible the recognition of the intention of genocidal acts against those who deviate from binary gender identity.

This speaker also pointed out that displacement means the continuation of the genocide. It is important to recognize ongoing incidents such as child marriage, sexual exploitation, trafficking, and disappearances.

The speaker added that State responsibility includes the obligation to make reparation as noted by a speaker on the first panel. One argument that can be made to the ICJ is that the Court should follow the pattern of the Inter-American Court of Human Rights and undertake transformative reparation to address these inequalities and to guarantee non-repetition. This also raises the issue of the relief and recovery pillars of the UN Security Council's Women, Peace, and Security Agenda.⁵⁴ The WPS agenda explicitly integrates a survival-centered approach that must respect and prioritize the needs of survivors without discrimination. The speaker added that the survival-centered approach requires holistic thinking, including recognition that provision of economic and social rights is integral to access to justice as well as to healing and human security. The speaker concluded by saying that all responses must be gender sensitive. Canada has an important role in bringing WPS to the forefront in all discussions along with a broader understanding of the requirement of full gender analysis.

Participants' discussion

One participant emphasized the extent to which violators of rights consider gender in their actions. Courts and international actors need to factor that into their actions. Comprehensive gender analysis and feminist foreign policy is important not only to the prosecution of crimes, but also to understanding the multiple dimensions of the issue. A feminist response would put money into the hands of local women. It is also important to avoid COVID-19 tunnel vision; the underlying structural issues have been exacerbated due to COVID-19.

A second participant stated strong support for The Gambia in its case against Myanmar for violating the Genocide Convention. The ICJ ruling on provisional measures is a critical step for justice and accountability for the Rohingya people. However, in ensuring gender sensitivity of

⁵⁴ Peace Women, About Women, Peace and Security in the Security Council: Women, Peace and Security Agenda, n.d., available at: <https://www.peacewomen.org/security-council/WPS-in-SC-Council>.

the humanitarian response to the Rohingya refugee crisis in Bangladesh, the empowerment of women and youth to participate in decision making is important. There is also a need to contribute to sustainable peace through empowerment of not only Rohingya refugees but also Burmese and Bangladeshi people. As an example, the speaker described a project whereby Rohingya women in the refugee camps and the host communities receive training to better access information and services available to them, and to participate in camp and community and national decision making, including the implementation of Bangladesh's National Action Plan on Women, Peace, and Security (WPS) to ensure that it addresses the issues confronted by women and girls and in refugee camps and host communities, such as sexual and gender-based violence. The project also assists in organizing activities to improve the socio-economic status of their families combined with advocacy for women's economic rights, facilitation of peacebuilding dialogues, and training of young women and male gender-equality allies in Myanmar on leadership and peacebuilding, including implementation of the Security Council resolutions on WPS.⁵⁵ The speaker noted the importance of fostering partnerships among actors in Myanmar, Indonesia, and Malaysia where there are also increasing the number of Rohingya people. Advocacy is also needed to lobby States within the Association of Southeast Asian Nations (ASEAN) to address atrocities committed by Myanmar. The speaker commended Canada for its support of this project to enable international civil society and women leaders in Bangladesh and Myanmar to contribute to long term solutions to the Rohingya crisis. The participant called on the international community to invest in empowerment approaches that are grounded in the human rights framework and fairness principles and build on the transformative resilience of women and youth.

Another participant asked a question about sexual trafficking of children by traffickers moving into the refugee camps. This participant also asked for information about children born of rape. One of the panellists responded by noting that trafficking has not stopped. It is difficult to find solutions for trafficking, especially from the refugee camps. The issue is controversial; the Bangladesh government has stated that there is no trafficking despite evidence of acts of international trafficking. It is difficult, particularly at this time, for agencies and NGOs to get accurate information without the cooperation of the Bangladesh government. The speaker stated that there have been about 2,000 babies born after rapes, and few are accepted by their families. The Bangladesh government is reportedly giving them birth certificates. The speaker indicated that the issue of trafficking is sensitive, and that asking questions results in threats from both traffickers and the government.

Another participant added a point on the potential use of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁶ and the UN Office of the Special Representative of the Secretary General on Sexual Violence in Conflict.⁵⁷ Some young women and male gender-equality allies have been trained to use the CEDAW as an instrument to address several issues, including gender-based violence against the Rohingya. The participant added that in the past the CEDAW Committee has called on both Myanmar and Bangladesh to remove

⁵⁵ The Security Council has adopted ten resolutions on women, peace, and security since 2000. See them at UN Women: <http://www.peacewomen.org/why-WPS/solutions/resolutions>.

⁵⁶ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations Treaty Series, Vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.htm>.

⁵⁷ See the website of this Office at: <https://www.un.org/sexualviolenceinconflict/>.

obstacles faced by Rohingya women and girls with regard to citizenship and urged the establishment of independent bodies to investigate, prosecute, and punish perpetrators and to address multiple intersecting forms of discrimination against Rohingya women as a result of their gender and indigenous identity.

Another participant noted that Canadian officials in Bangladesh have been greatly concerned about the children born of rape over the last two years. The participant noted a program in which there has been fostering of children within families in Bangladesh (fostering is done, because the adoption of children is illegal in Bangladesh). The questioning of the origin of a pregnancy has not been welcomed by the communities because of the potential for additional tension within families and increased spousal abuse. Therefore, the emphasis has been on acts of rape rather than on children born of rape in order to try to focus on community cohesion and acceptance within the family rather than focusing on the children's origins.

Another participant pointed out that when considering the topic of sexual violence within the context of genocide, it is important to think in terms of intersectionality particularly with regards to the Rohingya and in the context of reparations. What might be the approach of the ICJ on reparations in a case like this? The Rohingya are one of the poorest communities in the world, and there has been discussion about women, transgender people, and young people. How do these layers of disadvantage and the question of intersectionality play out in context of this issue?

One of the panellists responded to several points that had been raised, saying that it is important to consider the linkages between trafficking, armed conflict, and genocide for those who have been dehumanized. The notion of destruction of the group (tied to genocide) is worth exploring in this context. Regarding reparations, the panellist indicated that it is important to look at what the CEDAW Committee and other bodies such as the Inter-American Court of Human Rights have recommended. These bodies have made suggestions about appropriate reparations. The panellist noted that the ICJ is an inter-state body, so that reparations would go to The Gambia. The panellist is of the view that it might be productive to join up the thinking across these various bodies, as well as to consider the notion of transformative reparations. Canada could perhaps take a lead to see how the idea of transformative reparations could be addressed to the particular survivors in the particular context. This includes the intersectionality of ethnicity, sexuality, and other factors. Notions of transformation are not merely about financial compensation but about positive measures relating to education, livelihood opportunities, safety, and security. The panellist argued for holistic thinking, including the consideration of economic and social rights as entitlements alongside reparations.

Another panellist stated that guarantees of non-repetition could be part of the reparations framework, including creating spaces for structural changes with consideration of intersectionality. Guarantees of non-repetition, as a part of the reparations framework, provides opportunities to consider the policies, laws, and underlying issues that cause discrimination and propel violence against women and transgender individuals. These issues can be looked at within the broader framework of prevention. The reparations framework can also move the prevention framework forward – looking at it from an intersectional perspective or structural perspective.

Another panellist addressed the question of trafficking, emphasizing that trafficking in Bangladesh and Myanmar cannot happen without authorities' involvement in the trafficking process. Corruption among authorities in both countries is a serious issue. In the case of Myanmar, local smugglers and international boat owners work together to make trafficking possible. There is a need to look deeply into the corruption of authorities involved in trafficking of women and children. Regarding reparations, this panellist emphasized that participation of women and meaningful consultation with the communities, especially the victims and survivors, is critical.

Another participant pointed out that some panellists had said Canada has opportunities to take the lead on strengthening gender analyses of the genocide in the context of the ICJ. The participant wondered what concrete mechanisms could be used. The participant also asked a question related to recovery, which is a part of the WPS agenda, and wondered whether there have been efforts to incorporate the expertise and experience of countries that have gone through genocide and where gender has been an important dimension of genocide. The participant referenced the recovery efforts and healing experiences in Rwanda and wondered how those ideas could be incorporated into recovery efforts.

In response, one of the panellists said Canada has committed to supporting the ICJ case and that Canada is considering the nature and topic of the intervention. The panellist stated that Canada has an opportunity to help structure some of the broader gender arguments to the Court as well as to support and enhance the arguments already being made by The Gambia.

Another panellist pointed out that in Rwanda there was a high level of female participation in the processes following the genocide. Women played an important part in the processes.

Closing comments

The closing speaker expressed gratitude to the organizers of the conference. The speaker noted the emphasis of roundtable speakers on a holistic approach to the situation of the Rohingya. Given the abrogation of responsibility at the UN, it is time for Canada to step up to take a leading role in combating genocide wherever it is found – it is Canada's international responsibility. Given Canada's feminist foreign policy, it is appropriate that Canada's intervention provide gendered analyses. Canada has legal experts who can conduct such analyses as well as address questions of reparations in a holistic way. Also important is the inclusion of economic and social rights in the analysis, because it is important to rebuild societies after these terrible events. The voices at this roundtable have included academics, NGOs and those who have been affected, and the discussion has provided sufficient grounds for Canada to proceed with a holistic strategy to address questions of justice for the Rohingya.

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