



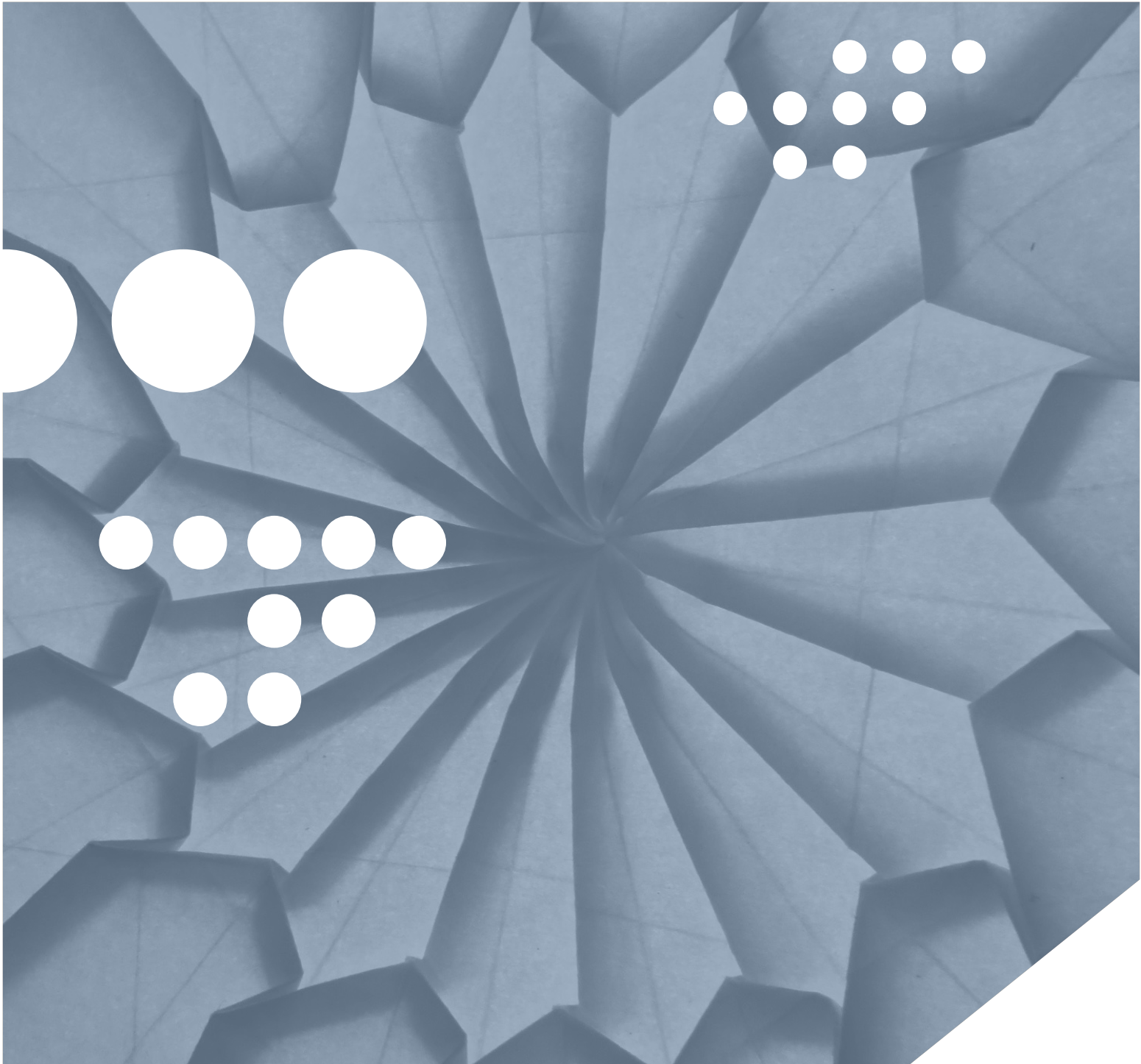
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Center for Studies of Holocaust and Religious Minorities

Myanmar and the genocide debate: Why definitions matter

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Main findings and policy recommendations:

The concept of genocide

- There are important differences between legal and non-legal definitions. Be aware of how genocide is defined when receiving and evaluating warnings of genocide.
- The legal definition in the Genocide Convention is poorly suited for monitoring, early warning and prevention purposes. Therefore, do not reject a genocide warning because the legal definition of genocide is not fulfilled.
- For the purpose of monitoring, early warning and prevention, non-legal definitions of genocide are important.
- Keep in mind that there is a wide variety of alternative definitions and that there is no agreed-upon alternative definition in the academic or advocacy community.

Pros and cons of applying the genocide term

- Definitions of genocide that focus on gradual escalation, radicalization and the role of the state structure carry important insights about how human rights abuses escalate to mass violence.
- Although diplomats may avoid the term genocide, the insights from the field of genocide studies should be applied to the work against human rights abuses.
- Applying the term genocide to ongoing human rights abuses carries risks. Avoid endless quarrels over legal definitions and political stalemates resulting from one side of a conflict feeling unfairly singled out as genocide perpetrators.
- Consider whether terms such as *severe human rights abuses*, *atrocity crimes* or *crimes against humanity* may prove just as useful and less confrontational.

The Rohingya in Myanmar

- Applying the legal definition of genocide to the situation for the Rohingya probably implies stretching the term too far.
- Using the confrontational genocide term is probably best avoided as long as the main diplomatic goal is to get access for humanitarian aid on the ground.
- The non-legal analysis of genocide as a process shows that the escalation and radicalization that usually precede genocides have already taken place in Myanmar.
- The Rohingyas' situation underlines the importance of using the SDGs as a momentum for improving the plight of minorities, and the potential link between living conditions, extreme marginalization and genocide.
- The non-legal analysis of the question of genocide in Myanmar clearly shows that the situation should be monitored closely, and that international attention and pressure must be sustained.
- The increasing violence and militarization of the conflict during October and November 2016 must be followed closely. The previous genocide warnings underline the severity of the recent escalation.

Myanmar and the genocide debate: Why definitions matter

The genocide debate in Myanmar (Burma)

How do advocacy groups apply the term *genocide* in Myanmar, and does it matter? Despite the development in international human rights of concepts such as *crimes against humanity*, *atrocity crimes*¹ and *responsibility to protect*, the term *genocide* still carries particular political and legal weight. Use of the term implies strong denouncement of perpetrators and correspondingly strong sympathy for the victims.² The Convention on the Prevention and Punishment of the Crime of Genocide (the Convention) requires all states to “prevent and punish” genocides.³ The term is particularly powerful in calls for action to intervene in ongoing conflicts, and is often avoided by policymakers for the very same reason.⁴ It is striking that the term continues to be used by policymakers and advocacy groups alike, despite the decreasing legal necessity for the term *genocide* for purposes of prevention and punishment. The continued use of the term requires policymakers to understand its implications. Not all definitions of genocide are the same.

In Myanmar, the Muslim Rohingya minority has suffered severe human rights abuses and increasingly dire living conditions over several years. The repression of the Rohingya peaked in 2012 with communal violence and widespread displacement, and again in 2015 with a massive boat refugee crisis in the Indian Ocean.⁵ This report will not investigate empirically the situation for the Rohingya, but will show how monitors of human rights abuses have applied the term *genocide* to the situation in Myanmar. Specifically, this report analyzes two warnings of genocide that were issued in 2015.⁶ These warnings were based on different definitions of genocide: one legal, and one sociological.

This report will illustrate the importance of a sound understanding of the different definitions of genocide when assessing warnings issued by advocacy groups or other monitors. Specifically, this report will show that for the purpose of monitoring, early warning and prevention, the legal definition given in the Convention⁷ is insufficient. The legal definition requires a special genocidal

intent, which is difficult to document before the atrocities have taken place. There are several non-legal definitions of genocide. The one analyzed in this report focuses on the steps leading up to genocide. This definition is useful for analyzing genocide risks and for issuing warnings, but it differs significantly from the legal definition, and does not trigger the international legal obligation to prevent and punish those responsible.

First, this report will place the analysis of the Rohingya in Myanmar within the broader picture of marginalized minorities. Today, minorities are often marginalized economically, culturally and politically, and their fate must be addressed if the world is to live up to the pledge for the UN Sustainable Development Goals (SDGs) that “no one will be left behind”.⁸ Second, the report will give an overview of the situation for the Rohingya. Third, the report will address the issue of genocide. This report will not assess whether genocide is occurring or might occur, but rather show how the warnings issued by advocacy groups have relied on very different definitions of genocide. To conclude, the report asks whether there is a tension between early warning advocacy and legal post-facto analysis, and whether it is always wise, for the sake of genocide prevention, to appeal to the Convention.

The relevance of “genocide”

When the Convention was drafted, the principle that individuals could be held criminally responsible for crimes committed against their own population *in peacetime* was groundbreaking. This radical development was only politically possible insofar as the scope of the Convention was narrow. The Convention would only target the most serious incidents of persecution.

Other norms in international human rights law have developed and expanded with time, whereas the legal interpretation of the Convention seems more or less as conservative as at the time of its establishment. Expansion of the norm *crimes against humanity* has filled the gap in international criminal law created by the narrow definition of genocide. *Crimes against humanity* is now detached from warfare, the norm is not limited to specific groups, and it does not require special intent beyond ordinary criminal intent.⁹

For the purpose of criminal prosecution, the term *crimes against humanity* now covers all incidents of genocide, without further specification of group definition or special intent.

The duty to prevent has been detached from the definition of genocide by political developments¹⁰, and interventions to protect civilian populations could just as well be justified with reference to crimes against humanity or ethnic cleansing, according to the *responsibility to protect* doctrine.¹¹ Two core features of the Convention – prevention and punishment – seem to have lost their legal significance. Does this make the term *genocide* obsolete?

In the realm of human rights advocacy and international politics, the concept of genocide is very much alive. For example, in March 2016, the US State Department issued a statement saying that the IS was committing genocide in Iraq and Syria. In 2004, Colin Powell declared that genocide was going on in Darfur, one decade after the US administration did what they could to avoid applying the term to Rwanda. There are no signs that the moral weight of the concept is losing ground. Due to the political and moral status of genocide as a crime, activists seem to prefer the term over the less complicated and wider-reaching *crimes against humanity*. When action is called for, no allegation arouses more international attention than that of genocide. The concept will live on, and advocacy groups, policymakers and diplomats must carefully consider its strengths and weaknesses, and how it is defined, when issuing or responding to genocide warnings.

The broader picture: The marginalization of minorities

In November 2015, the adoption of the UN Sustainable Development Goals (SDGs) reshaped the international development agenda. The goals follow the Millennium Development Goals, and provide an important context for any current strategies against poverty and marginalization.¹² The preamble to the goals boldly states that “no one will be left behind”. Today, those left behind economically and politically are often minorities.¹³ Furthermore, Goal 10 aims to “reduce inequality within and among countries”, and in target 10.2 to “empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion

or economic or other status”. The goals aim to “ensure equal access to justice for all” (target 16.3) and to “ensure responsive, inclusive, participatory and representative decision-making at all levels” (target 16.7).

The statement that no one should be left behind, combined with the more specific targets regarding equality and justice, may provide momentum for addressing the plight of minorities in terms of both economic development and political marginalization. However, advocates of minority rights, such as Minority Rights Group, were disappointed that the SDGs lacked specific mention of ethnic, religious and linguistic minorities. This may diminish possibilities to improve the situation for minorities.¹⁴ Added to this is the problem that many countries do not have development data disaggregated specifically for minorities.

The Rohingya people in Myanmar face the same challenges as many other minorities today, challenges which may lead to genocide or the risk of genocide under certain conditions. The Rohingya people have been subject to eruptions of violence, discriminatory legislation, appalling living conditions, denial of health care and emergency aid, and confinement in camps, coupled with deprivation of political rights, social stigmatization, and xenophobia. While political and economic developments in Myanmar are generally positive, the Rohingya minority has been increasingly marginalized. It is an extreme and vivid illustration of the importance of focusing on minorities in developmental policies. Their situation also illustrates the potential link between living conditions, political marginalization and genocide.

The Rohingya in Myanmar: “The most persecuted people on Earth?”

The Economist asked this question in June 2015. It is an illustrative example of the growing international concern for the Rohingya minority.¹⁵ While the country went through a democratization process and prepared for the November 2015 elections, international activists and journalists pointed to the potential genocide risk of this particularly vulnerable minority.¹⁶

The Rohingya Muslims in Myanmar live predominantly in Rakhine state, in western Myanmar bordering Bangladesh. The history of the Rohingya community in this area goes

back centuries, but their status in Myanmar is disputed. In Myanmar, they are often called “Bengali”, referring to the view that they are illegal immigrants from Bangladesh.¹⁷ They have gradually been excluded from political life. In 1982, a citizenship law stripped Rohingya of their citizenship and status as a national minority, but their representatives were still allowed to participate in politics. In the 1990s the situation for the Rohingya deteriorated, prompting a large flow of refugees to Bangladesh in 1991–92. Legislation that separated Rohingyas from other citizens was enacted in the 1990s. In 1993, one township restricted Rohingya marriages, and since 1994, Rohingya have not received birth certificates from the government. In 1997, travel restrictions were imposed on Rohingya in Sittwe town (the capital of Rakhine state), and in 2005 marriages and birth rates were restricted in Maungdaw township. Rohingya were, however, allowed to participate in the 2008 national referendum over the constitution.

Exclusion of the Rohingya minority through legal means continued, and in 2012 a wave of violence between Buddhists and Muslims erupted in Rakhine state. During this violence, about 147 000 people were displaced, the vast majority Rohingya. The displaced Rohingya are now living in wretched conditions in what observers have called detention camps and prison cities. Movement is heavily restricted, and food and medicine are in short supply. International relief agencies have been denied access. The Rohingya were stripped of their voting rights in 2015 and could not participate in the national elections in November 2015.¹⁸

The legal discrimination against the Rohingya culminated with the “race and religion laws” promoted by extremist Buddhist monks and enacted by the parliament in 2015. The laws imposed nationwide restrictions on the Rohingyas’ religious freedom and on their right to marriage and childbirth. The dire living conditions in the camps and cities where they live, combined with severe restrictions on their movement and denial of access to food and medical aid, pose the most immediate threats to the physical integrity of the Rohingya. In addition to occasional outbursts of violence, the Rohingya have also been subjected to forced labour, sexual abuse and torture.

The level of attention shown for the Rohingya peaked in 2015 when a boat refugee crisis was widely reported internationally.¹⁹ Tens of thousands

of refugees were left by their smugglers drifting around without food and water in the Indian Ocean, resulting from a prolonged crisis for the Rohingya living in Myanmar.²⁰ Advocacy groups and high-profile news agencies warned of genocide against the Rohingya.²¹

The poverty and marginalization of the Rakhine Buddhists in Rakhine state complicates the situation for the Rohingya. The Rakhine are the Buddhist majority in Rakhine state (there are approximately 2.1 million Rakhine and one million Rohingya), but they are a minority in Myanmar. Rakhine state is the second-poorest in Myanmar, and the Rakhine Buddhists also suffer the consequences of extreme poverty.²² Many Rakhine feel that their culture and identity is threatened. The Muslim Rohingya have become scapegoats, and animosity is fuelled by hateful agitation from extremist Buddhist monks.²³ The Rakhine fear being swamped by Muslim extremist immigrants from Bangladesh, and many Rakhine leaders see themselves as protectors of Myanmar and guardians of Myanmar’s western border against Muslim immigrants. Much of Rakhine nationalism is expressed as blatant genocide propaganda.²⁴ This anti-Muslim agitation intensified during the democratization process.

During the democratization process, which culminated in the elections of November 2015, extremist Buddhists exploited this climate to ignite fear and repression of the Muslim minority. The problem with the elections was not so much the anti-Muslim sentiment among the major parties²⁵, but the fear among politicians of being seen as pro-Muslim. The extremist Buddhist Ma Ba Tha movement aligned with the pro-military USDP party in order to influence the elections, and held the National League for Democracy party (NLD) hostage in an anti-Muslim climate. It was clear that any lenience shown towards the Muslims by the NLD would be exploited politically to secure votes for the outgoing pro-military party. The result was that the NLD removed all Muslim candidates from its lists, and Aung San Suu Kyi made no signs to address the plight of the Rohingya.²⁶

During 2016, the government and Buddhist leadership denounced the extremist monks and their anti-Muslim rhetoric. Further, the government set up a commission led by Kofi Annan, to look into the conflict in Rakhine. However, reports of increased tension, violence, refugee flows across the Bangladeshi border, and deployment of police

and military troops during October and November 2016 have replaced cautious optimism with renewed fear of escalation of the suffering of the Rohingya.

Is it genocide? Legal and sociological approaches

Two particularly thorough and important reports, issued in 2015 and based on extensive empirical analyses of the situation on the ground, warned of genocide against the Rohingya in Myanmar. The reports differ in their conceptualization of genocide. One applies the legal definition of the Convention, the other a non-legal, or sociological, approach. I will discuss the strengths and weaknesses of each approach, and show how different definitions of genocide affect the potential for monitoring, early warning and prevention.

In the realm of international politics – and for the purpose of generating action against genocide – the legal definition in the Convention serves as the reference point. The definition of genocide is a *jus cogens* norm, meaning that it is binding on all states, and above other laws, regardless of whether or not states have ratified it. However, documenting the crime of genocide while it is going on is inherently difficult. It is therefore useful to look at non-legal definitions that draw the attention to the gradual process leading up to genocide.

The legal approach: The difficult question of intent

The NGO Fortify Rights is a regional human rights watchdog based in Bangkok, and a central monitor of the human rights situation in Myanmar. Its report, published in cooperation with the Allard K. Lowenstein International Human Rights Clinic at Yale, applies a legal analysis to the question of genocide.²⁷ The report reviews the most important elements of the Convention's definition of genocide, namely the *group* element, the *acts* element, and the *intent* element. For a case to constitute genocide in the legal sense, all three elements must be documented.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

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.

Protected groups

Article 2 of the Convention 2 protects *national, ethnical, racial* and *religious* groups. These are often referred to as *protected groups*, and the categories often overlap. In the field of genocide studies, scholars often consider this group element too narrow. Many renowned genocide scholars have formulated their own definitions, particularly due to the omission of political and social groups in the legal definition. For the international tribunals, however, handling the group element has been relatively straightforward. The tribunals have interpreted this element flexibly.²⁸ Victim groups are usually defined *subjectively*, by the perpetrators of genocide, rather than *objectively* in the sense of technically or scientifically. For example, although prior to the 1994 genocide in Rwanda one could argue that the Tutsi was not a separate ethnic group in anthropological terms, their identification as such in national identity cards and by the perpetrators determined their status as a protected group.

The report by Fortify Rights concludes that the Rohingya constitute a protected group under the Convention.²⁹ This conclusion is uncontroversial. The group's history can be traced to the ninth century. They share a distinctive language and they represent a religious minority in the country, although there are other Muslim minorities in the country as well. Most importantly, national and regional authorities see them as a distinct group.³⁰ The government refers to them as Bengali (and more recently as Muslims), refusing to use the term *Rohingya*.³¹ No other group is referred to as Bengali in Myanmar, confirming the authorities' view of them as a distinct group, although they are not allowed to call themselves Rohingya. Clearly, the Rohingya constitutes a protected group both in objective terms (a common and unique language, a common history) and subjective terms (they see themselves, and are seen by political authorities, as a distinct group).

Acts of genocide

The report by Fortify Rights concludes that the Rohingya are exposed to conduct that fulfils the *acts* element of genocide. Such acts are committed by the government, police, military, and security forces. The report concludes that the evidence of this is "substantial and consistent".³² Fortify Rights argues that the Rohingya have been the victims of acts enumerated in items *a*, *b*, *c*, and *d*, as defined in article 2 of the Convention (see text box p. 7).

Killings can be the result of direct acts as well as of unlawful omissions. Contrary to what Myanmar authorities asserted, Fortify Rights finds that not all killings since 2012 have been committed by local, civilian Rakhine. Myanmar's police and army have been involved in killings.³³ State security forces failed to intervene to stop killings, and have even participated themselves.³⁴ The failure to intervene can constitute an act of omission and, thereby, responsibility for killing, according to case law.³⁵ Furthermore, the killings of Rohingya have not been investigated and no one has been prosecuted.

Serious bodily and mental harm can be caused by torture, rape, sexual violence, or inhuman or degrading treatment. The Rohingya in Myanmar have been subjected to torture by the Myanmar army and police. Torture has been used to force Myanmar to register as Bengali. There are several reports of widespread rape of Rohingya women by military and police forces.³⁶

Conditions of life inflicted on a group can be calculated to bring about its destruction, including acts that would lead to slow deaths through, for example, starvation or denial of medical services. It can also include forced labour or expulsion from homes. The Rohingya have been subjected to such conditions. They have been forced to live in camps where they have been denied food and medical care, and where their freedom of movement has been restricted, so that they have been unable to alleviate their situation.³⁷ Much of the destruction of homes has been carried out by mobs, but the police and military have reportedly participated or watched without intervening. Furthermore, the Rohingya have been denied food and medical aid from international agencies.³⁸ Most Rohingya live outside camps, but their situation is usually not much better, sometimes worse. They are not allowed to leave their villages, and many are forced into unpaid labour.³⁹

Measures intended to prevent births have also been imposed on the Rohingya. They are subject to restrictions on marriages and on the number and interval of births. They must pay fees and bribes, often unaffordable, to obtain permission to marry, and they are not allowed to have more than two children.⁴⁰

Fortify Rights concludes: "Substantial and consistent evidence suggests that the abuses against Rohingya fulfil the 'act' element of the crime of genocide".⁴¹

It is beyond doubt that the Rohingya have been subject to extremely severe human rights abuses, probably among the worst in the world today. A word of caution is still advised when applying the Convention to severe human rights abuses and persecution. It is worth bearing in mind that the Convention's drafters intended it to be narrow. Tribunals have interpreted it conservatively. When the Convention was adopted, *cultural genocide* was deliberately excluded, as were acts that today would be termed *ethnic cleansing*.⁴² Cases of ethnic cleansing or cultural genocide could be covered by the term *crimes against humanity*.⁴³ In the Bosnia and Herzegovina case, the International Court of Justice (ICJ), which has the authority to settle disputes between states regarding genocide, stated that ethnic cleansing did not necessarily imply an attempt to destroy according to the Convention: "deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is

such destruction an automatic consequence of the displacement”.⁴⁴ This suggests a rather high threshold for considering acts to constitute genocide, legally speaking.

Although the Convention and the subsequent case law imply a conservative interpretation of the acts element, there is no explicit threshold. The Convention says nothing about the number of deaths required for genocide to have taken place. Although the Convention refers to the destruction “in whole or in part” of groups, this does not refer to the *result* of genocidal policies, but rather to the *intent*. Interpreted literally, genocide can be committed if there is an *intent* to destroy a group “in whole or in part”, even if the result is that no one dies. However, application of the Convention by international tribunals points towards a conservative interpretation. In case law, there is a high threshold for acts to constitute genocide. According to case law, the part of a group destroyed, or intended for destruction, must be “substantial” or “significant”. On the other hand, the number of victims does not necessarily have to make up, for example, more than half of a group or even close to that. Notably, the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that the Srebrenica Muslims constituted a “substantial part” of Bosnian Muslims, although they made up a proportionally small part of the population as a whole.⁴⁵

Since few deaths due to the persecution of the Rohingya have been documented, the conclusion that the acts element has already been fulfilled *might* be interpreting the acts element too liberally. Relatively few Rohingya have been murdered, and the direct result of dire living conditions is difficult to measure. On the other hand, one can argue that the reference to the destruction of a “substantial” or “significant” part of a group, refers to the *intent* by perpetrators to destroy such a part of a group, and not to the result in terms of numbers. This leads to the most challenging aspect of applying the genocide definition: the element of *intent*.

Genocidal intent

Article 2 of the Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

The element of intent is the most difficult to

prove, but it is also perhaps the one that makes the term *genocide* so powerful and unique. The element of intent says something about the particular motive behind the crime and what sets the crime apart from other mass atrocities: destruction based on group-identity. Acts of genocide are committed because of *who* the victims are.

There are two sides to the intent element. First, there is ordinary criminal intent; a killing is carried out knowingly or consciously.⁴⁶ Second, and importantly, the Convention spells out a “special intent”, or a “genocidal intent”. The act in question is carried out with the intent to destroy a protected group.⁴⁷ In an analysis of relevant case law, Bergsmo concludes that: “The relevant sources in international criminal law provide a firm legal basis for the conclusion that *conscious desire* is the special intent requirement for the international crime of genocide”.⁴⁸ The acts listed above must be conducted *because* the victims belong to one of the protected groups, with the *destruction* of the group, in whole or in part, as a goal.

For the purpose of early warning and genocide prevention, the intent element is particularly challenging. The Convention requires all states to “prevent and punish” genocide.⁴⁹ However, in order to establish that genocide is – in the legal sense – occurring or is likely to occur, one has to demonstrate the presence of genocidal intent. This is extremely difficult, since few, if any, perpetrators will declare their intention to commit genocide. When the aim is genocide prevention, one cannot wait for a *post facto* trial or scholarly analysis. In the analysis of Myanmar policies towards the Rohingya, the report from Fortify Rights points to the interpretation of the intent element by international tribunals. Intent has to be inferred based on circumstances and context. Apart from obvious evidence such as explicit plans or policy statements, relevant contextual factors indicating genocidal intent could be “a racist climate in public opinion, public speeches, and private meetings”. Furthermore, the report points out that “the massive scale of prohibited acts against a protected group could itself demonstrate an intent to destroy a group”.⁵⁰ The report finds that “the evidence available supports a conclusion that the Myanmar government and local actors have acted with the intent to commit genocide”.⁵¹ The report adds that the conclusion is tentative, but points to derogatory rhetoric, evidence that Rohingya are

specifically targeted, birth and marriage restrictions directed at the group, deprivation of necessary resources for the group, and the large scale of the atrocities.⁵² It is the totality of the political actions and expressions that indicate intent.

As argued above, no numeric threshold of victims applies for establishing genocide, as long as there is intent to destroy a group in whole or in part. However, since intent is so difficult to document, numbers become important. A high number of victims indicates intent.

Again, the report from Fortify Rights seems to lean towards a liberal interpretation of the Convention. It states that the conclusion on intent is tentative. Genocide is considered *the* most serious international crime, and the requirement for documentation must be similarly strong. This is not only a normative principle; it was stated by the ICJ in the Bosnia and Herzegovina case, which required a “high level of certainty” for charges of genocide.⁵³ Of course, this refers to *legal* charges invoking the responsibility to punish, but the report in question presents a legal analysis and should have taken into account the high threshold for genocide charges.

Although prevention is a central element of the Convention – it is even part of the Convention’s name⁵⁴ – the Convention remains an inadequate tool for preventing genocide, since intent is almost impossible to document “with a high level of certainty” before it is too late. Therefore, in order to predict genocides before a group is exterminated, one is dependent on an understanding of the process leading up to genocide. Furthermore, the requirement of individual, special intent may be problematic because it may lead to an exaggerated focus on the motivation of the individual perpetrator. William Schabas, a legal authority in the field, explains: “The problem with such analysis is that it loses sight of the importance of the plan or policy of a state or analogous entity”.⁵⁵ Genocide might be committed even though individuals in the hierarchy may not themselves have a genocidal intent.⁵⁶

In sum, there are two major problems with the intent element for the purpose of genocide prevention: it makes it difficult to warn against genocide before it takes place and it draws

attention away from the organization and structure of genocide. For the purpose of monitoring, early warning and prevention, non-legal definitions are necessary.

The sociological approach: The gradual road to genocide

While William Schabas states that “Genocide is, first and foremost, a legal concept”,⁵⁷ researchers in the field of genocide studies have produced an array of definitions that differ from the legal definition. The extensive report “Countdown to Annihilation: Genocide in Myanmar”, published by the International State Crime Initiative (ISCI) at the University of London, applies a concept of genocide as a gradual process of radicalization and escalation.⁵⁸ The report concludes that “the systematic, planned and targeted weakening of the Rohingya through mass violence and other measures, as well as the regime’s successive implementation of discriminatory and persecutory policies against them, amounts to a process of genocide”.⁵⁹

The report applies a concept of genocide developed by Daniel Feiersten in *Genocide as Social Practice*, where he outlines genocide in six stages.⁶⁰ The report presents genocide as a crime perpetrated to achieve a state’s organizational goal.⁶¹ Furthermore, the aim of genocide is to destroy social relationships and to establish new models of social relationships and identities among survivors. A key point is the destruction of identity, with or without physical annihilation. The process of genocide might last for decades.⁶² The contrast to the legal definition is evident from the outset, with the focus on state-level organization and destruction of identity rather than on annihilation. The report applies terms such as *moral obligation*, *dehumanization* and *purification*, all of them well known from psychological and sociological approaches to genocide.⁶³

Stages of genocide: The Rohingya on the brink of extermination?

Genocidal stages

- 1) Stigmatization (dehumanization, negative stereotyping, scapegoating, etc.)
- 2) Harassment, violence and terror (arrests, detentions, deprivation of rights)
- 3) Isolation and segregation (separation of a group socially, geographically, economically, politically, culturally and ideologically from the rest of society)
- 4) Systematic weakening (destruction through deprivation, malnutrition, lack of health care, torture, sporadic killings, humiliation and abuse)
- 5) Extermination (organized mass killings)
- 6) Symbolic enactment (denial – removal of the memory of victims).

The ISCI report applies Feierstein's concept of genocidal stages to Myanmar.⁶⁴ The report argues that we are witnessing the fourth stage of genocide against the Rohingya.⁶⁵

Stigmatization and dehumanization has been going on for decades. A key event was the passing of a law excluding the Rohingya as an officially recognized ethnic minority in 1982. With this, the Rohingya lost their citizenship. Stigmatization and dehumanization are practised at all levels in society, from local communities in Rakhine state to the national government.⁶⁶ The military has been instrumental in stigmatizing the Rohingya as illegal Bengali.⁶⁷ A particularly vicious voice has been the extremist Buddhist monk Ashin Wirathu. The democratization process has led to uncertainty within the military, which has aligned politically with the monks and has thereby been tied to the extremist rhetoric. The military has used the monks to spread the message of fear and nationalism, and has tried to profit from it politically.⁶⁸

Harassment, violence and terror have also been going on for decades. It intensified with the violence in 2012 and resulted in tens of thousands of Rohingya fleeing by boat in 2015. Muslims in Myanmar are under surveillance by the state, and restrictions are imposed on marriage and childbirths.⁶⁹ The ISCI report finds that the violence and killings of June 2012 were, at least partly, organized by Rakhine state authorities, and that security forces participated. About 200 people were killed. The ISCI calls the massacre "Rakhine

state's Kristalnacht".⁷⁰

Isolation and segregation of the Rohingya have been enforced through the confinement of about 140 000 Rohingya in camps, strict surveillance, and restrictions on freedom of movement for most of the Rohingya population. The ISCI report describes the camps and cities where Rohingya live as detention camps and prison villages.⁷¹ The Rohingya are not allowed to travel freely in the state or in the country, and are therefore denied access to employment opportunities, medical aid, education, etc. The 4 500 Rohingya who remained in the state capital of Sittwe after the 2012 violence are now imprisoned in an overcrowded ghetto. The conditions in the ghetto are described as "a situation of systematic weakening based on denial of health care, restriction of food and a complete loss of livelihoods," with "hunger and illness ... visible throughout the ghetto".⁷² The report from the ISCI concludes that state authorities have "attempted to isolate the Rohingya from both wider Myanmar society and the international community", and that these policies amount to "persecution designed to bring about the destruction of the Rohingya".⁷³

Systematic weakening of the Rohingya has been extensive. The living conditions in the detention camps, villages and ghetto are appalling. There is widespread hunger and despair, and no economic opportunities. ISCI described the communities as broken, with people stripped of human dignity. The ISCI report argues that this has happened through "planned illness, hunger, loss of livelihood and the removal of basic human rights".⁷⁴ The denial of health care has led to preventable deaths.

The report from the ISCI concludes that genocide is underway: "The Rohingya face the final stages of genocide". Responsibility for the policies that have led to the first four stages of genocide lies with both national and local authorities. ISCI argues that the parallels with other genocides are stark, and that campaigns of hatred against the Rohingya are "reminiscent of those witnessed in Germany in the 1930s and Rwanda in the early 1990s".⁷⁵

The report from ISCI provides a thorough account of the hateful attitudes and policies towards the Rohingya. It illustrates the importance of focusing on gradual radicalization and the structure of genocidal policies. It gives a detailed account of how policies against the Rohingya have segregated the group from the rest of society, and

undermined their chance of survival. Because the concept of genocide defined in the report does not emphasize the legal requirement for intent but rather the steps preceding a full-blown genocide, it is a useful tool for monitoring and early warning.

The most obvious weakness of the approach by the ISCI is that the report does not address the legal definition of genocide. This may reduce the chances of generating action from international policymakers, who inevitably take the Convention as a reference point.⁷⁶ On the other hand, the sociological approach of focusing on genocide as a process of gradual escalation and radicalization is an useful tool for analyzing the nature of the human rights abuses in Myanmar. This approach draws attention to the dire situation of the Rohingya, and it allows for a clear and vocal genocide warning without engaging in endless debates over whether there really is evidence of special genocidal intent. While this is useful for drawing attention to an issue, reference to the Convention is unavoidable in any attempt to move international policymakers to act.

Conclusion: The dilemmas of genocide warnings

The two genocide warnings analyzed in this report apply different definitions of the term *genocide*, but reach the same overarching conclusion: that genocide is ongoing in Myanmar. However, there are important differences between the two definitions.

The report from Fortify Rights applies the legal definition. It concludes that genocide is ongoing, but the conclusion is “tentative”. The uncertainty is due to the difficulty of documenting genocidal intent. As my discussion shows, it is also possible to question whether the acts element is fulfilled according to the high threshold established by the Convention and confirmed by case law. These uncertainties point to a core problem of the Convention: it is difficult to prove that genocide is underway or ongoing according to the legal definition. The definition in the Convention is better suited to post-facto analyses and prosecution. Warnings and appeals might lead to lengthy debates over whether the requirements of the Convention are really met. For perpetrators, their allies, or policymakers who want to avoid the obligation to prevent it is possible to question

such warnings. On the other hand, applying the Convention has the benefit of drawing on the political and legal status of the Convention and its definition.

There is no agreed-upon alternative definition of genocide in the scholarly field. Therefore, warnings may be dismissed for strategically selecting non-legal definitions that fit the case in question. The report from the ISCI concludes that the Rohingya have gone through the fourth stage, and are on the brink of the fifth stage of genocide. Their conclusion is based on a concept of genocide that corresponds well with the situation on the ground in Myanmar. Genocide, according to their definition, must be seen as a gradually escalating process. Its report does not consider the applicability of the Convention at all. This is an obvious weakness if the goal is to engage policymakers who will inevitably have the Convention as their reference point. However, as the discussion above shows, non-legal definitions may have a significant advantage in that they analyze processes leading up to genocide, and are therefore much better suited to analyzing the severity of human rights abuses before the genocide occurs.

Since there is no agreed-upon alternative to the legal definition of the Convention, warnings relying on non-legal definitions of genocide should be interpreted with caution. However, their usefulness in understanding and identifying escalating human rights abuses that may lead to genocide is obvious. For the purpose of monitoring, early warning and prevention, non-legal concepts of genocide that focus on social processes and political structures are absolutely essential to complement the definition in the Convention. Warnings should not be dismissed simply because it is difficult to establish that the strict requirements of the Convention have been met.

In sum, there might be a tension between legal post-facto analysis and early warning advocacy when choosing between the legal and non-legal definitions of genocide. Actors who issue genocide warnings face the dilemma of deciding whether to apply the legally and politically powerful Convention but struggling to document that genocide is actually taking place, or to apply a non-legal definition that may be much more suited to capturing the severity of escalating human rights abuses but that does not carry the political and legal clout of the legal definition.

Another dilemma is whether or not to apply the term genocide at all. Actors may be careful in this regard, sometimes for good reasons. Using the confrontational language of genocide might make conflict-resolution measures more difficult on the ground. In Rakhine state in Myanmar, where the Rohingya live, the majority population (the Rakhine Buddhists) are also deprived and marginalized. Rakhine is the second-poorest state in Myanmar. Adding to this is the tense political situation in Myanmar, where every sign of lenience towards the Rohingya may lead to a nationalist outburst. Under these circumstances, actors must weigh their words carefully. An example of this is the statement issued by the UN Special Adviser on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect. They voiced their “concern at the politicization of ethnicity and religion” and raised “alarm at reports of increased advocacy of religious hatred” with reference to the fundamental rights of the Rohingya.⁷⁷ Policymakers and diplomats may need to tone down the conflict-laden rhetoric in order to gain access to important actors and processes on the ground. It is no coincidence that, with regards to Myanmar, the strongest rhetoric has come from advocacy groups, while actors involved in political processes have been far more cautious. If there is willingness to intervene in a situation of genocide risk, or to hold perpetrators legally responsible, policymakers will find the political and legal justification they need by applying terms such as *crimes against humanity* or *atrocity crimes*. They do not need to engage in endless discussions over whether genocide is really taking place. As we all know, it is difficult to generate this willingness to intervene, be it diplomatically, politically, legally or militarily. In order to generate such willingness, advocacy groups may find it necessary to use the forceful language of genocide. As recent examples of Myanmar and Syria/Iraq have shown, the “G-word” has not lost its potency.

Notes and references

- 1 *Atrocity crimes* refers to the most serious international crimes, namely genocide, war crimes and crimes against humanity as they are defined in international law. The most important legal sources are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and 1977, and the Rome Statute of the International Criminal Court. See *Framework of Analysis for Atrocity Crimes. A Tool for Prevention*, (United Nations, 2014), 1, 25. In contrast to genocide, the legal definition of *crimes against humanity* does not require victims to belong to a specific, protected group, but simply to constitute members of a civilian population.
- 2 One recent example is the report by the U.S. Department of State, issued on 17 March 2016. It concluded that the IS/Daesh is committing genocide in Iraq and Syria. U.S. Department of State, *Atrocities Prevention Report*, (17 March 2016).
- 3 United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, (9 December 1948), art. 1.
- 4 The long debate over whether the Sudanese government committed genocide in Darfur is a good example. See for example: Rebecca Hamilton, "Inside Colin Powell's Decision to Declare Genocide in Darfur," *The Atlantic*, 17 August 2011; Martin Shaw, "Darfur: Counter-Insurgency, Forced Displacement and Genocide," *The British Journal of Sociology* 62, no. 1 (2011); Tim Allen, "Is 'Genocide' Such a Good Idea?," *ibid.*; John Hagan and Joshua Kaiser, "The Displaced and Dispossessed of Darfur: Explaining the Sources of a Continuing State-Led Genocide," *ibid.*
- 5 Approximately 140 000 people were displaced in 2012, most of them Rohingya, and most of them still live in camps or in areas of restricted movement. In 2014 and 2015, approximately 100 000 people fled Myanmar by boat. "Burma. Events of 2015," Human Rights Watch, <https://www.hrw.org/world-report/2016/country-chapters/burma>. It is unclear how many people were killed during the height of violence in Rakhine State in June 2012. The government stated that 78 died. This is likely a very conservative number. Human Rights Watch, "The Government Could Have Stopped This." Sectarian Violence and Ensuing Abuses in Burma's Arakan State," <https://www.hrw.org/report/2012/07/31/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan>.
- 6 Penny Green, Thomas MacManus, and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar*, (London: International State Crime Initiative, 2015); Alina Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis*, (Allard K. Lowenstein International Human Rights Clinic, Yale Law School, 2015).
- 7 United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, art. 2.
- 8 United Nations General Assembly (A/RES/70/1), *Transforming Our World: The 2030 Agenda for Sustainable Development*, (25 September 2015), art. 4.
- 9 William A. Schabas, "The Law and Genocide," in *The Oxford Handbook of Genocide Studies*, ed. Donald Bloxham and Dirk Moses (Oxford: Oxford University Press, 2010), 140-41.
- 10 In 2004, when Colin Powell finally declared that genocide was going on in Darfur, it was based on an understanding that it would not legally bind the U.S. to intervene to prevent the genocide. Hamilton, "Inside Colin Powell's Decision to Declare Genocide in Darfur."
- 11 Office of the Special Adviser on the Prevention of Genocide, "The Responsibility to Protect," <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.
- 12 United Nations General Assembly (A/RES/70/1), *Transforming Our World: The 2030 Agenda for Sustainable Development*.
- 13 Minority Rights Group International points to the problem that countries might experience economic development at the national level, while marginalized minorities still live in deep poverty, "trapped in a cycle of exclusion and underdevelopment from which they cannot break free without targeted interventions". *Minorities, Indigenous Peoples and the Post-2015 Framework*, (Minority Rights Group

International, 2015), 3.

14 Ibid.

15 “The Most Persecuted People on Earth?,” *The Economist*, 11 June 2015.

16 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*; Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*; ‘They Want Us All to Go Away.’ *Early Warning Signs of Genocide in Burma*, (Washington DC: Simon-Skjodt Center for the Prevention of Genocide, United States Holocaust Memorial Museum, 2015); “Exclusive: ‘Strong Evidence’ of Genocide in Myanmar,” *Al Jazeera Investigative Unit*, 28 October 2015.

17 Lately, the government has used the term “Muslim minority”, which may be seen as a compromise between the term “Rohingya” used by the group themselves, and “Bengali” used by their opponents. Both Rohingya and Rakhine Buddhists have protested against the new term. Moe Myint, “Nationalists Protest Govt’s New Arakan State Terminology,” *The Irrawaddy*, 1 July 2016; “Thousands Protest in Arakan State against New Label for Rohingya,” *ibid.*, 4 July; Lawi Weng, “Despite Criticism, Suu Kyi Offers Hope to Rohingya,” *ibid.*, 24 June.

18 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 7-8 and 19-21.

19 See for example “Why Are So Many Rohingya Migrants Stranded at Sea?,” *BBC News*, 18 May 2015; Richard Javad Heydarian, “Southeast Asia’s Moment of Shame,” *Al Jazeera*; Thomas Fuller and Joe Cochrane, “Rohingya Migrants from Myanmar, Shunned by Malaysia, Are Spotted Adrift in Andaman Sea,” *The New York Times*, 14 May 2015; “The Most Persecuted People on Earth?”

20 Stein Tønnesson, *Asean’s Rohingya Challenge*, in *PRIO Policy Brief* (2015).

21 “Exclusive: ‘Strong Evidence’ of Genocide in Myanmar.”; Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*; ‘They Want Us All to Go Away.’ *Early Warning Signs of Genocide in Burma*; Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*; “Genocide Watch Alert 2015 on Burma/Myanmar,” Genocide Watch, <http://genocidewatch.net/2015/08/05/14477/>; Nicholas Kristof, “Myanmar’s Peace Prize Winner and Crimes against Humanity,” *The New York Times*, 9 January 2016; “Burma Rejects ‘Unbalanced’ Rohingya Remarks by Nobel Prize Winners,” 31 August 2016 2015; Emma Graham-Harrison, “Burma’s Boatpeople ‘Faced Choice of Annihilation or Risking Their Lives at Sea’,” *The Guardian*, 17 May 2015.

22 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 19-20.

23 There is a risk that the crisis in Myanmar will lead to terrorist threats. There is a strong religious dimension to most military conflicts today, but so far jihadism has not been widespread in Southeast Asia. Tønnesson, *Asean’s Rohingya Challenge*, 2.

24 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 40-48.

25 The Union Solidarity and Development Party (USDP) is former President Thein Sein’s party, and is closely allied with the military. The National League for Democracy (NLD) is Aung San Suu Kyi’s party, and the governing party after the 2015 elections.

26 David Doyle, “Burma Elections: Aung San Suu Kyi Steers Clear of ‘Stateless’ Minority the Rohingya,” *The Independent*, 16 October 2015; Jennifer Rigby, “Aung San Suu Kyi Aide: Rohingya Are Not Our Priority,” *The Telegraph*, 19 November 2015.

27 Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*.

28 Schabas, “The Law and Genocide,” 133.

29 Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis*, 44.

30 *Ibid.*, 42-44.

31 In an effort to bring “harmony”, the government has suggested using the term “Muslim community” instead of Rohingya or Bengali. Myint, “Nationalists Protest Govt’s New Arakan State Terminology.”

32 Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis*, 51.

33 Ibid., 45.

34 Ibid.

35 Both the international tribunals (ICTY and ICTR) have stated this. Ibid.

36 Ibid., 46-47.

37 About 140 000 Rohingya live in such camps.

38 Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis*, 48.

39 Ibid., 49.

40 Ibid., 51.

41 Ibid.

42 Schabas, "The Law and Genocide," 135.

43 Ibid.

44 Ibid., 130; International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro)*, (27 February 2007), para. 190.

45 Schabas, "The Law and Genocide," 136-37.

46 Ibid., 138.

47 Morten Bergsmo, "Intent," in *Encyclopedia of Genocide and Crimes against Humanity*, ed. Dinah L. Shelton (Detroit: Thomson Gale, 2005), 525; Schabas, "The Law and Genocide," 138. Bergsmo analyzes the case law from ICTY and finds: "Several decisions of the ICTY in effect confirm that there is a specific intent requirement for the international crime of genocide". Bergsmo, "Intent," 527.

48 "Intent," 530. Emphasis added.

49 United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, art. 1.

50 Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State? A Legal Analysis*, 52.

51 Ibid., 53.

52 Ibid.

53 International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro)*, para. 210.

54 Its full name is "Convention on the Prevention and Punishment of the Crime of Genocide."

55 Schabas, "The Law and Genocide," 138.

56 International courts have approached this problem by referring to the principle of joint criminal enterprise, which implies that international crimes may be committed by groups of individuals. Ibid., 138-39.

57 Ibid., 123.

58 The report was released during Rohingya Week arranged by the International State Crime Initiative from 27 to 31 October 2015. <http://statecrime.org/about-isci/events/isci-rohingya-week-27th-31st-october-genocide-myanmar-annihilation-rohingya/> (accessed 2 May 2016).

59 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 16.

60 Ibid.; Daniel Feierstein, *Genocide as Social Practice. Reorganizing Society under the Nazis and Argentina's Military Juntas* (Brunswick, NJ: Rutgers University Press, 2014). To analyze the stages of genocide is a well-established approach in the field. See particularly Gregory H. Stanton, "The 8 Stages of Genocide," (1998), <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>.

61 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 21.

62 Ibid.

- 63 Ibid., 20, 22.
- 64 This concept is strongly influenced by Stanton’s work. Stanton, “The 8 Stages of Genocide”.
- 65 Green, MacManus, and Venning, *Countdown to Annihilation: Genocide in Myanmar*, 22-23.
- 66 Ibid., 53.
- 67 Ibid., 55.
- 68 Ibid., 60.
- 69 Ibid., 71-72.
- 70 Ibid., 74-76.
- 71 Ibid., 82-85.
- 72 Ibid., 84-85.
- 73 Ibid., 87.
- 74 Ibid., 90.
- 75 Ibid., 99.
- 76 US State Department’s report on genocide in Syria and Iraq as an example. U.S. Department of State, *Atrocities Prevention Report*.
- 77 United Nations, “Statement by Adama Dieng, Special Adviser of the Secretary-General on the Prevention of Genocide, and Jennifer Welsh, Special Adviser of the Secretary-General on the Responsibility to Protect, on the Upcoming Elections in Myanmar “ news release, 4 November, 2015.

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