The number of Rohingya victims is uncertain: estimates range between 4005 and 6,700, but the categorization of the crime depends on the perpetrator’s intention rather than on the number of victims. Since August 2017, more than 670,000 Rohingya, lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh, joining more than 160,000 Rohingya refugees who were forced out of Myanmar in previous years. Approximately 80 percent of those are women and children, and while sexual violence has not been limited to women and girls, they appear to comprise the majority of victims of sexual violence in this context.

Genocide, CAH, and ethnic cleansing refer to different punishable acts and each have a different mens rea. To qualify as genocide, a crime must be committed with a dolus specialis, or specific intent to eliminate, an entire group of people based on their ethnicity, nationality, race, or religion. International criminal courts and tribunals have confirmed that this list of groups is conclusive. The narrow definition of the crime in the Genocide Convention, in particular the exclusion of conduct committed with intent to destroy political, economic, social, or cultural groups, was influenced by the negotiation process that led to the adoption of the treaty and the need to gain widespread state support in order for the treaty to be effective.

Absent proof of this specific intent, perpetrators can still be found guilty of CAH or ethnic cleansing. CAH are widespread and systematic attacks (chapeau element) knowingly directed against any civilian population, while ethnic cleansing only refers to the expulsion of a group from a particular area and has not been defined and recognized as a separate crime under international law. There is no precise definition of this concept or the exact acts to be qualified as ethnic cleansing.

Excluding the hypothesis that the act could be ethnic cleansing, it is important to focus on the other two options. While CAH focuses on the killing of a large number of individuals and is aimed at protecting the individual, genocide focuses on the destruction of groups and is aimed at protecting the group.

Criminal responsibility hinges on proof of intent, which is easier to establish with hard evidence in the form of a confession or a written document. Intent is discerned from direct and circumstantial evidence. The special intent requirement for genocide is particularly hard to establish since it is difficult to prove the perpetrators’ reasoning. In the case of the Holocaust, intent was made explicit in Nazi documentation and propaganda. A few decades later during the Rwandan genocide, in which national radio called for the extermination of the Tutsi ethnic group, propaganda played a similar role.

A different scenario played out during the Srebrenica massacre in 1995, where the International Criminal Tribunal for Former Yugoslavia convicted only Ratko Mladi of genocide in Srebrenica. In 2007 the International Court of Justice exonerated Serbia of direct responsibility for the mass slaughter of Bosnian Muslims at Srebrenica during the 1992-95 Bosnian war, but ruled that it failed to prevent genocide.

“All the evidence never lies” because the legal fact-finder—whether a judge, lay jury, or both—establishes a “formal legal truth,” which may or may not match the substantive truth. It does not matter what people say; all that matters is what they can prove at trial.

Last April, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) filed a request to the Pre-Trial Chamber seeking, for all intents and purposes, an advisory opinion on whether the ICC may exercise jurisdiction over the alleged deportations of Rohingya people from Myanmar to Bangladesh.

Immediately, the Myanmar government expressed “serious concern” about the request. The prosecution reviewed an enormous number of reports and other public information alleging that the crime of deportation was committed against the Rohingya population. These reports and other public information appear credible and consistent. Article 12(2)(a) of the Rome Statute provides that...
the court may exercise its jurisdiction” if the “state on the territory of which the conduct in question occurred” is a state party to the statute. This “conduct” requirement means only that “at least one legal element of an Article 5 crime” must occur on the territory of a member state.31

ICC has jurisdiction if only a fraction of the elements of a crime were committed on the territory of a member state (Bangladesh), in this case with the majority of elements having been consummated in a nonmember state (Myanmar). In other words, the alleged crime started in a nonmember state and it was completed in a member state. Also relevant to the question of jurisdiction is that the Myanmar government claims that Bangladesh is the Rohingya’s country of origin.32

But the question is even if Pre-Trial Chamber agrees with the OTP, will it be able to investigate in Myanmar considering the Myanmar government’s tensioning and blocking of access to Rakhine State?33

And again, what about the other crimes of murder, rape, and persecution? These alleged crimes were fully completed in Myanmar so probably are beyond the ICC’s reach.34

Collecting evidence to support any alleged charged crimes required the OTP to conduct investigations not only in Bangladesh or anywhere the displaced and deported Rohingya are being hosted but also in Myanmar.35 This will be very difficult unless and until the Myanmar government decides to cooperate.36

In the meantime, while anyone is questioning the situation, the massacre in Myanmar is still without a real solution and without any responsible party.

As of press time, the ICC had given Myanmar until July 27 to respond to a prosecution request that they consider hearing a case on alleged deportation of Rohingya population to Bangladesh.37

Endnotes

3The term “genocide” was coined by Raphael Lemkin in 1944 from
the Greek term “genos,” meaning race, nation or tribe, and the Latin term “caed,” which means to kill. It was adopted by prosecutors at the Nuremberg International Military Tribunal even though it was not included in the Nuremberg Charter. Raphael Lemkin, Axis Rule in Occupied Europe (1944).

The definition of crimes against humanity was included, for the first time, as one of the three categories of crimes in the Nuremberg Charter in 1945. Nuremberg Charter art. 6(c) (Aug. 8, 1945). See also Rome Statute of the International Criminal Court, Doc. A/CONF.183/9 (July 17, 1998) (entered into force July 1, 2002) arts. 7(1)(a), (b), & (d). The debate on the distinction between forcible transfer and deportation is rather settled under existing international jurisprudence. These crimes are distinct and not mutually exclusive. The term “ethnic cleansing” surfaced in the context of the 1990s conflict in the former Yugoslavia and is considered to come from a literal translation of the Serbo-Croatian expression “etničko čišćenje.”


3Id.


7Id.


10Rome Statute, art. 7.


22Supra note 8.

23Rome Statute, art. 19(3)(c). The ICC has jurisdiction over natural persons, art. 25, and has prospective jurisdiction over crimes committed after entry into force of the Rome Statute, in 2002. Myanmar is not a state party while Bangladesh is.

24See supra, note 6.


26See supra, note 26, at 4.

27See supra, note 23, at 14.

28See supra, note 9.


30Id.

31Id.

32Id.