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Panel C3 – The Role of International Criminal Law and the ICC in Responding to the Alleged Crimes Perpetrated against the Rohingya

Chair: **Fannie Lafontaine –** Université Laval, Faculté de droit

Speakers **Payam Akhavan –** McGill University, Faculty of Law
Kyle Matthews – Montreal Institute for Genocide and Human Rights Studies (MIGS) at Concordia University
Valerie Oosterveld – Western University, Faculty of Law

Rapporteur: **Blake Van Santen**

This conference was recorded by the Canadian Partnership for International Justice. You can watch the video at this webpage: https://cpij-pcji.ca/videos/.

The panel was assembled to consider the roles of ICL and the International Criminal Court (ICC) in addressing the crimes allegedly perpetrated by the government of Myanmar against the country's Rohingya Muslim minority.

The panel's first speaker was Mr. **Kyle Matthews**, Executive Director of the Montreal Institute for Genocide and Human Rights Studies at Concordia University. Mr. Matthews is closely connected with the Canadian All-Party Parliamentary Group for the Prevention of Genocide and has worked for the United Nations High Commissioner for Refugees in various locations around the world. Mr. Matthews explained to the audience that, for the past several years, events surrounding the Rohingya crisis had been the focus of his work. The title of Mr. Matthews' presentation bespoke the nature of this work: "Digital hate: how social media was used to dehumanize the Rohingya". The Rohingya of Myanmar's northwestern Rakhine

State is a Muslim minority in predominantly Buddhist Myanmar. They are denied citizenship, freedom of movement, and the right to intermarry. They were long branded as illegal immigrants from Bangladesh. They therefore are an easy target for hate propaganda.

In 2017, the already-precarious situation of the Rohingya turned to crisis following an alleged attack by Rohingya militants on a police outpost, leading to the death of several border police. The State responded with a brutal crackdown on the Rohingya, which also found itself targeted by state-sponsored communal violence. According to Mr. Matthews, social media was one of the most potent instruments used by state actors in Myanmar to sow the seeds of hate against the Rohingya.

"All wars have been fought by the latest technology available in any culture" read the heading of Mr. Matthews' next PowerPoint slide. He explained that this statement is no less true of social media than of advances in conventional weapons. According to Mr. Matthews, there has been clear evidence in Myanmar of "direct and public incitement to commit genocide"; one of the acts criminalized under the Genocide Convention. The unique aspect of events in Myanmar is the central role played by social media as a medium for inciting violence. The Rwandan Genocide demonstrated how potent a weapon the radio could prove when skilfully manipulated by state agents to dehumanize a minority. The audience was then asked to consider that, while Radio Rwanda had a mere two million listeners, the community of Facebook users amounts to well over two billion. The social media revolution has thus transformed the platform available to those intent on spreading hate speech. No longer is it necessary to have access to radio broadcasting equipment to address an audience of millions—billions can be reached by anyone with a smartphone and an Internet connection.

Over the course of 2017 and 2018, countless videos were posted to Facebook and, to a lesser extent, other social media platforms, falsely claiming to portray Rohingya committing reprehensible acts against children and other citizens. Viewers were exhorted to fulfill their duty to meet the Rohingya "threat" with violence. Evidence has emerged of Myanmar's military using bots—software applications designed to carry out automated online tasks on a massive scale—to create and spread these and similar social media posts, with the aim of fomenting anti-Rohingya sentiment and stirring up religious and ethnic animosity toward the group. Journalists at Buzzfeed also conducted an analysis of Facebook posts by Myanmar's politicians in 2017 and 2018 and found that a substantial proportion qualified as hate speech according to Facebook's Community Standards policy. Such content is prohibited by the site. However, even after illicit content had been flagged by users, Facebook reacted slowly to take down offending posts.

In a report issued by the UN Fact Finding Mission on Myanmar, Facebook was singled out for having facilitated hate speech and thereby fueled the violence toward the Rohingya. Social media organizations cannot, declared Mr. Matthews, shirk responsibility with the defense that they are not the actual publishers of the problematic content. So why did Facebook not take action? Why were its policies not enforced? Mr. Matthews pointed out that Facebook's errors in Myanmar include having too few staff responsible for the country's huge usership and, initially, having no native speaking personnel. Lax monitoring practices and the absence of the physical offices in Myanmar compounded these issues.

Mr. Matthews closed by summing up the lessons that should be taken away from the use of social media in precipitating the Rohingya crisis. Racist and abusive language on the Internet can translate into real violence, and social media organizations must have adequate policies in place to ensure that such content is removed as quickly as possible. This is an aspect of corporate social responsibility that has been very much neglected, and the consequences have been dire. To prevent problematic posts from appearing in the first place, the online activities of "extremist cheerleaders" must be tracked and their identities exposed, especially where these people occupy official positions.

The next panelist was **Payam Akhavan**, Professor of International Law at McGill University. Professor Akhavan was formerly Legal Advisor to the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia (ICTY) and has also appeared as counsel and advocate before the International Court of Justice, the International Criminal Court, the International Tribunal for the Law of the Sea, and the European Court of Human Rights. Professor Akhavan is a member of the Canadian Partnership for International Justice and revealed that he is currently serving as counsel for Bangladesh in the incipient ICC proceedings on crimes against the Rohingya—proceedings he would be discussing, albeit in a private capacity.

This panel, Professor Akhavan began, is an indication that the international community has once again failed to prevent genocide, which is no naturally occurring disaster, but a man-made calamity requiring intense government organization over a significant period of time. By the time we find ourselves speaking of genocide, as we are now, it is already too late. All there is left to do is promise the survivors that we will pursue accountability for the crimes committed, for years to come if necessary, because justice delayed is still justice delivered.

Professor Akhavan spoke of visiting Kutupalong refugee camp in Bangladesh—currently the largest refugee camp in the world—home to some 700,000 primarily Rohingya refugees that have fled persecution in neighboring Myanmar. In our academic discussions, far from the scenes of violence, it can be easy to lose sight of what lies behind the abstractions we refer to as "genocide" and "crimes against humanity". Professor Akhavan assured his listeners that the reality is quickly driven home when one meets the maimed and traumatized survivors. These people want their story told and their suffering recognized. More importantly, these people want justice.

As for our options in the pursuit of accountability, Professor Akhavan's view is that the ICC is really all there is. While the UN Fact Finding Mission has shown itself to be a useful tool, ultimately, individual criminal responsibility can only be established through the ICC. The real question, therefore, is how to bring a case concerning the crimes against the Rohingya within the jurisdiction of the ICC. Myanmar is not party to the Rome Statute. Moreover, owing to the virtual certainty of at least one adverse vote in the UN Security Council, a referral from that body must be ruled out. Recognizing that these circumstances limit the options for getting the case before the ICC, international lawyers have been busy over the past two years developing a creative solution. The feasibility of the approach ultimately arrived at became the subject of the first ever advisory opinion issued by the ICC. Clarification was requested from Pre-Trial Chamber I on (1) whether deportation, under Article 7(1)(d) of the Rome Statute, constituted an independent basis for a crime against humanity, and (2) whether the Court may exercise jurisdiction

where only one element of the crime of deportation (namely, the crossing of a border) takes place on the territory of a State Party. The State Party in question was, of course, Bangladesh, which has received nearly one million Rohingya refugees fleeing persecution in Myanmar. On 6 September 2018, the Chamber answered both questions in the affirmative, thereby finding that the Court has jurisdiction over the crime against humanity of deportation allegedly committed against the Rohingya. Moreover, the crime of deportation, explained Professor Akhavan, is sufficiently versatile to include in its scope the more reprehensible acts—such as mass sexual violence—used to precipitate the flight of the Rohingya from Myanmar. Professor Akhavan believes anxiety over the prospect of prosecution has already started to creep into the minds of Myanmar's military elite. At this year's Shangri-La Asia Security Summit in Singapore, the representative from Myanmar made a point of denying that the crime against humanity of deportation could have transpired in Myanmar. Such a crime would require the participation of Myanmar's government. The government is right now actively trying to secure the return of the Rohingya return to Myanmar; how can it be said that the government wanted them gone? This blustering, pre-emptive denial betrayed all too clearly, in Professor Akhavan's eyes, the fears of the Tatmadaw. It may take time, but justice will find a way, and perpetrators of atrocities against the Rohingya are right to feel apprehensive.

The implications of the Pre-Trial Chamber's recent advisory opinion potentially stretch far beyond the Rohingya crisis. In Professor Akhavan's experience, a common reaction to the advisory opinion has been to rush to the conclusion that Syrian officials will be next to appear before the ICC on charges of deportation. The situation is not so straightforward, cautioned Professor Akhavan, since making out the crime of deportation requires establishing *intent* to expel people across an international boundary. In the case of the Myanmar, officials' use of social media becomes important in this regard: the inflammatory posts discussed by Mr. Matthews can be used to demonstrate intent to force out the Rohingya. If that fails, then the loudspeakers setup in the border areas, urging the Rohingya to leave, will likely help to establish the point.

From the tragedy that has recently befallen the Rohingya, Professor Akhavan also drew examples of selflessness. He praised as heroes the Bangladeshi border guards who, long before UN agencies and NGO's appeared on the scene, assisted the flight of the Rohingya to Bangladesh and helped provide for them once there. Poor, rural Bangladeshi farmers were also quick to lend assistance. Professor Akhavan observed that this outpouring of goodwill toward a persecuted people by citizens of the world's most densely populated country presents a remarkable contrast with the xenophobic border policies we are now seeing in some Western countries.

Valerie Oosterveld was last to speak. A professor and former Associate Dean at the University of Western's Faculty of Law, Professor Oosterveld specializes in gender issues in International Criminal Law. Professor Oosterveld is also a member of the Canadian Partnership for International Justice and in 2010 formed part of Canada's delegation to the Review Conference of the Rome Statute of the ICC in Kampala, Uganda, which is just one of many ICC-related conferences she has attended on behalf of Canada.

In Myanmar, Professor Oosterveld began, the UN Fact Finding Mission found that Rohingya women between the ages of eighteen and thirty-five had been specifically targeted for sexual violence. She gave

some harrowing examples cited by the UN: sexual assaults carried out with knives and sticks; branding; genital mutilation; public gang rapes; and sexual slavery. While the peak of sexual violence against the Rohingya was reached in August 2017, such violence had been normalized in the years leading up to the crisis.

Discussing the steps being taken toward accountability for victims of sexual and gender-based violence, Professor Oosterveld referred to the independent mechanism established by the UN Human Rights Council in September 2018 tasked with collecting, preserving, and analyzing information on crimes committed against the Rohingya since 2011. The activities of this body will help expedite criminal prosecutions before any national, regional, international, or internalized tribunal that currently, or may in future, have jurisdiction over the crimes committed in Myanmar. The mechanism will also work closely with the UN Fact Finding Mission, turning the information collected by that body into usable evidence. If prosecutions are ever successfully brought over the atrocities in Myanmar, they will only have been made possible by the speed with which these entities have commenced their information and evidence-gathering operations.

Next, Professor Oosterveld considered how evidence of sexual violence could be brought before the ICC specifically. There had been an initial assumption that, as Professor Akhavan explained, this evidence could be submitted as context for the crime of deportation—as evidence of one of the "push factors" driving the Rohingya from Myanmar. Interestingly, the advisory opinion rendered by the ICC not only confirmed this possibility, it also suggested another avenue by which such evidence could be introduced, namely, through the crime of persecution. Persecution, according to the advisory opinion, is another of the underlying offenses for crimes against humanity that can originate in one jurisdiction and culminate in another. Moreover, the Rome Statute is the first international convention to establish gender persecution as a basis for grounding a crime against humanity. Evidence collected on the widespread commission of sexual violence against Rohingya women could therefore be used to ground a charge of gender persecution as a crime against humanity before the ICC.

Professor Oosterveld wished to conclude by sketching her conception of the ideal model for a tribunal for trying the crimes against the Rohingya. This body would begin as something along the lines of the evidence-gathering mechanisms for Myanmar and Syria. However, the body would have sufficient resources and capacity such that, when the opportunity arose, it would be capable of staffing and conducting full trials of individuals based on the evidence gathered. Furthermore, starting at square one with the drafting of the tribunal's constitutive instrument, the ideal tribunal would be designed to be acutely gender-sensitive. Professor Oosterveld held up the Special Court for Sierra Leone (SCSL) as an example worthy of imitation. From the beginning of its activities, the SCSL secured the assistance of sex and gender-based violence experts with a deep cultural understanding of Sierra Leone. A female-led community outreach team, also intimately acquainted with the local language and customs, helped the SCSL to connect with victims and secure the strongest possible bases of evidence. The ideal tribunal would also, again like the SCSL, integrate nationals into all levels the court and in all roles. In fact, concluded Professor Oosterveld, there is much from the example of the SCSL that the current mechanism for Myanmar could learn to great advantage.

Before the commencement of question period, **Fannie Lafontaine**, chair of the panel, Professor of Law at Université Laval and Project Director of the Canadian Partnership for International Justice, commented that the Rohingya crisis was an example of both the failures and successes of international law. There was a collective failure by the international community to apply the lessons of the past to prevent or even significantly reduce the scale of atrocities committed against the Rohingya. However, the victimization of the Rohingya by the government Myanmar sparked widespread condemnation from the international community—which, for the first time, gave due recognition to the sexual aspect of violence committed during a crisis of this sort. This, along with the early steps taken to gather evidence in anticipation of future prosecutions, are promising signs that, for the international community of nations, international criminal justice has not diminished in importance.

The first question fielded from the audience inquired whether the cause of the Rohingya might be better served if the atrocities committed against them were prosecuted as "genocide" rather than "crimes against humanity". Professor Akhavan responded by pointing out that, even if genocide could be made out on the facts of the case, it would not have taken place in Bangladesh, and the ICC would not therefore have jurisdiction to hear the case. He then questioned the desirability of the perceived sharpness in distinction between genocide and crimes against humanity. It seems to have become a common belief that genocide is the bar that must be met before a people's suffering is important enough to warrant the notice of, much less action from, the international community. This is a dangerous view.

The next question asked whether consideration has been given to prosecuting Facebook in Canada for its role in the incitement of violence against the Rohingya. The regrettable reality, replied Professor Akhavan, is that the War Crimes Section of the Department of Justice is not as well-resourced as might be desired; budgetary restrictions are a main reason why the section has managed to bring just two criminal prosecutions over the course of its eighteen-year existence. Thus, even if a sound basis could be found for a Canadian court's jurisdiction to hear a case against Facebook, prosecuting international crimes is not high on the federal government's agenda, which all but extinguishes the chances of such a case coming to fruition.

Another question asked whether there is any centralized organization coordinating the efforts of the many lawyers and private individuals that have travelled to Myanmar to help gather information and evidence on the crimes recently committed there. Professor Oosterveld responded in the negative and acknowledged that the absence of such a centralized body is problematic. In the past, lack of coordination has led to repeated interviews of the same witnesses. Inevitably, such witnesses eventually contradict themselves in the details of their accounts. This comes back to plague prosecution cases, as defense counsel are quick to attack the credibility of witnesses who have given prior inconsistent statements. This is a particularly significant issue concerning victims of sexual violence, because the effects of trauma may cause victims to recall events differently depending on whether they are interviewed immediately after the incident, following treatment, or years after the fact. Professor Oosterveld expressed her hope that the mechanism for Myanmar would assume the role of a centralized coordinating body to ensure that, as information is gathered, it is catalogued as to where, when, from whom, and by whom it was taken, which will facilitate the task of prosecution and prevent witness fatigue.

The final question was whether national courts should not be the fora for prosecutions of the crimes against the Rohingya, with the ICC playing a supporting role. Professor Akhavan pointed out that there is no realistic prospect of domestic prosecutions in countries, like Myanmar where atrocities have been carried out, due to government complicity in the violence. As for the rest of the international community, the unfortunate reality is that states are generally reluctant to expend the substantial level of resources necessary to prosecute crimes of universal jurisdiction. The ICC, concluded Professor Akhavan, is really the only show in town.

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