Sexual and Gender-Based Violence in The Gambia v. Myanmar

Melanie O'Brien

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One of the key parts of the International Court of Justice (ICJ) decision finding Myanmar has committed genocide against the Rohingya was the inclusion of sexual and gender-based violence (SGBV) in the Court's reasoning.

The ICJ's *Gambia v Myanmar* decision represents a much more comprehensive understanding of what genocide encompasses than in some (or even much) of the past jurisprudence, including its own. In the cases brought against Serbia in the ICJ, the Court only found that what occurred in Srebrenica constituted genocide, in keeping with the findings of the International Criminal Tribunal for the former Yugoslavia. *Gambia v Myanmar* goes beyond the focus on genocide as killing, engaging substantially with other genocidal crimes – including SGBV.

The judgment addressed two types of sexual and gender-based violence, particularly against women, that were part of this case: rape (and sexual violence), and imposition of measures intended to prevent births. These crimes were comprehensively recognised by the ICJ as an integral part of the genocide against the Rohingya, as specific crimes and as evidence of genocidal intent.

A Dearth of Attention to Sexual and Gender-Based Violence in Genocide Before International Courts

There has generally been insufficient attention paid by international courts and tribunals to sexual and gender-based violence against women in the context of international crimes, but particularly so for the crime of genocide. Over the years, there have been advances, but gaps remain, despite feminist scholars and practitioners framing sexual and gender-based violence as part of the genocide process, including the Rohingya genocide.

It was only at the push of feminist advocates and then-judge Navi Pillay (incidentally, an ad hoc judge on the bench for *Gambia v Myanmar*) that rape featured as part of the *Akayesu* case in the International Criminal Tribunal for Rwanda (ICTR).

However, few other ICTR cases resulted in convictions for sexual violence, and that Tribunal's subsequent treatment of sexual violence has been criticised. In the ICTY, there was no finding of genocide other than the gendered killing of boys and men at Srebrenica, despite the extensive and systematic sexual and gender-based violence against Bosnian girls and women, including rape camps. Such violence was recognised in convictions for war crimes and crimes against humanity. Thus, while the case law contributed to the development of the definition of rape and other forms of sexual violence, there was no engagement with the idea of sexual violence as genocide even though such sexual violence has had long-term impacts on Bosnian women.

Rape and Sexual Violence

Rape, including gang rape, was a ubiquitous part of the violence against the Rohingya, directed predominantly against girls and women. The Court would have been remiss if rape had not formed a significant part of its ruling, and the Court blatantly found "extensive acts of rape and other forms of violence" were committed by Myanmar's security forces, with rape and gang rape "a notable and recurrent feature of the violence" (para. 254).

At no point was the definition of rape discussed; the Court simply took its reference to rape as a given, which demonstrates the acceptance of this crime in the context of international crimes. The Court also determined that the exact number of victims is diffi-

cult to establish due to stigma, but noted *at least* 1,834 victims were listed in one report (paras. 258, 335). However, the Court held that "it need not set out the precise extent of the injuries suffered or make a conclusive finding on the number of victims" to find that serious physical or mental harm occurred. This is an appropriate finding, given that it is impossible to have an exact number of victims of sexual violence, and it is generally assumed that the number of victims is always higher than any figure that may be produced.

Rapes were committed with particular brutality, usually in public, often gang rapes, in front of family members, and frequently including mutilation. The "extreme physical brutality" of the rapes was acknowledged, as was the rape of pregnant women, and the fact that such violence was also committed with mutilation of the victims (including breasts and genitalia) (paras. 255-6). There are also reports of sexual violence against boys and men (mentioned in paras. 254, 260, 369).

The Court also included sexual violence as a component of its discussion on attacks on children. Here, the judges specifically positioned children as victims of sexual violence. The judgment draws attention to several individual cases, with girls as young as 9 raped (para. 260).

The decision considered rape within the context of Article II(b) causing serious bodily or mental harm, acts under which must be intentional. The Court drew from several intervening states' submissions that "the harm resulting from sexual and gender-based violence is 'almost universally' » serious « by its nature" (para. 324). It confirmed its previous finding in the Serbia cases that rape and SGBV can constitute the *actus reus* of genocide under Article II(b). It confirmed that the widespread rape and sexual violence committed by Myanmar's security forces "resulted in serious physical harm" (para. 329).

The Court also took into account the trauma caused by the "brutal sexual violence", which has resulted in long-term physical, as well as psychological, social and community effects (para. 257). It categorised the rape and sexual violence as contributing "to lasting mental harm to survivors, as well as to those who witnessed the acts" (para. 331). The Court found these acts intentional and committed with knowledge that they would cause serious mental harm (para. 334), and was "fully convinced" that the violence of 2017 "caused serious bodily and mental harm to a very significant number of" Rohingya.

The SGBV was deemed to be genocidal, because "sexual violence not only physically and mentally harms the victims, it can also be a step in the process of degrading and destroying a human group by causing the 'destruction of the spirit, of the will to live, and of life itself'" (para. 417, citing *Akayesu* para. 732). In taking into account the physical and mental harm of the sexual violence, the widespread nature of the rapes, and the extreme brutality of the rapes, the Court held that "Myanmar's security forces committed sexual violence against members of the Rohingya population in a way that degraded the victims and their communities to an extreme degree" (para. 420). The sexual violence was framed as an act that violates "the foundations of the Rohingya group" (para. 416).

Imposition of Measures Intended to Prevent Births

The majority judgment deemed measures intended to prevent births (Article II(d)) (which can also be termed reproductive violence) to encompass "measures intended to bring about the failure of the group 'to live and reproduce normally'" (para. 360, citing the ICTY). Importantly, the judgment confirmed that such measures do not have to be successful, just *intended* to prevent births (para. 362). This is a welcome departure from the Court's ruling in *Croatia v Serbia*, an erroneous application of the provision, which is clearly worded "measures *intended* to prevent births", not "measures that prevent births". In *Croatia v Serbia* (para. 166, emphasis added), the Court stated that rape could only be considered to fall under Article II(d) if "the circumstances of the commission of [acts of sexual violence], and their consequences, are such that the capacity of members of the group to procreate *is* affected".

In the current case, the Court held that both the physical and psychological impact of birth prevention measures are relevant, including the social and

cultural context, for example where victims of sexual violence are stigmatised (para. 361). In applying this broad view, the Court considered two main types of conduct committed by Myanmar's security forces and the government to be measures intended to prevent births.

Unsurprisingly, rape was a key part of this crime. The Court held that "the magnitude and character of the acts of sexual violence... support the conclusion that the acts were intended to physically and mentally impair the willingness and ability of the population to procreate" (para. 366). The Court again drew attention to the brutality of the rapes, including gang rapes, mass rapes, rape of pregnant women, extreme violence against girls and young women, rape of girls, and the additional physical violence accompanying the rapes, such as mutilation. The long-term physical and mental consequences of the rapes was noted, including "physical harm to reproductive functioning", as well as trauma, social ostracisation and cultural stigma (paras. 367-8).

Beyond that, the Court also included a range of discriminatory measures that Myanmar had imposed on the Rohingya over the decades, including through legislative means, as measures intended to prevent births (paras. 363-5, 401). These measures were restrictions on Muslim marriages, restrictions on birth (expressly stated to be a measure against the Rohingya and only imposed against the Rohingya), and "denial of birth registration and issuance of birth certificates for Rohingya children" (para. 365). Such measures were considered part of a broader context of culpable acts that were "systematically directed against the Rohingya" (para. 399).

These two categories of acts were found to "establish an intent to impact the capacity of members of the Rohingya community to reproduce normally and thus an intent to prevent births within the group", convincing the Court of the commission of the *actus reus* of Article II(d) (paras. 370-1).

A Strong Judgment

The prominence of SGBV in *The Gambia v. Myanmar* decision cannot be overstated. That forms of SGBV were positioned in the ruling as such a key part of the genocide process against the Rohingya not only demonstrates that the Court has developed a more sophisticated understanding of genocide and genocidal intent, but also that it is recognising the gendered nature of the crime overall.

In one sense, the Court is simply applying the law, because it is clear and well acknowledged that rape causes serious bodily and mental harm. However, the Court's recognition of a system of human rights restrictions that had long-lasting social and cultural impact on the Rohingya people's ability to procreate as the crime of measures intended to prevent births, adds something new to the jurisprudence.

This judgment captures the reality of what happened to the Rohingya, and more broadly, what the genocide process actually entails. It is reflective of what genocide scholars have long been writing about: that genocide is more than killing, it is gendered, and long-term discriminatory and persecutory policies that do not necessarily involve physical violence are an integral part of the process.

ABOUT THE AUTHOR

Melanie O'Brien

Melanie O’Brien is Professor of International Law at the University of Western Australia Law School, former President of the International Association of Genocide Scholars, and non-resident visiting scholar at the University of Minnesota Human Rights Law Center.Melanie O’Brien is Professor of International Law at the University of Western Australia Law School, former President of the International Association of Genocide Scholars, and non-resident visiting scholar at the University of Minnesota Human Rights Law Center.

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