

The Rape of the Rohingya

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When Rohingya refugees first enter Bangladesh, they are greeted with questions. What happened? Who were they with? Where? Their stories ring with horror: villages were burnt, men and children were killed, women raped. Their testimonies become the basis for investigation.

When Myanmar categorically denied the army's involvement in murder and arson, authorities had evidence to prove otherwise. From Teknaf, one could see the smoke rising from Rakhine, cell phone videos showed killing fields overflowing with bodies. Testimonies helped narrow down the time, the place, the extent of the atrocity—they told us who the bayonets belonged to and what uniform the perpetrators wore.

As the first UN reports on the Rohingya crisis were written, it became apparent that the crime that would be hardest to prosecute was rape. When the UN alleged rape had been used as a weapon of war as early as 2017, Myanmar hit back, describing it as 'wild claims' unsubstantiated by evidence. They pointed to their own internal investigations which had found no military involvement; they cited the fact that UN overseers had not been allowed full access to Rakhine—if they weren't there, how did they know? They knew because organisations in the camps were scrambling to provide post-rape care, and practitioners were documenting stories of survivors. When asked about the situation on the ground in 2017, Aerlyn Pfeil, who had worked with victims of rape in South Sudan and Somalia, replied: "I have never heard so many stories of so many women being publicly raped then killed."

Rape was first classified as a crime against humanity in the aftermath of the Rwandan genocide, when witness testimonies coupled with fact-finding missions uncovered the extent of its use. Those cases formed the bedrock for all cases moving forward, but it also wrought new trauma for the women involved. At least 10 were killed before they could testify and those who did had to relive harrowing pasts. One of the key witnesses, Cecile, described it as a feeling she couldn't quite explain: "It's like everything was damaged in the brain. Your mind is tied up, and your voice is stuck inside." And yet, they were the lucky few who got justice. At the *ad-hoc* tribunal for the former Yugoslavia, 78 defendants faced sexual violence charges; only 32 were convicted. Since opening in 2002, the International Criminal Court (ICC), a permanent war crimes body with near-global jurisdiction, has tried twenty five cases that include sexual violence charges; it has won three.

While jurisprudence routinely infers order to prosecute commanders for non-gendered war crimes, studies highlight its reluctance in inferring executive command for rape. In 2018, for example, the Appeals Chamber of the ICC reversed the Trial Chamber's conviction of Jean-Pierre Bemba for crimes largely pertaining to

rape and sexual assault because it could not prove beyond reasonable doubt that "Bemba had failed to take all necessary and reasonable measures" required to avoid liability. In particular, the Appeals Chamber critiqued the Trial Chamber's reliance on evidence it determined to be "weak, often consisting of media reports including anonymous hearsay." In actuality, testimonies of witnesses had been corroborated by media articles, NGO reports, and oral recordings of statements. While the Trial Chamber had heard testimonies firsthand, the Appeals Chamber had not. Susana Sa' Couto, Director of the War Crimes Research Office at American University, sees this trend as troubling: "As a matter of law, inferences are made in all instances. However, the Bemba

quagmires. Justice for victims relies fundamentally on narrative histories: all survivors have their stories, and stories change.

In 1977, psychologists coined the term 'flashbulb memory' to describe those events that get seared onto our subconscious: instances so emotionally jolting we remember each detail surrounding it. While traditional memories decayed over time, the consensus was that flashbulb memories were immune to deterioration.

In 2001, Hirst and Phelps put that theory to the test. A day after the Twin Tower attacks, they asked three thousand participants circumstantial questions about the day before: where they were, who they were with, who had told them. They asked the same questions to the same group 11

deteriorated as survivors battled trauma, tragedy, and time. As testimonies were vetted for reliability, misconceptions around memory articulated through each step of the legal process increased the probability of a miscarriage of justice.

When Rohingya victims come forward with testimonies, if that time ever comes, inconsistencies will appear. The names of perpetrators might change as will the names of villages, the age of victims, the date of the crime. That doesn't mean rape didn't occur—it simply means that the 'mind is tied up, and the voice is stuck inside.' One of the seminal psychology studies of our times attests to that.

As our world enters a new era of violence, the ICC must ask itself where the truth lies, and how it can get to it by causing the least trauma. It is the job of



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case suggests that the court might be uncomfortable in inferring command responsibility in cases with an element of liability as it pertains to sexual violence charges."

Little surprise then, that the Myanmar Army Chief remains defiant. As the ICC prepares to exercise jurisdiction over Myanmar, the Senior General labels allegations against him 'criticism without proof', and he's not alone. When asked to condemn violence against the Rohingya by the BBC, Suu Kyi chose instead to respond with a question of her own: "What are you asking me to condemn?"

Mass rape is the most despicable of crimes, but it is also the one hardest to prove. The process is expensive, time intensive, and wrought with ethical

weeks later, then 25 weeks later, and again 119 weeks after. Their findings proved, for the first time, that confidence characterised flashbulb memories, not consistency. The details varied, participants left parts out or added them in as time went by, but at each point, they unflinchingly believed it had happened.

Of course they did, because it had. The towers had come down, people had died, futures had gone up in flames.

For Americans, 9/11 is a flashbulb memory; for the Rohingya: genocide. Interestingly, the ambit of 'flashbulb memory' provides insight into cases where courts have failed to prosecute crimes of sexual violence: those hearings took place years after the actual event. In those years, memories we thought to be foolproof had

arbitrators to listen, investigate and lend credence where it is due. It is also their job to understand the fundamentals of human memory—the ways in which it decays, the ways in which it remembers.

The stakes could not be higher. Each day, almost 60 new babies are born in the Rohingya refugee camps in Bangladesh. If we don't listen to their mothers, we will never know what unspeakable violence birthed them. We will never be able to forge the political courage to give them the futures they deserve.

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