

THE ICC IN MYANMAR AND BANGLADESH: AN EXCLUSIVE INTERVIEW WITH WAYNE JORDASH QC REGARDING THE ROHINGYA REFUGEES

Wayne Jordash QC is a world-leading expert in International Humanitarian Law (IHL) and International Human Rights Law (IHRL), with unparalleled experience across the globe, regularly advising governments, including the Ukrainian, Bangladeshi, Libyan, Serbian and Vietnamese governments, on their compliance with IHL and IHRL. Wayne has been assigned as the legal representative to 400 Rohingya women, who are victims of crimes committed in Myanmar and Bangladesh. On May 30, 2018, Wayne filed a [submission to the ICC](#), on behalf of the 400 Rohingya women, requesting the Pre-Trial Chamber to provide jurisdictional clarification regarding the ICC's jurisdiction over the crimes of deportation, persecution, apartheid and genocide committed against the Rohingyas.

Harsh Mahaseth, Research Analyst at CSEAS, and Ishita Dutta, Research Intern at CSEAS, spoke with Wayne to understand the role the ICC can play in such a situation for the Rohingya refugees.



Picture Courtesy: Wayne Jordash QC

What role can the International Criminal Court (ICC) play in bringing justice to the Rohingyas' suffering?

Whatever role it plays, it is going to be a very slow one. It is going to, in the end, be much less than the crime deserves. The ICC accepted jurisdiction on a very limited basis. If the crimes take place in another country, but part of the crimes goes over into a country which has not signed the Rome Statute, then those crimes can be prosecuted.

So, Myanmar is not a signatory to the Rome Statute, but Bangladesh is, and so crimes which took place in Bangladesh or a legal element is fulfilled in Bangladesh then those crimes can be prosecuted on the basis of Bangladesh's signing of the Rome Statute; but of course, that means it is very limited. It is automatically limited to those crimes which fall that definition, so what the ICC has done is identify several crimes which include deportation, other inhumane acts which are crimes against humanity and essentially there are other crimes such as genocide. Genocide is also possibly a crime that fits into that definition on the basis that the attack on the Rohingyas was intended to destroy part or all of their group and it began in Myanmar but continued into Bangladesh, and the idea is just to make it a bit more practical. If, for example, the Myanmar military attacked the Rohingya refugees and intended that they would drive them out of Myanmar in order to destroy them, then they will have committed genocide.

Full investigations in the ICC take a very long time. They will not be completed in less than two years, more likely to be three or four or even five or six. So, you know, that is ordinarily the timeframe, but in the case of the Rohingyas, the situation is more difficult because the investigators - the prosecution - do not have access to Myanmar. Now, that is not necessarily fatal to the investigation, but it does make it very difficult. There are one million Rohingyas sitting in Bangladesh, so there is a real opportunity to obtain witness statements. However, to really access the command structures, you need access to the military, and access to the political structures. What international cases depend upon is what we call insiders. Insiders are those who cooperate with the prosecution from inside the military organizations, inside the political organizations, and they are the ones who can connect the crimes on the ground with the people at the very top. If you do not have insiders that makes it very difficult. If you do not have access to the territory, it is very difficult to get insiders, so justice through the ICC will be a long and difficult process, not an impossible one.

What is the reception of the victims regarding this entire trial and the role that the ICC can play from their point of view?

Well, I think it is as you would expect it is mixed. They do not all speak with one voice, I would say. There is among some real hope and I think that despite what I just said about the prospects of accountability being narrow, you have to put yourself in their position, which is that for years they have been denied even the basics. I have been doing this work for 20 years and when I read what happened in Myanmar to them from the UN fact finding mission and from speaking to witnesses, it is shocking. It is just generally shocking even for someone like me who is used to studying war crimes and crimes against humanity. The conditions in Myanmar are effectively apartheid - the level of persecution is really extreme; the level of impoverishment is really extreme. I have never worked with vulnerable groups who have been denied such basic things for so long and so when they hear about the ICC, I think that the level of understanding is low but for the first time some court is taking notice of their condition and so I think the ICC has become, to some, a symbol of possibility. The possibility that they may get some recognition, acknowledgement of the terrible suffering and maybe that it could help them to go home, which is a lot; which is what a lot of them want to do despite the treatment they received from the Myanmar authorities and despite the disregard of their condition by Aung San Suu Kyi and the civilian government (now a suspended civilian government). They want to go home as most people do when forcibly displaced from their homes. So, it is hopeful with a symbolic hope as much as anything, I would say. I think others focused on the immediate, and the Bangladesh authorities have done quite a lot. The Bangladesh authorities have done quite a lot for the Rohingyas but it is deeply depressing to go to the Cox's Bazar in Bangladesh and see how they are forced to live in refugee camps with no real provisions for education, no provisions for leisure, no provisions for creating a life for oneself. They are in limbo and there is no obvious way out of that. ICC is one thing that they have to focus on and the others are perhaps even more pressing which is just how to try to live a life which is more than just sitting and waiting.

What are the next steps for the ICC regarding the case?

The preliminary examination was quite short compared to the usual because the Pre-Trial Chamber was keen to move forward with it and there has been a lot of fact-finding due to the UN fact-finding mission which had done a very good job and published several reports which really detailed the crimes that had been committed. In late middle of last year (2020), the Pre-Trial Chamber ordered a full investigation and the ICC invested very less in terms of prosecution as they have very few resources. They said they would investigate in the country but you have gotten a million people sitting in Bangladesh and you are sending only between 2 to 5 investigators. It will take a very long time to investigate a sufficient number of people to build a case. So, that is where we are. The investigation is taking place, and there are almost certainly no more than about three or four investigators from the prosecution on that investigation. I think we will be waiting a long time before the investigation is complete. I would be surprised if it was done quicker than three years. I would not be surprised if it took four. We will see, who knows, but I think it is in an incredibly difficult investigation to conduct and then after that what happens during the investigation is that they will identify named suspects and at the end of that when the prosecutor believes that they have got enough evidence or information then they will apply for an arrest warrant. The next problem is then the perennial continuous problem of international criminal law - how do you get a hold of the suspects? If the ICC issues an arrest warrant, I cannot imagine that the Myanmar military are going to surrender themselves to the Hague. So, you have a real problem there of enforcement and what is likely to happen is unless there is a change of government, which does not look very likely, you are likely to have arrest warrants issued and then nothing will be done to enforce those arrest warrants and so in those circumstances you cannot have a trial.

What is the significance of Aung San Suu Kyi defending Myanmar's military in court?

The stimulation to the ICC is not significant at all because of being a different court but this is sort of a political question. In the ICJ what they are looking at is whether Myanmar, the state, has responsibility for genocide and legally there is no significance of her defending that position. It does not change the legal calculation, so it was a political move to shore up support internally. There is a low-level civil war happening in Myanmar - there are many ethnic groups who are at war with the central government; the Rohingyas to degree are part of that conflict. The Rohingyas are incredibly marginalized but not just by the central government. They are discriminated against by many of the ethnic groups in Myanmar and so because there is no political capital to be gained by supporting the Rohingyas, and that is why Aung San Suu Kyi came to the Hague. She wanted to show the population that she was going to stand up to the West; that she supported the Myanmar military and that she did not support the Rohingyas and so the significance of her attending the Hague was more of a symbolic gesture for her own internal politics than it was for any legal issue. The Myanmar military had just engaged in a coup, they have now taken control of the country which to be honest they already had. It looks like everything in Aung San Suu Kyi's calculation that she would somehow persuade the Myanmar military to give up the constitution which gives the military power and its power over the democratically elected government of Aung San Suu Kyi did not work out. So not only it is highly unlikely to be accepted by the court but it did not also do the trick which she wanted, which was to shore up her position at home but instead embarrassing her for no real legal significance.

Can the ICC's order be enforced?

For the ICC to be effective, what you really need is a democratic government in Myanmar that genuinely cares about its citizens' human rights and then they will cooperate. All the more importantly, they will carry out domestic trials themselves. Something to remember is that the ICC, even if it is working well and states are cooperating and the ICC orders are complied with, at the end of the day, you are just talking about a handful of accused being tried at the top. If you think about the scale of the crimes committed against the Rohingyas, what you really need to talk about are the hundreds, if not thousands, of perpetrators from the Myanmar military, and the political classes. So, trying the top military would be and is certainly something to be applauded but it does not even start to scratch the surface in relation to who did what and who committed those terrible crimes. Realistically, it is not going to happen for a very long time, certainly not in the next few years by the looks of the internal politics. Another possibility is that it could happen because of the states outside decide to investigate and prosecute those cases using universal jurisdiction principles. States have an obligation to investigate and prosecute war crimes, crimes against humanity, and genocide. So many countries in Western Europe and also in Asia have universal jurisdiction principles in their criminal codes. The problem with it is that you still end up with the same problem which is most of those principles require the victims on the premises on the territory or the suspects on the territory because otherwise you have a trial in absentia which most countries do not want to be involved with too deeply. So, it is a possibility to have trials in absentia but the possibility is very slim.

What has been ASEAN response to the ICC's actions?

They have generally been supportive but rather than proactively supportive there are some mixed views as I understand it within the organization. Sadly, some of them are more interested in keeping Western notions of international justice out of the region, and secondly ensuring that they stay on the right side of China, which always objects to international justice, especially when it concerns countries with significant investments, such as Myanmar. If China was not against Myanmar military's prosecution, we could have had quite a different response internationally. We could also have seen quite a different response among ASEAN.

Why is there a low reception of the ICC in Southeast Asia? Is there a certain ambivalence of these countries toward the ICC or international criminal justice?

If you look at the Rome Statute, it is very Western Euro-centric. It combines Common Law and Civil Law but there is nothing about other legal systems. There are some obvious ways in which the statute could have been designed to more fairly reflect legal traditions from elsewhere and you know the fact that it does not and then you combine that with the power of the UN Security Council to refer cases and then you combine that with that none of the powerful countries ever find themselves in the firing line and you have an institution which looks very much like it is a tool of the West and a tool of powerful countries to impose upon others. I think the ICC has got a lot of work to do to interpret. If I was in control, I would advise the ICC to reform the Rome Statute considerably and make it more inclusive. It is not just about the message it would send to those who feel excluded but I think the quality of justice delivered would be high as there would be traditions from Africa to Asia. It is supposed to complement diverse global jurisdictions and at the moment it does not.