‘The People v. Myanmar’: Of ‘Compassion’ in International Justice

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1. Introduction

From the international to the domestic, the various mechanisms for accountability over the situation in Rakhine in Myanmar might seem like a textbook example of the popular idea of justice ‘cascading’. Activists leading the international justice effort against Myanmar might feel that they are making the idea a reality. Payam Akhavan, co-counsel for The Gambia before the International Court of Justice (‘ICJ’), has remarked:

Throughout the ages, small groups of people who have been deeply touched by suffering and oppression, who have joined forces with a unified and indomitable purpose, have defied overwhelming odds and triumphed in the pursuit of truth and justice. Why should the cause of international justice be any different?

Indeed, the apparent “accountability turn” may offer hopes that, more than 70 years after the Holocaust, the “anti-imputability mindset” may slowly be sinking in. International law does appear to gently civilize humankind, particularly our “compassion” – our unique ability to ‘suffer with’ others. It seems to herald, if not confirm, Judge Cançado Trindade’s “new jus gentium”.

In that spirit, this policy brief looks at some structural obstacles to international justice in the way of a ‘new jus gentium’, using the Myanmar case before the ICJ as a reference point. Looking at the parties and the subject matter, I argue that the international justice system in fact manifests a ‘compassion gap’, which can and must be closed by a ‘compassionate mindset’.

2. The Applicant

The 1948 Genocide Convention, the ICJ famously held, “was manifestly adopted for a purely humanitarian and civilizing purpose”. Other than their accomplishment, “the contracting States do not have any interests of their own”. But that was 70 years ago. Unlike the International Criminal Court (‘ICC’), where the victims now have some standing, those before the ICJ can only take the spectator’s stand or, at most, the witness box. Practically, how much of a say do victims get in the case theory and strategy? Some norm entrepreneurs may want to push the envelope of the crime of genocide away from its Holocaust heritage, with its clear emphasis on physical-biological destruction of the group as such, to cover persecutory or discriminatory acts more broadly. Tellingly, however, Wai Wai Nu, an activist who was at the provisional measures hearing, wrote:

For me, it does not even matter whether these crimes are found to meet the legal definition of genocide. What matters is that we see justice and accountabil-ity for what has happened, and that’s why last week meant so much for the Rohingya. So many Rohingya had waited so long to have the truth heard.

‘Justice’, ‘accountability’ and ‘truth’ are no doubt goals of international justice; but, leaving aside their different meanings, empirical research has revealed how the priorities among parties often differ significantly, even within victim communities. If the ICJ decides to stand firm on specific genocidal intent as it is de lege lata — which remains the distinguishing feature of the crime — what can be offered to the victims at the end of the road, when the acrimony in the litigation has corroded the goodwill and political energies?

In domestic strategic litigations, creative transactions and quasi-legislation beyond the four corners of the law often happen out of court. Here, then, to what extent can victims decide to ‘settle’ — when refugees in Cox’s Bazaar are even threatened against repatriating to Rakhine, as going back is seen by some actors to “indicate an acceptance of Myanmar’s measures”?

Besides the case before the International Court of Justice, there are at the time of writing investigations by the International Criminal Court (‘ICC’) and a universal-jurisdiction case in Argentina. All mainly rely on the outputs of various United Nations (‘UN’) human rights apparatuses like special rapporteurs, the fact-finding mission, and the relatively nascent investigative mechanism on Myanmar. This reliance raises problems as discussed by Dow Jacobs, “Limitations of Using Fact-Finding Reports in Criminal Proceedings: The Case of Myanmar”, Policy Brief Series No. 118 (2020), TOAEP Academic EPublisher (TOAEP), Brussels, 2020 (http://www.toaep.org/pbs-pdf/118-jacobs/).


I. Chan, “From Empathy to Equity: Reflections on Integrity and Institution-Building”, in CILRAP Film, 1 December 2018 (https://www.cilrap.org/cilrap-film/181201-akhavan/).


6. Ibid.


9. See, for example, Phuong Pham et al., When the War Ends: Peace, Justice, and Social Reconstruction in Northern Uganda, Berkeley, Tuleane Initiative on Vulnerable Populations and International Center for Transitional Justice, 2007, p. 22.

Notwithstanding the lofty Reservations Advisory Opinion, when rights as important as those protected by jus cogens norms must be espoused by States under erga omnes (partes) obligations, victims are left at the mercy and whims of political actors. After all, The Gambia, whose Attorney-General recently stepped down to take up a position in international criminal justice in The Hague, was one of the ICC’s original parties.13

While there may not be any manifestation where the interests converged, the latent structural issue remains. Those from northern Rakhine have more success in airing their grievances than many other groups in Myanmar and abroad, in part because they could also lobby for the support of the very international organization which, in the same session in 2019, “commends the efforts of the People’s Republic of China in providing care to its Muslim citizens.”14

Thus, while powerful actors — whether colonial powers in the past or foreign corporations and investors nowadays — take for granted their own ‘extraterritorial jurisdiction’, victims are forced to cling to their victimhood as a proxy of standing, by resorting to, and thus further entrenching, their victimization. This plainly goes against ‘compassion’: suffering with is more than standing for. Akhavan’s reflection is a reminder.

There is a certain glamour to that metaphor we know as ‘The Hague, conjuring as it does the imagery of sophisticated bureaucrats and diplomats, brilliant jurists and experts, distinguished academics and activists. After all, it is reassuring to belong to an exclusive club of cosmopolitan savours. Perhaps this is exactly where the corruption begins, in a self-contained war crimes industry, exploiting the suffering of others for status and prestige. It is easy to express noble sentiments, when looking down at the arena of anguish from 30,000 feet. It is the utmost feeling of euphoria, to be on top of the world, without being a part of it.15

3. The Respondent

Just as the international justice system fails to represent the victims’ interests but simplistically entrusts them into the hands of ‘good Samaritans’, it also tends to see the other side only as ‘perpetrator’, as such.

As human rights apparatuses under UN auspices have increasingly “juridified” amid the “accountability turn”, they began publicizing names of alleged defendants, as was done here.16 In addition to factual findings, they also make legal determinations (such as genocidal intent) on apparently legal standards, even when the fact-finders are neither qualified as, nor meant to be, lawyers.17 Despite substantial doubts18 and Myanmar’s context,19 Judge Cançado Trindade’s Separate Opinion is essentially a summary of those reports, taken at face value.20 Perhaps he felt obliged to speak for the ‘vulnerable’ and ‘defenceless’.21

The Muslims of northern Rakhine have doubtlessly suffered from repeated waves of conflict and outflow since 1942.22 At the same time, it would be a stretch to portray Myanmar as the Goliath against whom fights David (unlike Afghanistan or Iraq). Many tend to forget that Myanmar is one of the world’s poorest countries. While British colonizers only hardened, if not strengthened, military regime, which still shares power and constitutional reform appears unlikely.23 Despite the neat attribution for State responsibility in law, it is not reducible to some monolithic Leviathan.

If one must be reductionist, it would be ‘The People v. Myanmar’, a trial where the allegation of atrocity suspends, if not extinguishes, the accused’s membership and rights in his or her community. Apart from the personal attacks against Myanmar’s counsel for ‘defending alleged genocidaires’, the utter absence of Myanmar’s factual narrative (as exemplified by Judge Cançado Trindade’s Separate Opinion) makes the slogan of “pro persona humana, pro victimas” sound rather narrow, if not hollow.24

Of course, a State is not entitled to human rights (unlike corporations); the ICJ is no criminal court; and there is no comparable international legal ‘system’. Still, if our common goal is towards an international rule of law, then ‘omnes’ will necessarily include every ‘hostis humani generis’, let’s alone an alleged one.

Indeed, it is none other than humankind whom ‘compassion’ asks that we ‘suffer with’. The victims, the victimizers, ourselves: everyone suffers, especially in an internal armed conflict such as that in Rakhine, albeit differently. Like justice, then, selective compassion is not compassion proper. ‘Compassionate’ international justice, in that reading, does not mean turning a blind eye; but it does mean accepting our flawed humanity as we resolutely denounce proven atrocities and punish their perpetrators, rather than merely casting stones at others’ wrongdoing.

For one, this is informed by humility and honesty about the human condition — that we may not be that far away from wrongdoing as we would like to think.25 At least, that may give us pause before casting the first stone, especially for a generation which tends to air our grievances in 140/280 characters and retweet without reading.26 Just as international law learnt to see other humans not as lesser beings, we must continue to expand the object of our compassion: beyond ‘victims’ and indeed individuals.

4. ‘Compassion’ and ‘Empathy’

Ironically, the deficit in ‘compassion’ which we witness is caused in part by a surplus of ‘empathy’. It may be that international justice needs to be more ‘emotional’ and ‘empathetic’, as Akhavan has argued:

‘Emotional connection is not superficial psychobabble […] It is in fact essential to reconciling abstract beliefs with concrete actions […] In feeling the pain of others, in embracing the oneness of humankind, we move from perfunctory incantation to profound inspiration; we move from our unusual talent for hypocrisy, to that authentic condition we call “empathy”’.27 However, ‘empathy’ (at least ‘affective empathy’) has recently been critiqued by some psychologists.28 In fact, Arendt has openly criticized “the most powerful and perhaps the most devastating passion motivating revoluntariness, the passion of compassion.”29 Like many other seemingly acrimonious debates, though, the difference may be one of definition rather than substance: whereas compassion seems often mistaken with passion (much like empathy is mistaken for sympathy), it

14 Resolution No.146-MM on Safeguarding the Rights of Muslim Communities and Minorities in Non-EC Member States, operative para. 20 (bold in the original, italics supplied).
15 Above note 4.
17 See Dov Jacobs, “Limitations of Using Fact-Finding Reports in Criminal Proceedings: a blind eye; but it does mean accepting our flawed humanity as we resolutely denounce proven atrocities and punish their perpetrators, rather than merely casting stones at others’ wrongdoing.
19 See, for example, SUN Yun, “China, the Arakan Army, and a Myanmar solution”, Frontier, 23 March 2020.
20 Separate Opinion of Judge Cançado Trindade, para. 64, see above note 22 (quoting his Separate Opinion in Ukraine v. Russian Federation).
24 See, for a recent example, Paul Bloom, Against Empathy: The Case for Rational Compassion, Ecco, 2016.
can be almost a ‘cold’ cognitive insight into the human condition and suffering. While we often equate ‘compassion’ to ‘empathy’, ‘suffering with’ is not the same as ‘feeling into’ someone. With due respect, it is not sufficient to be deeply touched by suffering and oppression. Even though without using the word, Dag Hammarskjöld has left us with this ‘waymark’. Openness to life grants a swift insight – like a flash of lightning – into the life situation of others. A must: to force the problem from its emotional sting into a clearly conceived intellectual form – and act accordingly.33

The ‘compassion’ advocated in this policy brief is thus also hinged on reason.34 Emotions such as passion must be tempered by compassion, lest it ‘reflexively’ entrench hatred and bigotry just as it brings about atrocities.

5. The International Crime of Genocide

Indeed, this ‘compassion gap’ can be fatal in an unjustified charge of genocide. While inevitably vertically-enabled by power structures and organization, some atrocities also have a horizontal dimension that taps into the darker side of our social nature – the same social identity that bestows on us a sense of belonging. Often, it manifests and is underlaid by a toxic cocktail of existential fear and hatred between members of groups, inevitably with complex social, political and historical roots.

As the Israel–Palestine example shows, group grievances are delicate and difficult for well-meaning outsiders to undo, particularly through international justice efforts. Recently, Laetitia van den Assum warned of the thinking in some diplomatic circles that, now that the international criminal lawyers have taken over, they can touch other matters.35 Instead, as the Annan Commission recommended in 2013, there is more to be done within Myanmar to ease deep-rooted inter-communal prejudice and distrust.36

Rather than creating conditions favourable to implementing needed changes, one risks further entrenching the binary us versus them paradigm by pinpointing the case of genocide against Myanmar on behalf of ‘the Rohingya’. In a recent keynote, Philippe Sands QC, co-counsel for The Gambia, admitted “the problem with genocide”:

that by focusing on the protection of one group against another, there is a tendency to reinforce the sense of ‘them’ and ‘us’, to amplify the power of group identity and association, to reinforce the sense of victimhood of the targeted group, and hatred towards the perpetrators as a group.37

Some activists might brush this aside. Instead of ‘Myanmar vs. Rohingya’, Wai Wai Nu said she chose to see the case as “the struggle of some of the people of Myanmar for the benefit of all of them”.38 Yet, is this not the Emperor’s new clothes? Under the dualistic nature and rules of international justice as we know it, is not the State by definition the parens patriae that represents the people of Myanmar, whereas an applicant under the Genocide Convention perceives a need to pit the case as straightforward physical elimination of the ‘Rohingya’ as such, due to the high hurdle of the specific intent?

Indeed, following Aung San Suu Kyi’s opening statement before the ICJ in December 2019, some tried to make a point of her not using the term ‘Rohingya’, claiming that she thereby denies their very identity.39 Yet, they fail to address the conundrum of identity in the crime of genocide which they invoke.

Regrettably, in his lecture, Sands too fell short of offering a solution, but simply defended Lemkin:

He was surely right to recognise the reality, that in most (if not all) cases, mass atrocity is targeted not against individuals […], but against those who happen to be a member of a group that is hated at a particular time and place.

34 Some have sought to term this aspect cognitive empathy as separate from affective empathy: see, for example, Jean Decety and Jason M. Cowell, “Empathy, Justice, and Moral Behavior”, in AJOB Neuroscience, 2015, vol. 6, no. 3, pp. 3–14.
38 Wai Wai Nu, 18 December 2019, above note 12.

Lemkin would say, and it is a powerful argument, that the law must reflect that reality, that it must also recognise and give legitimacy to feelings that probably all of us have, of kinship and association with one or more groups.40

But just as it would be quite a legal fiction to shrink the Holocaust as, say, ‘extermination’, we cannot pretend as if “reality” could be simply “reflected” either. “If men define situations as real”, holds the ‘Thomas theorem’, “they are real in their consequences”.41 This is also studied by the historian,42 the clinical researcher,43 the sociologist,44 and indeed the common lawyer.45 A deliberate narrative of genocidal intent may indeed feed prejudice, hatred and fear in ways that undermine relations between communities. Any perceived ‘expressive’ or other need to allege intentional destruction of a group ‘as such’, should therefore be balanced with the ‘reflexive’ potential to entrench inter-communal tension and conflict. The reconciliation and accommodation of these two opposing imperatives – as the law par excellence does – lies at the heart of international justice.

The key in counteracting the ‘negative reflexivity’ in genocide lies in the ‘positive reflexivity’ or what I would call a ‘compassionate mindset’;46 beliefs about the nature of human attributes which can shape reality. In cases of horizontal violence, rather than lumping every interest into the ‘good Samaritan’, the ‘evil genocidaire’ or the ‘vulnerable victim group’, international justice with a ‘compassionate mindset’ means we must honour the grievances of all parties, which – if it goes without saying – does not equate to impunity should there be real evidence of violations. There can be accountability without (af-fective) blame, two distinct concepts which we tend to blur.47 To practice ‘positive reflexivity’ or a ‘compassionate mindset’, however, we must first listen properly and seek to understand.

6. Practical Implications

‘Compassion’ is a mindset in which, and before, we act; but equally, compassion is what compassion does. Not because we are not offended by proven wrongdoing, but in spite of it. In this light, ‘compassion’ can be seen as basis for the prohibition of outlawry and trial by ordeal, the Miranda warning, equality of arms, and so on. Just as the individualization of international law could also be seen as a compassionate turn, I argue that this can be a next phase of the ‘anti-impunity mindset’ under a ‘developmental’ approach to international justice.

In particular, I argue that complementarity is compatible with a ‘compassionate mindset’. Again, notwithstanding all the post-Cold War development of international criminal law, including the Rome Statute, the discourse and international justice efforts are largely framed by products of World War II such as the Genocide Convention and the ICJ Statute. Based on contemporary international law, should not the sensitivity to domestic efforts, which complementarity actually implies, permeate discussions on alleged international wrongdoing that may amount to core international crimes, regardless of the international justice forum in question? Should not the inter-relation-ship between international justice – including its accompanying discourse – and relevant domestic developments inform stakeholders in a manner that instils incontrovertible trust in international justice?

Related to this is the need to actively practise and support ‘positive complementarity’ broadly understood: aiding domestic justice efforts in terms of human and material resources that may be required, as well as morally and politically.48 The UN and other international and foreign actors should

40 Sands, 27 January 2020, see above note 37 (emphasis supplied).
42 History is a “level-two” chaotic system”, where the very accuracy of a prediction undermines itself. See, for example, Yuval Noah Harari, Sapiens: A Brief History of Humankind, Vintage, 2015, pp. 26–68.
43 The observer-participation (so-called ‘Hawthorne’) effects.
45 The so-called ‘Hume’s guiltline’ of-ought-duality.
46 Also called ‘implicit theories’. For instance, that what we do (or fail to do) does not define who we are and, ergo, that we can be better than our erstwhile selves. See Carol Dweck, Mindset: The New Psychology of Success, Random House, New York, 2006.
48 See SONG Tianyong, “Positive Complementarity and the Receiving End of Justice: The
offer to assist ongoing domestic justice efforts. Compare for a moment the combined resources put at the disposal of the ICJ, the ICC, parties before such courts, and all international civil society personnel working on Myanmar, with the resource situation of the justice system in a developing country like Myanmar. Should not this imbalance be a source of concern for fair-minded persons who care about the real situation on the ground?

Domestic ability and will to justice are crucial. But one again wonders if it is even realistic to expect willingness to co-operate with foreigners from a country historically strong-armed by imperialists and still transitioning from military dictatorship. “Only if domestic accountability fails, may international justice come into play”,49 said its State Counsellor in open court, which was dismissed by commentators as incredible, if not entirely ignored by mainstream Western media.50 At the time of writing, Myanmar has convicted 13 officers and soldiers for violations during the 2017 Rakhine violence, in two completed courts-martial, and the Office of the Judge Advocate General has launched a formal investigation into Maung Nu and Chut Pyin, two Rakhine villages where reports allege that the highest numbers of persons were killed in the 2017 violence.

While we often recognize the struggles of oppressed minorities who succumb to stereotypical predictions of failure,10 actors in the international community have repeatedly dismissed Myanmar’s domestic accountability efforts, even if the actors lack legal qualifications.52 For example, the COE executive summary and 12 annexes (which tally more than 230 of the report’s overall 450 pages) were swiftly ridiculed the day after their release, notwithstanding its considerable attribution of responsibility to the Myanmar military.53 Are such patellar reflexes indicative of objectivity, lack of bias, and concern to nourish domestic justice efforts – or compassion? How much has the international community attempted to make those often “poorly funded, understaffed” domestic processes work?54 Do we actually consider this important?

“Despite their best efforts, post-conflict national judicial systems will lack investigative resources and the capacity for optimal compliance with due process standards”, Akhavan reminds us again. “In such extreme circumstances, national courts will invariably fall short of ideal expectations of expeditious and fair trials. In order to do justice, they will require both time and resources for institutional capacity building in the context of a wider post-conflict transformation.”55

7. Conclusion
The Myanmar situation raises a number of questions, inviting us to rethink the raison d’être of international (criminal) justice. Over the past two centuries, ‘compassion’ has crystallized into a legally-protected ‘good’ or interest in international law, but its conceptualization is too myopic both in terms of its object and dimension. The Myanmar case underscores the compassion gap in the current system in how it treats victims and alleged victimizers, which risks further entrenching destabilizing us–them dichotomy, unless we guide our actions with a ‘compassionate mindset’. To bring about a ‘new jus gentium’, the international community and international justice can go one step further, in truly standing and suffering with humanity.

This is not just about Myanmar; far from it. It is well-known and discussed these days how the international legal order, including its values and institutions, is facing the risk of giving way to a more authoritarian one. But there are not just pull-, but also push-factors. From recent news of State visits to Myanmar and infrastructure projects in Rakhine, it is not difficult to see who stands to profit the most from the international community’s disengagement from Myanmar.57 The three policy briefs published in this Series with geopolitical perspectives on Rakhine should help us see this.58 As explicitly and powerfully stated by SUN Yun, a young Chinese scholar naturalized and working in the United States:

Western actors who have single-mindedly called for externalization of accountability for alleged crimes committed against Rohingya in northern Rakhine have contributed significantly to the strengthening of ties between China and Myanmar, culminating with the signing of the key agreement on the Kyaukphyu deep-sea port in January 2020.59 We need to ask ourselves whether it is feasible to warn against taking “easy money” while using sanctions as one’s predominant modus operandi without losing coherence and persuasion.60

The foundational nature of the prohibitions of genocide, crimes against humanity and war crimes in international law gives them the potential to serve as a critical ‘lowest common denominator’ of humankind. This is an essential function in a world that may become increasingly fraught with dichotomies. They should not be conceptualized and used as conduct by ‘enemies of mankind’ in manners that reduce our ability to understand and acknowledge human suffering and flaws. If the approach is not sufficiently nuanced and sensitive to multi-level factual complexity, we risk that diplomacy and civil society advocacy under the banner of ‘never again’ may end up an empty proclamation by one constituency of the international community. That invites other constituencies to claim that international efforts at accountability are but a further proclamation.

Case of Myanmar”, note 2 above.

53 See, for example, LEE Yanghee, in Global Justice Center, 20 May 2020, above note 35.