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INTRA VIRES

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Letter from the Editors

Dear Readers,

With the exceptionally unique and challenging circumstances the world continues to face, it is all the more important to consider the role that law plays in our societies and our lives. In light of the heightened circumstances of the pandemic, we have, in unprecedented ways, been able to observe rapid developments in law and policy-making while experiencing the very tangible and direct influence the legal system has on our lives. As students, we have witnessed the law's direct impact on our educational experience more than ever. And as citizens, we have experienced the ability of the law to constantly evolve and adapt to changing circumstances, imposing rules that impact our everyday lives. Additionally, this year has also been one of racial reckoning, as the systemic issue of racial inequality, which has weaved itself into the very fabric of the legal system, is finally receiving the attention and acknowledgement it so urgently calls for. Discussions about systemic racism and the fundamental, societal changes that must take place cannot be productive without considering the role of the law as both a source of the inequality as well as a means by which progress can be realized. The events of 2020 have made it impossible to ignore the inseparability of the law from the way our lives are both explicitly and implicitly governed.

As a significant source of governance and as a tool by which systemic changes can be achieved, it is crucial that we critically examine and engage with the law. While the law can serve as a vital instrument to promoting justice and fairness in our societies, we must be cognizant of its limitations, and consider the direction in which it should grow as an ever-evolving set of principles. This issue of *Intra Vires* features work from University of Toronto undergraduate students that explores these very topics. Addressing the problematic implications of placing 'rap on trial', the limitations of international law in accommodating climate change refugees, and the legal question of convicting states of genocide, Issue 5.2 discusses some of the most salient questions that plague this present moment in legal history.

Shelby Martin's paper, "People v. Olguin: Legitimizing the Practice of Placing Rap on Trial", provides an in-depth analysis of one way in which the legal system perpetuates racial inequality in both the Canadian and American contexts. This piece brings attention to the biased use of rap lyrics as evidence of a defendant's guilt in criminal proceedings - which is both informed by and perpetuates stereotypes about the "threatening Black Other"- and contributes to a legal system that disproportionately convicts Black men. The analysis also considers the far-reaching impact such legal practices have on the ability of youth of colour to engage in free artistic and cultural expression, without fear of their work being taken out of its artistic context to be used against them in incriminating ways. The singling out of rap in receiving heightened legal scrutiny, while other artistic mediums are not subject to such literal interpretation, is itself a manifestation of racial prejudice in the legal system, and Shelby skillfully explores this topic.

"Climate Change Refugees: A Misnomer" by Sanjna Ullal explores the *Refugee Convention* and its limitations in being able to accommodate the asylum claims of climate change migrants. With the lack of mobilization by world leaders in addressing climate change, it seems inevitable that climate-induced displacement and migration will continue to rise, with more and more individuals seeking refuge on these grounds. Given this global situation, the issue of how climate change refugees should be defined and accommodated under international law is relevant now more than ever. Sanjna's analysis of the limitations of the current *Refugee Convention* allows the gaps in the existing legal framework for refugees to be identified and addressed. In coming to terms with the unfortunate reality that climate change refugees will become a rising class of displaced peoples, the law must adapt and grow in order to meet these new demands and contexts.

Kaitlyn Min, in her essay titled "Questions of Genocide in Myanmar", examines another aspect of international law in the context of the case against Myanmar and its involvement in the Rohingya crisis that is currently ongoing in the International Court of Justice. Through considering the advent of the concept of 'genocide', its codification in international law, and past decisions by the ICJ, this paper presents a comprehensive analysis and argument for why it is unlikely that Myanmar, as a state, will be found guilty of genocide, while at the same time genocide will be found to have occurred in the region. The Rohingya crisis left hundreds of thousands dead, injured, and displaced, with many Rohingya still remaining in Myanmar and facing ongoing abuse. The impact has been devastatingly huge and the humanitarian needs are significant. From a legal perspective, international law's response to such events must be scrutinized, as the law is an important source of guidance in not just the governance of individuals, but also of states.

Most importantly, we would like to extend our sincere thanks to all who were involved in the production and publication of Issue 5.2 of the Journal. Thank you to Shelby, Sanjna, and Kaitlyn for submitting your insightful and thought-provoking work to *Intra Vires*, allowing us to share your important thoughts with the wider University of Toronto community, and helping us become more critical and well-informed students and citizens alike. We would like to thank our editors, Michelle, Emily, Veronika, and Grace for their continuous dedication and effort put into making this issue the finest it can be. The editorial process for this issue has been longer and more demanding than previous issues, and our editors have remained diligent and meticulous in their edits and feedback throughout, and for that, we are immensely grateful. Thank you to Professor Jennifer Leitch, our staff advisor, for her steady support and thoughtful guidance in both ensuring the quality of legal scholarship and refining the arguments put forward in this issue. In addition, we would like to thank the UTPLS and their continued support of the Journal in promoting *Intra Vires* across their platforms to share with our student community.

We hope you enjoy Issue 5.2!

Sincerely,

Emily Jin and Nicole Shi
Editors-in-Chief, 2020-2021

Illustration by Paul Kim for The Walrus depicting 'rap on trial'.

People v. Olguin: Legitimizing the Practice of Placing Rap on Trial

A Threat to the Artistic Expression and Engagement of Youth of Colour

by Shelby Martin

In 1992, Cesar Olguin and Francisco Mora confronted rival gang members in California after their gang-related graffiti had been replaced with Shelley Street gang markings (*People v. Olguin*, 1994). Representing the Southside gang, Olguin, Mora and an accomplice returned to the tagged intersection where a fight with Shelley Street gang member John Ramirez ensued. As the fight escalated, Olguin drew his gun, killing Ramirez. The defendants were convicted of second-degree murder with a firearm and were subject to the gang sentencing enhancement, which is an additional penalty imposed on gang-related felonies. During trial, the prosecution presented the jury with rap lyrics discovered in Mora's home. The prosecution, having literally interpreted the lyrics, claimed they demonstrated Mora's

Southside loyalty, familiarity with gang culture, and his "motive and intent" on the day of the murder. Olguin and Mora appealed, challenging the admissibility of the lyrics. Concurring with the trial judge, the appeals court declared the lyrics admissible and important in proving that the killing was gang-related.

People v. Olguin demonstrates that rap lyrics, purportedly discussing violence and gang ethos, may be used to establish an individual's affiliations and 'criminal' mind-set (Nielson & Dennis, 2019, p.65). The notion that rap lyrics may be taken at face value grossly misunderstands the genre by ignoring its complex artistic conventions. Consequently, the precedent set by this case asserts that rap - unlike other music genres - is devoid of artistic value, where its creators are incapable of dissociating their realities from the subject matter of their music. This judgment presumes rap lyrics to be non-fictional stories spoken over a beat, discounting rap's lyricism and aesthetic complexity. And thus, this decision set the precedent for the practice of rap on trial, thereby having momentous impacts on marginalized youth of colour, aspiring artists, free speech, and free and creative expression.

Locating Rap and Hip-Hop as Black Cultural Expression

Emerging in the South Bronx during the 1970's, hip-hop arose from the racial and cultural isolation of Black and Latino communities in the United States, and the systemic racism that deprived these communities of local support systems and social resources. Acting as a stage for the powerless, hip-hop provided Black youth with the ability to express their thoughts and emotions creatively, allowing them to write stories and voice social commentary in an artistic way (Rose, 1999). Hip-hop culture became a means whereby marginalized youth of colour could form alternative identities and pursue social status in communities where conventional local support institutions had been demolished (Rose, 1994, p.34). From its inception, hip-hop and rap music have operated as a medium for Black cultural expression that prioritizes Black voices, thereby making rap's artistic conventions and mechanics largely foreign to White America (Rose, 1999).

As a medium of resistance, rap enables artists to challenge power inequalities and the ideological domination of oppressive institutions through metaphors, cultural codes, and parodies (Rose, 1999). Rappers craft complex and often abstract stories to represent their unique perspectives, act out fantasies of subversion, and convey experiences of racial marginality (Rose, 1994, p.23). The violent, hypersexual lyrics and hyperbolic rhetoric that tends to characterize rap are often written with the intent to parody racialized stereotypes, as a form of social commentary. With its rise in popularity coinciding with the war on drugs, which disproportionately affected Black people, rap has historically been critical of politics and the justice system – causing it to be subject to intense governmental scrutiny. Continuing into the 1990s, the war on drugs and subsequent tough-on-crime policies had successfully impressed onto society stereotypes about Black criminality and destructive tendencies (LoBianco, 2016). This went on to set the foundation for the criminalization of rap music and its artists.

The War on Hip-Hop: Contextualizing Rap on Trial

Beginning in the late 1980s and continuing into the 1990s, rap was received with condemnation by the American government and law enforcement due to its critical political commentary and unapologetic presentation of sensitive and controversial subject

matter. During the 1990s, the American government attempted to censor 2 Live Crew's 1989 rap album, "As Nasty As they Wanna Be", citing the album as inappropriate, offensive and bereft of artistic value (Nielson & Dennis, 2019, p.118). Outraged by the album's sexually explicit content, the government attempted to place a complete ban on the performance and distribution of the album and its associated materials (Rimer, 1990).

N.W.A's 1988 track "F*** Tha Police" similarly shocked America, attracting fierce criticism from law enforcement, the American government and White America. With the song highly critical of law enforcement and drawing widespread controversy, radio stations and MTV refused to broadcast the track. The American public protested the group, and the police refused to provide security for their shows (Kennedy, 2017, para.3). The FBI voiced its staunch disapproval of the track in a letter to Priority Records, the distributer of the song. At the same time, the song gained traction within Black America, acting as a rallying cry in L.A. during the infamous Rodney King riots of 1992 (Kennedy, 2017, para.16). "F*** Tha Police" soon became an anthem of Black rebellion.

The 1990s quickly became an environment intolerant of the messages of rebellion and resistance that rap endorsed (Nielson, 2011, p.350). As a result, rappers became targets of police surveillance and harassment, which prompted the creation of hip-hop task forces in major American police departments (Nielson, 2011, p.350). The purpose of these task forces was to monitor and occasionally disrupt the activities of rap artists across the country (Nielson, 2011, p.350). As the newly emerging war on hip-hop gathered speed, Black Americans with no connection to the hip-hop community increasingly found themselves also subject to this policing, which led to a staggering increase in Black incarceration rates during this time (Nielson, 2011). The increased policing of rap meant that Black communities were disproportionately scrutinized and criminalized. [is author saying increase in incarceration rates caused by police focus on rap]While the preceding war on drugs nearly doubled the incarceration rates of Black Americans during the 1980s, by the mid 1990s, nearly one in three Black men between the ages of 20 and 29 were under some form of correctional control (Nielson, 2011, p.350). These cases illustrate the sociopolitical climate that embroiled rap in the 1990s and contextualizes the complicated relationship between Black Americans and the state. Together, this brief history elucidates the contentious climate that Olguin and Mora would soon contend with.

Racialized Impact: Inordinate Effects on Marginalized Youth of Colour

The court's decision to consider Mora's lyrics in *People v. Olguin* resulted in the dramatic expansion of placing rap on trial. As a uniquely Black art form performed predominately by Black individuals, the outcomes of placing rap on trial are highly racialized, disproportionately impacting young men of colour (Nielson & Dennis, 2019). Poor communities of colour are impacted most by this practice, as members of these communities disproportionately find themselves on trial for violent, and often gang-related, offenses. Because rapping is a pursuit that carries the potential for wealth and social mobility, it symbolized hope for those isolated from traditional means of achieving socio-economic success. As a result, many marginalized youth residing in desolate communities participate in hip-hop culture, lending to their inordinate representation in rap on trial cases.

Recognizing Implicit Biases

The interpretation of rap as dangerous and threatening is tied to beliefs of Black people as dangerous and threatening. Innumerable studies have explored racial stereotyping, demonstrating the implicit biases that individuals often have towards men of colour. A 1999 study by Carrie Fried examined the impact of musical genre on responses to violent lyrics. Fried (1999) found that lyrics were perceived negatively when attributed to a rapper, whereas the same lyrics were perceived as less threatening when attributed to a country singer. Notably, country music is typically associated with white performers, while rap is associated with Black performers and Black culture. Fried (1999) emphasized that rap "primes the negative culturally held stereotypes of urban Blacks", thus reinforcing the trope of the threatening Black Other (p.716).

Similarly, a 1999 study conducted by Stuart Fischoff found that when presented with rap lyrics authored by a Black defendant, individuals were significantly more likely to think of the man as capable of committing a crime. Shockingly, Fischoff (1999) found that mere exposure to a defendant's authored lyrics evoked a negative reaction greater than the reaction elicited from being informed that the man was on trial for murder. Moreover, a more recent 2018 study, which used the same set of lyrics that Fried did, found that those who are perceived as having written violent rap lyrics are more easily associated with criminal wrongdoing and violence, demonstrating that these implicit biases still prevail today (Nielson & Dennis, 2019, p.92).

An earlier study by Carrie Fried in 1996 explored the biasing effects of race on the perception of a lyrical passage. Fried (1996) found that a lyrical passage was perceived as worrisome and ominous when associated with an image of a Black man, who Fried claimed to be the artist. Here, Fried did not associate the lyrical passage with any particular musical genre, rather she simply presented the lyrics and an image of the supposed author. Further, by exploring the public perception of rap fans, Amy Binder found that simply listening to rap music was perceived as threatening and dangerous (Nielson & Dennis, 2019, p.91). Binder discovered that rap was understood as having the potential to cause its Black listeners to hurt others (Nielson & Dennis, 2019, p.91).

These studies illustrate the implicit biases that plague rap music and the prejudice that accompanies its use in trials. The admissibility of rap lyrics as evidence in criminal proceedings is especially harmful to Black defendants, as violent or aggressive lyrics work to reinforce stereotypes about Black men and criminality.

Incidence, Extent, and the Courtroom Narrative

A comprehensive survey conducted by Nielson and Dennis (2019) discovered approximately five hundred cases whereby rap has been placed on trial in the United States (p.12). In these cases, rap music, lyrics, and participation in hip-hop culture were presented as evidence of criminality or used to support claims of dubious character. In 95% of these cases, the defendant was a young man of colour (Nielson & Dennis, 2019, p.18). While investigating the incidence of white defendants, they found that in addition to white defendants accounting for only 1-2% of 'rap on trial' cases, the judicial outcomes are generally more favourable than those of Black or Latino defendants (Nielson & Dennis, 2019, pp.19;74). Even where evidence is otherwise weak, the introduction of rap within the courtroom creates a biased narrative that is difficult to undo, resulting in an increased likelihood

of conviction and stricter sentencing (Nielson & Dennis, 2019, p.19). Furthermore, the survey found that these defendants are frequently sentenced to decades, or even life, behind bars, with nearly thirty of the cases resulting in death sentences (Nielson & Dennis, 2019, p.19). The deadly coalition of race and gender operate alongside rap as a tool for the prosecution and punishment of Black men.

In 2009, Sequoyah Hawkins found himself on trial for homicide after an altercation with a group of men ended with Hawkins stabbing one of his attackers in the neck. Hawkins would argue that he had acted in self-defence (Nielson & Dennis, 2019, pp.75-76). Testifying on his own behalf, Hawkins vehemently asserted that fighting, aggression and violence of any sort was completely uncharacteristic of him (Nielson & Dennis, 2019, pp.75-76). Unfortunately, because Hawkins had testified that he was a nonviolent person – a testimony to his character – he enabled the prosecution to introduce evidence that would potentially refute this characterization (Nielson & Dennis, 2019, p.77). Hence, the prosecution introduced a rap music video featuring Hawkins as evidence. Though unrelated to the crime in question, the video was intended to demonstrate that Hawkins had a propensity toward violence. In essence, the reasoning was that because Hawkins performed a song about violence, he himself must be a violent person (Nielson & Dennis, 2019, p.77). Upon viewing the rap music video, the jury found Hawkins guilty of voluntary manslaughter (Nielson & Dennis, 2019, p.77). Sequoyah Hawkins was a Black man residing in an area riddled with gang violence. For Hawkins, the simple act of performing rap music was enough to cast doubt upon his demonstrably good character.

Sequoyah Hawkins is only one case of five hundred. It should not be assumed that all of these defendants are innocent of their crimes, but it is imperative that their guilt be determined independent of their creative endeavours and independent of racial stereotypes, as these factors criminalize rap music and imbue skin colour with markers of criminality.

Probative Value and Prejudicial Effect: The Canadian Climate

The practice of putting rap on trial is not an exclusively American issue; Canadian courts increasingly fail to apply a culturally competent lens to the valuation of rap lyrics as evidence in relation to its biasing effects on defendants of colour (Tanovich, 2016). As of 2016, 36 cases had been identified as pertaining to the issue of rap on trial in the Canadian context (Tanovich, 2016, p.29). Although imperfect in their approach, Canadian courts have nonetheless attempted to engage meaningfully with the practice of rap on trial, thus demonstrating an evolving understanding of the racialized effects of this practice.

In the Canadian context, the "*Seaboyer*" exclusionary discretion may be used in determining the admissibility of rap related evidence when the admissibility of such evidence has been challenged (Tanovich, 2016, p.37). The case of *R. v. Seaboyer* (1991) concerns the constitutionality of excluding evidence of a complainant's sexual history under s.276 of the Criminal Code and the exclusion of evidence concerning a complainant's sexual reputation under s.277. The legal reasoning provided in *Seaboyer* addresses how the probative value of evidence should be balanced against the prejudicial impact it may have on the trial process. S.277 was deemed constitutional because evidence concerning a complainant's sexual reputation fails to have probative value that outweighs its prejudicial impact and the threat to the fair trial process it poses (R. v. Seaboyer, 1991). Hence, *Seaboyer* functions to

The Supreme Court of Canada

consider prejudice together with probative value. Here, prejudicial evidence need only have the potential to adversely affect the integrity and fairness of the proceedings (Tanha, 2012, p.168). As per *Seaboyer*, where there was a reasonable basis to conclude that the prejudicial effect of the evidence outweighs its probative value, the judge may exclude the evidence (Tanha, 2012, p.169). The application of the principle from *Seaboyer* in the context of assessing probative value and prejudicial effect necessitates the recognition of the concerns associated with using rap lyrics as criminal evidence (Tanovich, 2016, p.37). Relevant concerns include the cultural competence of trial actors to understand the nature and meaning of rap lyrics, the negative influence of racial biases on the integrity of the trial and verdict, and the criminalization of culture and the chilling effect this would have on artistic expression (Tanovich, 2016, pp.37-38). In effect, courts must recognize the likelihood that rap lyrics will trigger racialized stereotypes when assessing the prejudicial impact of the proposed evidence (Tanovich, 2016, p.38).

The use of rap lyrics as evidence is a strategic prosecutorial tactic that effectively plays upon and perpetuates enduring stereotypes about the inherent criminality of young men of colour (Nielson & Dennis, 2019, p.201). In effect, the lyrics are taken to be a direct reflection of the thoughts, feelings and character of the defendant. When operating within the racial narrative that Black men are dangerous and threatening, what is written conforms to how society perceives criminals, namely in terms of what they look like and where they come from (Nielson & Dennis, 2019, p.201). As recognized by Justice Doherty in *R. v. Parks* (1993):

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil. In

> my opinion, there can be no doubt that there existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes toward black persons (paras. 54-55).

When assessing the admissibility of evidence, it is imperative that the courts thereby consider the inescapable fact that rap lyrics tend to inflame stereotypical assumptions about young men of colour and criminality (Tanovich, 2016, p.42). In essence, the practice of rap on trial relies upon the acknowledgement of and engagement with implicitly held biases.

Constitutional Impact: A Threat to Fundamental Freedoms

Further, the practice of placing rap on trial has constitutional ramifications, potentially violating the First Amendment and the Canadian Charter of Rights and Freedoms. Both the American and Canadian constitutions claim to protect free speech and expression, yet young artists find their artistic production being put on trial. The artifice created by the legal system is that while rap itself cannot be prosecuted, those who create it can be silenced as long as rap is allowed to serve as evidence of criminality.

The Freedom of Speech

First Amendment protections of free speech also extend to inflammatory and offensive language (Nielson & Dennis, 2019, p.102). American courts have consistently demonstrated a strong devotion toward the protection of First Amendment rights, with the Supreme Court in 1971 writing that, "one man's vulgarity is another's lyric", and later in 1978 that "speech may not be banned on the ground that it expresses ideas that offend" (Cohen v. California, 1971, para.20 ; FCC v. Pacifica Foundation, 1978, p.438). On many occasions, the Court has upheld the constitutional protection of free speech even when such speech has transcended offense, traversing into downright repugnance.

In one particularly contemptible case, anti-gay protestors from Westboro Baptist Church were protesting military funerals to draw attention to what they considered the immoral tolerance of homosexuality in America (Nielson & Dennis, 2019, p. 105). In addition to shouting homophobic slurs, picketers wielded signs emblazoned with sayings such as "Thank God for dead soldiers" and "Fag troops" (Nielson & Dennis, 2019, p. 105). In Snyder v. Phelps, the case that challenged the protestors' actions, the Supreme Court ruled that the protestors' speech was protected under the First Amendment, reasoning that debate on public issues should be uninhibited (Nielson & Dennis, 2019, p. 106). Why then, when rappers critique the justice system, comment on the government, and craft lyrics exaggerating stereotypes of "Ghetto Blackness", is their speech placed on trial?

Relishing their First Amendment rights, artists enjoy the freedom to express their thoughts and ideas creatively through a variety of mediums. But as a result of its vulnerability to mainstream contempt and misinterpretation, rap is regularly punished in ways that other artistic mediums are not (Huff, 2018, p.359). Rap offers a stage for the historically disenfranchised, the continuously marginalized, and those most impacted by injustice and inequities, lending to its controversial subject matter and brash delivery – and that which characterizes the genre simultaneously criminalizes it. While the rules for determining admissible evidence are subject to the constitutional requirements for fair trials, the courts have yet to interpret the First Amendment in terms of how it applies to rules of evidence (Nielson & Dennis, 2019, p.113). As such, individual courts are responsible for determining the admissibility of evidence on a case by case basis. Rap, unlike other kinds of artistic production, tends not fare well during this assessment.

Like the First Amendment of the Constitution of the United States, Section 2 of the Canadian Charter of Rights and Freedoms lists "freedom of thought, belief and behaviour" as a fundamental freedom protected. Similar to the United States, Canada fails to interpret this freedom as justifying a prohibition on the use of rap as evidence in criminal proceedings. It would be absurd to argue that Stephen King's novels be used as evidence of his propensity towards violence in the instance of criminal wrongdoing – after all, they are merely works of artistic fiction. Yet, in the 2014 case against Ronald Herron, a.k.a. "Ra Diggs", a number of his fictional and hyperbolic violent rap lyrics were exploited by prosecutors to land a conviction (Nielson & Dennis, 2019, pp.53-54). It seems then, that not all art, and certainly not all artists, are treated equally.

When rap is placed on trial, these defendants are not only denied a fundamental freedom, but it also enables the criminalization of an entire art form and culture (Tanovich, 2016, para.21). When rap is criminalized, voices are silenced, and freedom is denied.

The Chilling Effect

If a rap lyric might land you in jail, would you think twice about writing it? The systematic exclusion of rap music from protection under the First Amendment and Charter threatens to have a chilling effect on the international rap industry, as aspiring artists find themselves censored and silenced in fear of persecution. When courts use creative expression as evidence to legally implicate artists in criminal wrongdoing, a chilling effect permeates that art form (Huff, 2018, p.359). As a result, punishing rap, even indirectly, is likely to chill it.

As rap lyrics continue to enter the courtroom at an alarming rate, it seems unlikely that the rappers of tomorrow will feel confident about rapping and writing songs that contain controversial or violent lyrics (Huff, 2018, p.359). Left unchecked, rap on trial has the potential to silence a generation of artists attempting to exercise their right to creatively express themselves (Render, 2019). This chilling effect is capable of crippling the rap industry, as it is an industry that is characterized by and thrives on its dissentient messages and social commentary (Huff, 2018, p.359). Although rap music continues to grow as a commercial industry despite being subjected to improper prosecutorial treatment, this does not undermine the fact that placing rap on trial in criminal proceedings debases the genre to be inherently problematic, which adversely effects both the defendant in the courtroom and the rap industry as a whole (Huff, 2018, p.368).

The courts' acceptance of rap lyrics as evidence of criminal wrongdoing fortifies the notion that rap music is violent and aggressive, perpetuating harmful stereotypes about the genre and its artists (Huff, 2018, p.368). The negative impression left by this systemic criminalization devalues rap music as a medium of creative expression, which further deters engagement, innovation and growth in the genre. The chilling effect of putting rap on trial not only reduces creative expression, but it also prevents marginalized youth from pursuing rap as a means of achieving socio-economic success and self-improvement, as rap has previously done for many youth of colour. Rap's earning potential, paired with its effect of being an important creative outlet, inspires hope in com-

munities otherwise classified as hopeless, encouraging aspiration, ambition and creativity among its members. When all such hope is removed, nihilism – a greater danger – takes hold.

The preservation and protection of one's freedom of speech is integral to public discussion and debate, which is in turn crucial to the integrity of a democratic nation. Although the justice system is unable to prosecute rap itself, the use of rap as evidence is enough to criminalize, censor and silence the genre as a whole. If exercising one's freedom of speech can be used to deny one's right to a fair trial, then such speech ought not to be used in determining criminal culpability.

Conclusion

Should Freddie Mercury's lyrics, "Mama, just killed a man. Put a gun against his head, pulled my trigger, now he's dead", have been interpreted as an autobiographic account of criminal wrongdoing? Perhaps Johnny Cash ought to have been charged once he sang "I shot a man in Reno just to watch him die". How is it then that these men retain their freedom of speech and creative expression – their art perceived as art – yet the poor, young Black or Latino teenager who writes the same is characterized as a malicious, ominous, aggressive criminal? As rap has increased in popularity, the practice of placing rap on trial has increased alongside it. Recognizing this opportunity, prosecutors have discovered that hyper-violent and crime-related lyrics of amateur rappers can serve as evidence of gang affiliation and a propensity toward criminal behaviour in order to secure convictions and harsher sentences (Nielson & Dennis, 2019). *People v. Olguin* was merely the beginning, as the precedent set by the landmark decision enabled the criminalization of not only an art form, but also a culture. As such, the ripple effects of *People v. Olguin* have been felt by Black and Latino youth in America and Canada as their rap lyrics are used to support claims of criminal culpability. One's musical style and race should not determine their culpability, yet the legal system is complicit in its allowance. When people misunderstand rap and criminalize it for its contentious messages, caricatures of Blackness are normalized, and racialized communities are vilified (Rose, 1994). As judges fail to weigh the prejudicial effects of these lyrics against their probative value, Black and Latino voices are being silenced as they find themselves convicted and harshly sentenced for the lyrics they have written (Nielson & Dennis, 2019). *People v. Olguin* gave rise to the practice of putting rap on trial, which will continue to discriminately prosecute young men of colour if left unchecked.

Bibliography

Clark, D. (2020, January 2). Over 200 members of Congress ask Supreme Court to 'reconsider' Roe v. Wade. *NBC News*. https://www.nbcnews.com/politics/politics-news/over-200-members-congress-ask-supreme-court-reconsider-roe-v-n1109781.

Cohen v. California, 403 U.S. 15 (1971)

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978)

Fischoff, S. P. (1999). Gangsta' Rap and a Murder in Bakerfield. *Journal of Applied Social Psychology* 29(4), 795-805.

Fried, C. B. (1996). Bad Rap for Rap: Bias in Reactions to Music Lyrics. *Journal of Applied Social Psychology* 26(23), 2135-2146.

Fried. C. B. (1999). Who's Afraid of Rap: Differential Reactions to Music Lyrics. *Journal of Applied Social Psychology* 29(4), 705-721.

Huff, D. O. (2018). Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics. *Savannah Law Review* 5(1), 335-368.

Jackson, A. (2004). Prosecuting Gang Cases: What Local Prosecutors Need to Know. *American Prosecutors Research Institute*, 1-47.

Kennedy, G. D. (2017, December 9). The moment N.W.A changed the music world. *Los Angeles Times*. https://www.latimes.com/entertainment/music/la-et-ms-nwa-parental-discretion-20171205-htmlstory.html.

Lemieux, S. (2019, October 7). Supreme Court's new abortion case shows Roe v. Wade's end will come slowly. But it'll come. *NBC News*. https://www.nbcnews.com/think/opinion/supreme-court-s-new-abortion-case-shows-roe-v-wade-ncna1063361.

Millhiser, I. (2019, September 27). The fight to end Roe v. Wade enters its endgame next week. *Vox.* https://www.vox.com/2019/9/26/20873873/supreme-court-gut-roe-v-wade-next-week-abortion.

Nielson, E. (2011). 'Here come the cops': Policing the resistance in rap music. *International Journal of Cultural Studies* 15(4), 349-363.

Nielson, E., & Dennis, A. (2019). Rap on Trial. *The New Press.*

People v. Olguin, 31 Cal.App.4th 1355 (1994)

Render, Michael. (2019). Foreword. In Nielson, E., & Dennis, A, Rap on Trial (pp.ix-xii). *The New Press.*

Rimer, S. (1990, October 21). Rap Band Members Found Not Guilty in Obscenity Trial. *The New York Times*. https://www.nytimes.com/1990/10/21/us/rap-band-members-found-not-guilty-in-obscenity-trial.html

Rose, T. (1994). Black Noise: Rap Music and Black Culture in Contemporary America. Weslayen University Press.

R. v. Parks, 15 OR (3d) 324 (CA), [1993] OJ No 2157

R. v. Seaboyer, 1991 SCC 20666, [1991] 2 SCR 577

Tanha, R.H. (2012). The Trial Judge's Four Discretions to Exclude Technically Admissible Evidence at a Criminal Trial. *Manitoba Law Journal* 36(1), 143-192.

Tanovich, D. M. (2016). R.v. Campbell: Rethinking the Admissibility of Rap Lyrics in Criminal Cases. *24 Criminal Reports* 7, 27-43.

Tanovich, D. M. (2016, May 18). Rap on Trial: How courts are using song lyrics to convict young black men. *The Walrus.* https://thewalrus.ca/rap-on-trial/.

Climate Change Refugees: A Misnomer

The Inability of the Refugee Convention to Accomodate Climate Change Migrants

by Sanjna Ullal

International bodies are aware of the potential for large scale climate-induced migration. By some estimates, approximately 150 million people will be displaced due to environmental factors by 2050 (Duong 2010, 1251), and yet, there is no explicit legislative framework that addresses the needs of 'climate change refugees.' However, as more countries experience aberrant climatic patterns to a critical degree, through rising sea levels and the increased severity of tropical storms, concern about the potential for climate-induced migration and hence recognition for the plights of climate change refugees has become more acute in international discussions. During the negotiations at the 2015 United Nations Climate Change Conference, climate change refugees received 20 percent of parties' intended nationally determined contributions (Fraser 2016, 110). They were also recognized in both the Annex to the Paris Agreement and the Paris Decision, the latter of which established a task force to recommend approaches to address the issue (ibid). In a more recent development, the United Nations Human Rights Committee (UNHRC) issued a ruling that climate emergencies might trigger 'non-refoulement obligations', understood as the obligation of states to not send someone back to a country where they would face "torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm" (United Nations 1997) (OHCHR 2020).

Despite these promising steps, there remains a large gap in the current international framework regarding climate change refugees. Although it appears logical that they seek asylum under the *Refugee Convention* (1951), this paper argues that both the nature and narrow scope of the *Convention* prevents it from being able to appropriately address such claims. Given this reality, a better approach would be to adopt a suggestion put forth by Williams (2008) to create a series of regional agreements, specifically addressing climate-induced migration, which would operate under an international umbrella framework.

This paper will begin by briefly introducing how climate change can result in the forced displacement of individuals from their communities of origin. Understanding that categorizing and defining people displaced by climate change is and of itself an obstacle to addressing the issue, the paper will then discuss the various terms that are used to refer to individuals displaced by climate change, and argue that climate change migrants is the most appropriate. After considering arguments that establish the *Refugee Convention* as an appropriate means for addressing and accommodating the claims of climate change refugees, this analysis will refute these claims by looking at the legal and practical limitations of the definition of 'refugee' in the convention. Having done so, this analysis will explain why the proposed alternative of a series of regional agreements is better suited to address climate-induced migration.

Although the effects of climate change continue to be experienced around the world, some of its most significant impacts will be borne by communities in the Global South. Some of these communities, such as those in Bangladesh, are more vulnerable to abrupt climactic changes because they are located in low-lying coastal areas with a high population density and are economically dependent on the agricultural sector (Williams 2008, 505). Compared to other low-lying coastal areas, such as Germany and Denmark, the effects of potential flooding in the Global South will affect a larger number of people and have a more pronounced capacity to destroy infrastructure and contaminate previously arable land; hence, dramatically weakening the economies of these areas which are often agrarian in nature (Williams 2008, 505). Glacier melting can threaten other communities living in lower valleys for much of the same reasons, as can storm surges which create food and water insecurity by affecting crop production and the availability of clean water (ibid). Many communities in the Global South already suffer from limited infrastructure and institutional capacity, and they are disproportionately populated by people with limited personal means. Therefore, climate change migrants are not limited to those who are displaced due to deteriorating environmental conditions and natural disasters. Due to the propensity for climate change to heighten the structural causes of poverty (Byravan 2014, 142), many people will not be able to recover from the long-term economic consequences of environmental degradation, and will thus be forced to leave their community of origin. These examples demonstrate the range of climatic effects that can induce displacement and the varying degrees to which they can affect mi-

gration, with some effects rendering return impossible and others making it more arduous.

This range of effects, along with the multi-causal nature of climate change, are partially why it has been so difficult to secure the rights of climate change 'refugees' (Duong 2010, 1251; Williams 2008, 507; Fraser 2016, 117). Another complication is the lack of consensus with respect to defining and referring to those who have been displaced by climate change. Some choose to describe these people based on the kind of displacement they are experiencing (i.e. temporary vs. permanent), the temporal basis of that displacement (i.e. gradual onset vs. rapid), or the reason for displacement (i.e. human vs. natural) (Nishimura 2015, 114; Docherty and Giannini 2009, 355; Williams 2008, 506-507). Others use the term 'climate change refugee' to draw on the traditional concept of 'displacement', which invokes ideas of transboundary migration and the state's failure to protect (Nishimura 2015, 112). Unfortunately, as this paper will demonstrate, this term is too limited to address the scope of climate-induced migration. Because it is not necessary for this paper to distinguish between the type, temporal basis, or cause of displacement, it will adopt Nishimura's definition of climate change migrants as those "whose movement is triggered, in part or exclusively, by the effects of climate change" (ibid, 114). This definition encapsulates the true scope of the climate migration phenomenon and stands in stark contrast to the narrow definition employed by climate migrants' only current recourse: the *Refugee Convention.*

There are several reasons why the *Convention* is incapable of accommodating the claims of climate change migrants, but they all fundamentally stem from its definition of 'refugee'. The definition requires: (i) a fear, (ii) that is well-founded, (iii) of persecution (iv) based on reasons of race, religion, nationality, membership in a particular social group, or political opinion (Refugee Convention 1951.) It is relatively clear how the 'well-founded fear' requirement can be met by these migrants: many of them experience climatic changes that exacerbate socioeconomic vulnerabilities or tensions that leave their home territories uninhabitable or drastically altered. The applicability of requirements (iii) and (iv), however, are far more contentious.

Although persecution has been traditionally interpreted to involve actions by a nation's government or outsider groups fighting the government, Duong (2010) argues that because 'persecution' is not defined by the original Convention, it can be expanded to mean the "sustained or systemic denial of basic human rights demonstrative of a failure of state protection" (2010, 1263). However, there does not appear to be any legal precedent within refugee law that suggests such an expansion would be possible. As such, it would be beneficial to look at the legal issues in applying requirement (iii) as it is traditionally understood, to climate change migrants.

Fraser's (2016) analysis of *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* illustrates two of these issues: (a) the difficulty of substantiating persecution, and (b) the difficulty of substantiating *discriminate* persecution (113). The case concerned a Kiribati man, Ioane Teitiota, who sought to appeal against the decision of the New Zealand Immigration and Protection Tribunal that had declined to grant him refugee status as a climate change migrant. Teitiota's lawyers made the case that the international community — especially high emitting countries — should be classified as the persecutors in this case because their actions contributed the most to producing the climatic changes that resulted in Teitiota's forced displacement (ibid, 110). To make this argument, they claimed that human

agency was not necessary in establishing persecution (ibid, 114). Counsel for Teitiota further explained that there was an insufficient nexus between harm suffered by Teitiota and an intention to discriminate by the international community (ibid, 117). However, New Zealand's Immigration and Protection Tribunal (IPT) maintained that 'being persecuted' requires a human agent to prosecute, reasoning that this is what the plain reading of the phrase suggests and that this is what is necessary for establishing discriminatory intent (ibid, 114). The trial court held that it was unclear when the adverse consequences of climate change became foreseeable, and that there was nonetheless no apparent intention to harm a particular group or person, especially given the diffuse and multi-causal nature of climate change (ibid). More fundamentally, the IPT described a legal problem where current emissions cannot be linked to contemporary climate-related harms, but rather to harms suffered in the future by victims whose claims do not yet exist (ibid).

The court also raised a second objection: Mr. Teitiota's argument reversed the Convention paradigm. Whereas traditional refugees flee their own government, climate refugees are seeking refuge within countries that have contributed to their persecution in the first place (i.e. high-emitting states) (ibid, 118). These two objections cut to the very core limitations of the framing and scope of the *Convention*, demonstrating the difficulty in trying to attain protections for climate migrants within a framework that was not intended for cases of this sort. While Fraser indicates a trend towards a more protectionist approach in interpreting the *Convention* (i.e. a declining emphasis on persecutory intent, and instead a focus on the mere fact of persecution) (ibid,128), there would still be the matter of the *kinds* of groups that are included within the definition itself.

Part (iv) of the definition lays out five different social groups whose claims can be made in accordance with the *Convention*. Climate change migrants are not included. While

Ioane Teitiota, Kiribati man who sought status as a climate change refugee.

Duong (2010) argues that interpretation of the refugee regime, which is the body of law surrounding international refugee migration, should generally be expanded in accordance with international human rights law, she claims that one can nonetheless make the case that climate change migrants fit into the existing definition (1264). She substantiates the latter portion of the claim by drawing on the example of Tuvaluans, whom she claims are persecuted on the basis of their membership in the 'social group' of Tuvaluans (ibid, 1265). She argues that if they were not part of the specific geographic region of Tuvalu (or more generally, the Pacific Islands), they would not be in danger of being subsumed by the ocean or losing their unique way of life (ibid). On the other hand, Williams argues that since the "on the grounds of…" list detailed in (iv) is exhaustive, it has already established fairly strict boundaries for the *Convention's* application, which has subsequently been supported by refugee law jurisprudence (508), rendering the *Convention* less open to interpretation. Furthermore, even though Duong's interpretation might be adopted in light of the purpose of the treaty, it certainly extends beyond what is assumed in the ordinary meaning of the text, thus violating Article 31 (a) of the Vienna Convention on the Law of Treaties – which states that a treaty must be interpreted in light of its purpose and in accordance to the ordinary meaning of the text – and associated customary legal principles.

Duong's claim that the interpretation of the overall refugee regime should be expanded in accordance with human rights law is premised on both (a) an understanding of the object and purpose of the *Convention* and (b) an understanding of how environmental degradation impinges on human rights considerations. Duong, quoting Cooper (1997), argues that the definition of refugees is imbued with an emphasis on human rights, and draws on the following excerpt to guide her claims:

> The Conference, [e]xpresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides (United Nations 1951).

Given this intention and the fact that a climate migrant's entitlement to human rights is no different than that of traditional refugees, there are grounds for using the concept of human rights to expand the existing 'refugee' definition (Duong 2010, 1262). This claim is furthered by an understanding of the ways in which climate change affects several universal rights, such as affecting the right to life on account of storm surges, rising sea levels, drought and famine; the right to health because of how climatic changes affect food supply and the incidence of disease; and the right to self-determination and cultural expression for Indigenous peoples due to the way their lives are inextricably linked to the environment and its preservation (Duong 2010, 1256-1257). The human rights of climate change migrants should certainly be protected, and there is no reason why the *Convention* is the only means by which this goal can be achieved.

There are numerous limitations to expanding the refugee definition to include climate migrants. For one, refugee law differentiates between 'refugees', those who cross national boundaries, and IDPs, those who are internally displaced because each are entitled to different forms of assistance (ibid, 510). However, there is flexibility for climate change migrants in this regard, as many migrants are likely to have previously experienced internal displacement with climatic changes before eventually necessitating cross-border migration (Nishimura 2015, 113; Williams 2008, 513). Because climate change migrants are likely to move between the definitions of 'refugees' and 'IDPs' over time, it therefore does not make sense to have a regulation that differentiates the rights and protections afforded to individuals based on whether they are internally displaced or crossing a border.

Another reason why some hesitate to include climate change refugees into the traditional paradigm is that the expansion of this regulation could dilute protections for traditional refugees, or alternately, create tensions between the two groups (Docherty and Giannini 2009, 393). This is especially true because if the definition of refugees were to be expanded, the United Nations High Commissioner for Refugees (UNHCR) would likely be responsible for climate migrants' management and protection. The organization already faces lamentable resource constraints that prevent it from providing effective, sustainable services to the many refugees it is currently responsible for. Adding the additional category of climate change migrants would involve a further expansion of its mandate and require resources that it does not have (Nishimura 2015, 122).

Additionally, there are more conceptual concerns with incorporating climate change refugees into the UNHCR's mandate. It argues that there are two sub-groups of environmental refugees: (a) those whose governments are partially culpable in the environmental destruction or environmentally-induced displacement, thereby precluding the UNHCR from adopting responsibility for the welfare of those affected, or (b) those whose governments are unable to offer any assistance to their citizens because of the nature of the environmental impact (Williams 2008, 510). Those in the first category could conceivably qualify for protection under the refugee regime, but the latter group would likely not be able to. Therefore, they argue that lumping these two groups together could undermine efforts to help either group or to address the root causes of either type of displacement (ibid). This also demonstrates an overall difficulty that the *Convention* has in addressing the range of displacement types discussed earlier in the paper: each type of displacement requires a unique response based on different communities' capacities to adapt to climate change (Nishimura 2015, 124). This required variability of response calls into question whether the *Convention*, given its narrow and fixed framing, would be the best instrument to deal with climate-induced displacement.

There are individuals who recognize the shortcomings of the *Convention* and suggest using another existing international framework instead: The United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC, although relevant in the sense that it addresses climate change, deals exclusively with interstate relations, and as such, is not designed to provide humanitarian aid or human rights protections (Docherty and Giannini 2009, 395). It also focuses almost exclusively on climate change prevention, and its few attempts to recognize and act on climate-induced migration have resulted in voluntary, non-specific, and non-actionable measures (Nishimura 2015, 116). A similar critique is that the UN Conference of Parties (COP)'s accord-making process is slow and inefficient, and therefore may not provide the degree of responsiveness or urgency necessary for handling climate-induced migration (Nishimura 2015, 116). Since this approach is thus inadequate for addressing climate-induced migration, the international community should therefore move towards creating new agreements that can better serve migrants' needs.

Docherty and Giannini (2009) suggest

United Nations Headquarters in New York City.

the creation of a new international instrument. However, given that climate change and climate change-induced migration cuts to the heart of the question of state sovereignty and requires certain states to accept responsibility for their actions, it is likely that such an instrument would face a great deal of political resistance (Williams 2008, 517). Notwithstanding the practical challenges of implementing a new international instrument, this paper argues that Williams' suggestion of creating several regional agreements under a common framework umbrella would prove to be a better approach (2008, 518).

By promoting the notion of subsidiarity, Williams makes a convincing case that climate-induced migration should be handled at the regional level (2008). This approach would likely face fewer political obstacles and allow for a degree of adaptability not provided by international instruments. Regional organizations are better equipped to handle climate-induced migration because most displaced people who leave their country will either be looking for, or be forced to migrate to, another place within the same region (ibid, 519). Furthermore, regional agreements allow countries to build upon existing socio-economic and cultural ties to create an agreement that is best suited to the needs and capabilities of the region in question (ibid, 521). These agreements could take place either within existing organizations, such as the AU, EU, ASEAN, or among other regional partners who have strong histories of cooperation (ibid). Although international support and cooperation is still required, this approach would limit the number of political obstacles that a similar but wider international agreement would face, allowing for greater experimentation, the establishment of best practices, and flexibility in recognizing the varying needs of climate migrants (ibid).

Williams suggests that these regional agreements should create a graduated scale of status for 'refugees' with associated protections; the range would run from an acute form of refugee status, afforded to those for whom return is impossible (e.g. those from Pacific Island states), to those enduring a more chronic form, where environmental resources are gradually being degraded (ibid, 522). These agreements can incorporate and build upon

existing principles of internal displacement to fully acknowledge the complexity of the climate change migrant experience. To that effect, these agreements might also benefit from viewing migration as a form of adaptation so as to have mechanisms in place that allow for planned or managed migration, rather than simply reacting to climate-induced displacement after the fact (Nishimura 2015, 132). These mechanisms must also be imbued with strong human rights protections and adopt a participatory and collaborative relationship with the affected migrant populations (ibid). Some degree of coordination should be facilitated between these various regional organizations by an existing international one, like the UNFCCC or the UNHCR, as this would create some level of international accountability while maintaining the flexibility and responsiveness allowed of regional agreements (Williams 2008, 521; Nishimura 2015, 132).

The narrow scope of the *Refugee Convention*, its inability to adapt to the varying needs of different climate migrants, and its exclusive focus on trans-border migration render it an inappropriate means by which to address the claims of climate change migrants. The UNFCCC is likewise ill-suited to address these claims largely because of its focus on inter-state relations and climate change prevention rather than remedial mechanisms. However, the insufficiency of present institutions in addressing climate-induced displacement offers an opportunity to develop a new set of regional regimes that will be more adaptable, responsive, and capable of protecting the rights of these migrants.

Bibliography

Bonnie Docherty; Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees," Harvard Environmental Law Review vol 33, no. 2, 2009, pp. 349-404.

Byravan, Sujatha. "Climate Policy and the Poor: Some Perspectives." *Environmental Justice*, vol. 7, no. 5, 17 Oct. 2014, pp. 142–145., doi:10.1089/env.2014.0011.

Cooper, Jessica B. "Environmental Refugees: Meeting the Requirements of the Refugee Definition," New York University Environmental Law Journal vol. 6, no. 2, 1998, pp. 480-530

Duong, Tiffany TV. "When Islands Drown: The Plight of Climate Change Refugees and Recourse to International Human Rights Law," *University of Pennsylvania Journal of International Law,* vol 31, no. 4, Summer 2010, pp. 1239-1266.

Fraser, Selwyn. "Climate Persecutors: Climate Change Displacement and the International Community as Persecutor," *New Zealand Journal of Environmental Law,* vol. 20, 2016, pp. 107-134.

"Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims." OHCHR, January 21, 2020. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E.

"New Zealand: 'Climate Change Refugee' Case Overview." The Law Library of Congress. Government of the United States of America, July 1, 2015. https://www.loc.gov/law/help/climate-change-refugee/new-zealand.php#Refugee.

Nishimura, Lauren. "Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies." International Journal of Refugee Law, vol. 27, no. 1, 11 Feb. 2015, pp. 107–134., doi:10.1093/ijrl/eev002.

Williams, Angela. "Turning the Tide: Recognizing Climate Change Refugees in International Law." Law & Policy, vol. 30, no. 4, Oct. 2008, pp. 502–529., doi:10.1111/j.1467-9930.2008.00290.x.

United Nations. "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons." Refworld. United Nations, July 25, 1951. https://www.refworld.org/docid/3e2becbb4.html.

United Nations. "UNHCR Note on the Principle of Non-Refoulement." Refworld, November 1997. https://www.refworld.org/docid/438c6d972.html.

The United Nations. 1969. "Vienna Convention on the Law of Treaties." *Treaty Series* 1155 (May): 331.

The Gambia's Justice Minister, Abubacarr Tambadou, speaks in front of the International Court of Justice on December 10, 2019.

Questions of Genocide in Myanmar

by Kaitlyn Min

On August 25th, 2017, the Arakan Rohingya Salvation Army (ARSA) launched attacks on 30 police posts that left 12 people dead.[1] In the months that followed, the Myanmar military, known as the Tatmadaw, along with local mobs targeted the Rohingya population by burning villages and attacking civilians that left hundreds if not thousands dead and many more injured, inciting a massive flood of Rohingya refugees to flee Myanmar.[2] The actions of the government of Myanmar cannot be denied, but whether they constitute genocide remains to be decided by the International Court of Justice (ICJ). Through discussion of the legal genealogy of genocide, legal requirements needed to prove genocidal intent, and comparisons with previous rulings by the ICJ, we can assess the merits of the case being put forth by the Gambia. This paper will argue that the Gambia will be able to prove that genocide occurred in Myanmar and that the government of Myanmar failed to prevent genocide from occurring, but Myanmar itself will not be found guilty of genocide or attempt of genocide.

The Republic of the Gambia initiated proceedings against the Republic of the Union of Myanmar in the International Court of Justice on November 11th, 2019 with the backing of 56 other members of the Organization of Islamic Cooperation (OIC).[3] The ICJ is the United Nation's highest court used to settle legal disputes between states based on the principle of consent from both parties.[4] The ICJ is comprised of 15 international judges who act as civil servants, in addition to an extra appointed judge from each country that is party to the case, resulting in a total of 17 judges.[5] On one side, the case is being headed by Abubacarr Marie Tambadou, the Attorney General and Minister of Justice of Gambia, while on the other, Aung San Suu Kyi, the State Counsellor of Myanmar, leads the case.[6]

The Gambia has accused Myanmar of violating the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, also known as the "Genocide Convention", specifically Articles I, III, IV, V, and VI.[7] Both countries have signed and ratified the treaty, thus giving the ICJ jurisprudence to try this case.[8] Further, the Gambia requested that provisional measures be issued by the ICJ in light of the "ongoing, severe and irreparable harm" being done to the Rohingya, as well as what it considers an ongoing genocide.[9] As of yet, there has been no determination by the International Court of Justice on whether genocide or attempted genocide was committed. In fact, this case is expected to take many years to adjudicate, especially considering the serious nature of the charges. However, it is important to note that on January 23rd, 2020, the court issued a unanimous provisional ruling that requires the Myanmar government to take action to prevent any genocidal acts while the case is ongoing.[10]

The Gambia is a small and relatively poor country, geographically disconnected from Myanmar and not directly affected by the actions of the government of Myanmar against the Rohingya population. However, the Gambia felt compelled to bring a case against Myanmar to the ICJ. Firstly, the Genocide Convention allows any signatory state to bring a case against another for genocide because not engaging in genocide is considered an obligation *erga omnes* — "an obligation owed to everyone".[11] Secondly, the OIC, of which the Gambia is a member, is made up of Muslim majority countries and has an interest in protecting the Rohingya, a predominantly Muslim ethnic group.[12] Since 2017, the OIC has been pushing for action by one of its member states on behalf of the Rohingya.[13] Combined with the fact that the person spearheading the case, Abubacarr Tambadou, served as a prosecutor for the UN tribunal for Rwanda and has stated that he sees many parallels between the two situations, the Gambia was well-positioned to bring the case forward.[14]

The Gambia brought forth the case against Myanmar following widespread global outrage at video footage and testimonials from the hundreds of thousands of Rohingya fleeing Myanmar in 2017. However, relations between the Myanmar government of a Buddhist-majority country and the Rohingya, a predominantly Muslim ethnic minority, have been tense for many decades and included periods of outright violence. Prior to 1989, Myanmar was known as Burma. In 1962, the Burmese military junta led a coup d'etat placing the country under anti-democratic military rule until 2011, although the military still holds a significant amount of political power.[15] Since 1962, the Rohingya have been persecuted by the Myanmar government through measures such as being denied citizenship and being excluded from the census. The Rohingya claim that they are indigenous to the region and have been settled there for hundreds of years, thus

having a rightful claim to the land.[16] But the Myanmar government claims that the Rohingya are illegal immigrants from Bangladesh and thus do not recognize the Rohingya as a separate ethnic group.[17] This conflict over the origins of the Rohingya came to a head with *The Burma Citizenship Act of 1982,* which granted full citizenship to only those who could prove their family residency in Burma prior to 1823 — an onerous requirement that is almost impossible to prove.[18] The other way to gain Burmese citizenship is to be part of one of the 135 recognized ethnic groups, but the Rohingya are not included in this list.[19] Following the 1982 Act, the vast majority of Rohingya were stripped of citizenship and became one of the largest stateless groups in the world.[20] The Rohingya are designated as "foreigners" unable to buy property, obtain a passport, travel freely, hold public office or vote.[21] They are also severely limited in their access to education, healthcare, and employment.[22] To this day, *The Citizenship Act of 1982* remains in place.[23] And official Myanmar governmental statements and documents use the pejorative "Bengali" or "kalar" instead of Rohingya.[24]

The Rohingya have had to flee their villages before on numerous occasions in 1978 and 1991 following military operations, with repatriation agreements later enacted to allow most of the refugees to return.[25] From 1994 to 2018, Rohingya couples had to receive official permission from local authorities to marry, which often required bribes that can be prohibitively expensive.[26] Additionally, the marriage license photographs required men to be clean-shaven and prohibited women from wearing face coverings which conflict with Islamic religious beliefs.[27] Starting in 2005, the townships of Maungdaw and Buthidaung in northern Rakhine added an additional requirement that couples wishing to obtain a marriage license had to sign a document agreeing to have no more than two children.[28] There are numerous other instances of discrimination facing the Rohingya including restrictions on freedom of movement within Myanmar and access to higher education. In sum, the Rohingya have been persecuted and discriminated against in Myanmar for many decades.

While this case is still pending and both parties have many months to present their petitions, both sides presented oral arguments in front of the ICJ on December 10th to 12th, 2019. Both sides have also made their arguments in front of the court of public opinion. While there is consensus on the general events that occurred in Myanmar, it is difficult to pin down specific facts, even facts as simple as the number of casualties, as both sides provide different figures. The Gambia relies heavily on the report by the UN Independent International Fact-finding Mission (IIFM) on Myanmar conducted in 2017, the UN Special Rapporteur's report, and findings from "international human rights organizations and other credible sources".[29] However, Myanmar has refused entry to UN investigators, which has placed a significant barrier to carrying out fact-finding missions. Further, the Gambia has alleged that Myanmar is attempting to cover up what happened by destroying evidence.[30] In response, Myanmar created its own Independent Commission of Enquiry (ICOE) in June 2018, which investigated and released its findings just days before the January 23rd provisional ruling.[31] The full 461-page report has not been released to the public, but the executive summary states that "war crimes, serious human rights violations, and violations of domestic law took place", but that those acts were not committed with "genocidal intent".[32]

At the beginning of 2015, there were over one million Rohingya living mostly in the northern Rakhine state of Myanmar, making them one of Myanmar's largest minority

Rohingya refugees in Bangladesh on August 28, 2017.

groups.[33] In the following years, over 900,000 Rohingya refugees have fled to Bangladesh alone, where there are lax border controls.[34] Even more have fled to Pakistan, Saudi Arabia, and other surrounding countries.[35] As of April 2020, less than half a million Rohingya are still living in Myanmar. Over 100,000 Rohingya are in internally displaced persons camps, and even more are in refugee camps in Bangladesh.[36] "Clearance operations" by the Tatmadaw in coordination with the Myanmar Police Force and Border Guard Police began on October 9th, 2016 in response to attacks on three Border Guard Police posts.[37] The Gambia characterizes Myanmar's response through this operation as the systemic use of violence, as Rohingya civilians were "shot, killed, forcibly disappeared, raped, gang raped, sexually assaulted, detained, beat and tortured".[38] Corroborated by satellite imagery, in mixed ethnicity villages, only Rohingya settlements and buildings were burned down while "ethnic Rakhine people and habitations remained untouched".[39] That wave of clearance operations ended on February 16th, 2017 only to resume months later on August 25th, 2017 after ARSA militants attacked 30 police outposts.[40] One thousand and six hundred members of the Tatmadaw's 33rd and 99th Light Infantry Divisions were airlifted into Rakhine to assist with those clearance operations.[41] Myanmar asserts that their actions constituted legitimate military action against violent rebels, like the ARSA, and that the clearance operations were only in response to terrorist activity.[42] The Gambia claims that the military response came only hours after the ARSA attacks. This suggests that the military response "had been pre-planned by senior Government officials" as it would have "required significant logistical planning over a considerable period".[43] The UN IIFM states that soldiers carried out attacks "without any apparent military objective" and did not distinguish between legitimate military targets and civilians".[44]

International bodies, including the ICJ, are hesitant to use such a legally specific and politically charged term as 'genocide', preferring instead to label such acts as discrimination, ethnic cleansing, and persecution of

minorities.[45] 'Ethnic cleansing' is not a legal term, unlike genocide, and thus does not confer legal or moral obligations to states who use the term.[46] However, based on the initial ruling, which implemented a provisional measure of protection, as well as precedent from past cases, this analysis holds that Myanmar will be found guilty of having breached Article I, which requires states "to prevent and to punish" genocide.[47] But this paper also contends that Myanmar will not be found guilty of Article III, which is complicity in genocide, committing genocide, conspiracy to commit genocide or attempting to commit genocide, due to the high burden of proof required. This analysis will proceed to demonstrate that Myanmar lacks the necessary requirement of genocidal intent under Article III of the Genocide Convention, and thus will not be found guilty of committing genocide.

Genocide was first articulated as a legal concept by Raphael Lemkin in 1933 at the Fifth International Conference for the Unification of Criminal Law regarding the Armenian Genocide.[48] This concept was then expanded upon by Lemkin in 1944 in relation to the Nazi regime's policies of occupation and expansion.[49] He defined genocide as "the destruction of a nation or of an ethnic group" through "a coordinated plan of different actions".[50] The concept of genocide was further popularized during the International Military Tribunal at Nuremberg where the concept of "crimes against humanity" emerged.[51] Genocide was written into international law in 1946 with the passage of General Assembly Resolution 96-I.[52] The Genocide Convention was then approved by the UN General Assembly in 1948.[53] The International Criminal Tribunal for Rwanda, established in 1994, determined that the systemic and mass-killing of the Tutsi population constituted genocide.[54] This marked the first time that the 1948 Genocide Convention was interpreted and enforced by an international tribunal.[55] Following the crimes against humanity committed in the 1990s in the Balkans and in Rwanda, the principle of the Responsibility to Protect was implemented in 2005, which was endorsed by all member states of the United Nations.[56] As a commitment to "collective action" in cases where states failed to protect their own population from genocide, this international norm served to confer the responsibility to prevent and punish genocide on all member states.[57]

Raphael Lemkin, Polish lawyer and linguist who coined the term "genocide".

The legal standard for what constitutes genocide is not clearly defined as it evolves with every case that is tried. Perpetrators of genocide are generally unwilling to admit their intentions, instead offering explanations ranging from outright denial to classifying deaths as casualties of war.[58] The Gambia needs to establish that the government of Myanmar had genocidal intent, or *mens rea*. Without establishing the *mens rea* to "destroy an ethnic, national, racial or religious group", Myanmar's

actions cannot be qualified as a genocide.[59] However, few perpetrators leave explicit plans detailing their intentions to commit genocide. Combined with the previously mentioned difficulties of obtaining reliable information on the situation, there is a very high burden of proof that the Gambia will need to establish.

The case of *Bosnia and Herzegovina v. Serbia and Montenegro* assists in evaluating the chances of the Gambia's success. Until the Bosnian Genocide case in 2007, there was no guide to establishing that states could commit genocide. This is because all previous rulings prosecuted individuals for the crime of genocide, and not states.[60] In the Bosnia case, the Court upheld that genocide did occur during the Bosnian War, however, Serbia was not held responsible or complicit.[61] The judges decided that discriminatory intent is not enough to constitute genocidal intent, but rather *dolus specialis*, or specific intent, is required, which is a much higher standard that must establish that "the perpetrator clearly [sought] to produce the act charged".[62] The Court distinguished between the terms 'ethnic cleansing' and 'genocide', as the act of using force or coercion in an ethnically homogeneous region does not necessarily mean it was carried out with the purpose "to destroy, in whole or in part".[63] Further, "the Court requires that it be fully convinced that allegations made in the proceedings [...] have been clearly established", meaning that while a consistent pattern of conduct may be used to prove intent, the intent to destroy must be the only conclusion that can be reasonably drawn.[64] Based on the standards set by the ICJ in that ruling, this analysis finds that it is highly unlikely that Myanmar will be found guilty of committing genocide, conspiracy to commit genocide, or attempting to commit genocide under Article III of the Genocide Convention.

However, the Court also found that Serbia failed to prevent genocide from occurring in violation of Article I. The Court determined that states have "a duty to act [to prevent genocide] which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome".[65] Failure to prevent genocide was also defined distinctly from complicity in genocide based on two criteria. First, the duty to prevent genocide may be breached by a simple failure to act, whereas complicity involves a proactive act in the form of aid or support.[66] Second, the duty to prevent genocide is invoked by the state's understanding that genocide *could* be perpetrated, whereas complicity includes knowing that genocide is going to be conducted, or that it is ongoing, with a high degree of certainty.[67] Based on this, while the Gambia may not be able to prove that Myanmar is guilty of committing genocide, they may be able to establish that genocide did occur in Myanmar. There are three elements that must be proven in order to legally determine the occurrence of genocide, which are "(i) enumerated acts of violence; (ii) committed against a protected group; (iii) with the intent to destroy this group in whole or in part".[68] In the case of Myanmar, the mass-killings, systematic use of sexual violence, and destruction of property fulfill requirements (i) and (ii). And the exclusive targeting of Rohingya buildings established through satellite imagery constitutes an intent to cause the destruction of an ethnic group, fulfilling requirement (iii).[69] Additionally, genocidal intent can be established through "specific utterances of commanders and direct perpetrators" in combination with government policy that was explicitly designed to "alter the demographic composition of Rakhine State".[70] For example, the Commander-in-Chief of the Tatmadaw, Senior General Min Aung Hlaing, wrote in a Facebook post that "the Bengali problem was a longstanding one which has become an

unfinished job".[71] The Rakhine Nationalities Development Party wrote in 2012 that "crimes against humanity or inhuman acts may justifiably be committed as with Hitler and the Holocaust", and that the next step with the Rohingya would be "getting it over and done with".[72] Numerous more instances of lower-ranking military personnel discussing their intentions appear online, such as one Facebook exchange between a lieutenant and his friend en route to Rakhine where the friend commented "Crush the kalar, buddy", to which the lieutenant replied "Will do".[73] Thus, while tracing the chain of command back to the state is difficult to establish, there exists enough evidence that the troops deployed had intentions to destroy the Rohingya, at least in part, regardless of where they received those orders from.

In conclusion, this paper argues that it will be extremely challenging for the Gambia to present evidence sufficient to find that Myanmar is guilty of committing genocide, conspired to commit genocide, attempted to commit genocide, or was complicit in the genocide under Article III of the Genocide Convention. However, this analysis finds that the Gambia will be successful in proving that genocide did occur in Myanmar. Furthermore, similar to the Bosnian Genocide case, there seems to be sufficient evidence to prove that Myanmar failed in its Responsibility to Protect by failing to prevent genocide from occurring.

Endnotes

1. "Myanmar Rohingya: What You Need to Know about the Crisis." BBC News. BBC, January 23, 2020. https://www.bbc.com/news/world-asia-41566561.
2. Ibid.
3. "Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice." Human Rights Watch, December 9, 2019. https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court.
4. Ibid.
5. Ibid.
6. *Application instituting proceedings and Request for the indication of provisional measures* (Republic of the Gambia v Republic of the Union of Myanmar), Institution of Proceedings, I.C.J. 11 November 2019.
7. Ibid.
8. Ibid., 6.
9. Ibid., 38.
10. "War Crimes, Not Genocide: Myanmar Foreign Ministry." The Daily Star, January 24, 2020. https://www.thedailystar.net/rohingya-crisis/news/war-crimes-not-genocide-myanmar-foreign-ministry-1858489.
11. Longobardo, Marco. "Genocide, Obligation Serga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence." The International Journal of Human Rights 19, no. 8 (2015): 1199–1212. https://doi.org/10.1080/13642987.2015.1082834.
12. Kirby, Jen. "The Top UN Court Ordered Myanmar to Protect the Rohingya. An Expert Explains What It Means." Vox. Vox, January 24, 2020. https://www.vox.com/world/2020/1/24/21078774/icj-myanmar-roghingya-genocide-gambia.
13. Ibid.
14. Ba, Oumar. "Analysis | This Tiny African Country Got the U.N.'s Top Court to Investigate Myanmar for Genocide." The Washington Post. WP Company, January 29, 2020. https://www.washingtonpost.com/politics/2020/01/29/this-tiny-african-country-got-uns-top-court-investigate-myanmar-genocide/.
15. Smith, Matthew. "'All You Can Do Is Pray': Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State." Human Rights Watch, October 3, 2017. https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims.
16. Albert, Eleanor, and Lindsay Maizland. "What Forces Are Fueling Myanmar's Rohingya Crisis?" Council on Foreign Relations. Council on Foreign Relations, January 23, 2020. https://www.cfr.org/backgrounder/rohingya-crisis.
17. Blakemore, Erin. "Who Are the Rohingya People?" National Geographic. National Geographic, June 14, 2019. https://www.nationalgeographic.com/culture/people/reference/rohingya-people/.
18. "Country Policy and Information Note Burma: Rohingya (Including Rohingya in Bangladesh)." Country of Origin Information. UK Home Office, February 6, 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790310/Burma_-_Rohingya_-_CPIN_-_v2.0__March_2019_.pdf.
19. Ibid.
20. Smith, Matthew. "Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar." Fortify Rights, 2014. 16.
21. Wallace, Julia. "Myanmar Casts Minorities to the Margins as Citizenship Law Denies Legal Identity." The Guardian. Guardian News and Media, November 3, 2016. https://www.theguardian.com/global-development/2016/nov/03/myanmar-casts-minorities-to-margins-citizenship-law-denies-legal-identity.
22. Ibid.
23. Al Jazeera. "Who Are the Rohingya?" Al Jazeera. Al Jazeera, April 18, 2018. https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html.
24. Smith, Matthew. "Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar." Fortify Rights, 2014. 16.
25. Ibid., 51.
26. "Country Policy and Information Note Burma" February 6, 2019. 15.
27. Smith, Matthew. "Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar." Fortify Rights, 2014. 30.
28. "Country Policy and Information Note Burma" February 6, 2019. 20.
29. *Application instituting proceedings and Request for the indication of provisional measures*, I.C.J. 2.
30. *Application instituting proceedings and Request for the indication of provisional measures*, I.C.J. 40.
31. Nachemson, Andrew. "Myanmar to Release Its Rohingya Crackdown Investigation Results." Al Jazeera. Al Jazeera, January 16, 2020. https://www.aljazeera.com/news/2020/01/myanmar-release-rohingya-crackdown-investigation-results-200115232104648.html.
32. "Independent Commission of Enquiry." Independent Commission of Enquiry. National Reconciliation and Peace Centre, January 20, 2020. https://www.icoe-myanmar.org/icoe-pr-final-report.
33. Lumpur, Kuala, Shamlapur, and Sittwe. "The Most Persecuted People on Earth?" The Economist. The Economist Newspaper, June 13, 2015. https://www.economist.com/asia/2015/06/13/the-most-persecuted-people-on-earth.
34. Albert, Eleanor, and Lindsay Maizland. "What Forces Are Fueling Myanmar's Rohingya Crisis?" Council on Foreign Relations. Council on Foreign Relations, January 23, 2020. https://www.cfr.org/backgrounder/rohingya-crisis.
35. Ibid.
36. "Country Policy and Information Note Burma." February 6, 2019. 40.
37. United Nations, Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64 (12 September 2018), available from undocs.org/en/A/HRC/39/64. 10.
38. *Application instituting proceedings and Request for the indication of provisional measures*, I.C.J. 20.
39. Ibid., 31.
40. United Nations, *Report of the independent international fact-finding mission on Myanmar*, 8.
41. *Application instituting proceedings and Request for the indication of provisional measures*, I.C.J. 26.
42. "War Crimes, Not Genocide: Myanmar Foreign Ministry." The Daily Star, January 24, 2020. https://www.thedailystar.net/rohingya-crisis/news/war-crimes-not-genocide-myanmar-foreign-ministry-1858489.
43. United Nations, *Report of the independent international fact-finding mission on Myanmar*, 10.
44. Ibid., 12.
45. Quran, Layla. "Whats the Difference between Genocide and Ethnic Cleansing?" PBS. Public Broadcasting Service, October 24, 2017. https://www.pbs.org/newshour/world/whats-the-difference-between-genocide-and-ethnic-cleansing.
46. Longobardo, Marco. "Genocide, Obligation Serga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence." The International Journal of Human Rights 19, no. 8 (2015): 1199–1212. https://doi.org/10.1080/13642987.2015.1082834.
47. UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, United Nations, Treaty Series, vol. 78, 277. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf, 1.
48. Andreopoulos, George J. *Genocide: Conceptual and Historical Dimensions*. Philadelphia: University of Pennsylvania Press, 1997. 2.
49. Meiches, Benjamin. *The Politics of Annihilation: A Genealogy of Genocide*. Minneapolis: University of Minnesota Press, 2019. 4.
50. Lemkin Rafaël. *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington: Carnegie Endowment for International Peace, Department of International Law, 1944. 79.
51. Meiches, Benjamin. *The Politics of Annihilation: A Genealogy of Genocide*. Minneapolis: University of Minnesota Press, 2019. 5.
52. Andreopoulos, George J. *Genocide: Conceptual and Historical Dimensions*. Philadelphia: University of Pennsylvania Press, 1997. 2.
53. Ibid.
54. Kreß, Claus. "The Crime of Genocide under International Law." International Criminal Law Review 6, no. 4 (2006) https://doi.org/10.1163/157181206778992287. 467.
55. Ibid.
56. "Responsibility to Protect." United Nations Office on Genocide Prevention and the Responsibility to Protect. United Nations. Accessed November 8, 2020. https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.
57. Ibid.
58. Andreopoulos, George J. *Genocide: Conceptual and Historical Dimensions*. Philadelphia: University of Pennsylvania Press, 1997. 7.

59. UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 1.
60. Paul, James. "ICJ Bosnia Ruling Sets Important Precedents." Global Policy Forum, February 28, 2007. https://www.globalpolicy.org/component/content/article/163/28681.html.
61. Islam, Md. Rizwanul. "Gambia's Genocide Case Against Myanmar: A Legal Review." The Diplomat. The Diplomat, November 26, 2019. https://thediplomat.com/2019/11/gambias-genocide-case-against-myanmar-a-legal-review/.
62. Goldsmith, Katherine. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach." *Genocide Studies and Prevention* 5, no. 3 (2010). https://doi.org/10.3138/gsp.5.3.238. 241.
63. Savoie, Pierre-Olivier, and J Morgan-Foster . "World Court Finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide." The American Society of International Law. The American Society of International Law, April 3, 2007. https://www.asil.org/insights/volume/11/issue/9/world-court-finds-serbia-responsible-breaches-genocide-convention-not.
64. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, 90.
65. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. 194.
66. Savoie, Pierre-Olivier, and J Morgan-Foster . "World Court Finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide." The American Society of International Law. The American Society of International Law, April 3, 2007. https://www.asil.org/insights/volume/11/issue/9/world-court-finds-serbia-responsible-breaches-genocide-convention-not.
67. Ibid.
68. Schaack, Beth Van. "Determining the Commission of Genocide in Myanmar." *Journal of International Criminal Justice* 17, no. 2 (January 2019). https://doi.org/10.1093/jicj/mqz008.
69. United Nations, *Report of the independent international fact-finding mission on Myanmar*, 31.
70. Ibid., 16.
71. Ibid., 8.
72. Nice, Geoffrey, and Francis Wade. "Preventing the Next Genocide." Foreign Policy, May 12, 2014. https://foreignpolicy.com/2014/05/12/preventing-the-next-genocide/.
291.
73. Lewis, Simon. "Special Report - The Shock Troops Who Expelled the Rohingya from Myanmar." Reuters. Thomson Reuters, June 26, 2018. https://uk.reuters.com/article/uk-myanmar-rohingya-battalions/special-report-the-shock-troops-who-expelled-the-rohingya-from-myanmar-idUKKBN1JM1YA.

Bibliography

Al Jazeera. "Who Are the Rohingya?" Al Jazeera. Al Jazeera, April 18, 2018. Available at: https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html.

Albert, Eleanor, and Lindsay Maizland. "What Forces Are Fueling Myanmar's Rohingya Crisis?" Council on Foreign Relations. Council on Foreign Relations, January 23, 2020. Available at: https://www.cfr.org/backgrounder/rohingya-crisis.

Andreopoulos, George J. *Genocide: Conceptual and Historical Dimensions*. Philadelphia: University of Pennsylvania Press, 1997.

Application instituting proceedings and Request for the indication of provisional measures (Republic of the Gambia v Republic of the Union of Myanmar), Institution of Proceedings, I.C.J. 11 November 2019.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007.

Ba, Oumar. "Analysis | This Tiny African Country Got the U.N.'s Top Court to Investigate Myanmar for Genocide." The Washington Post. WP Company, January 29, 2020. Available at: https://www.washingtonpost.com/politics/2020/01/29/this-tiny-african-country-got-uns-top-court-investigate-myanmar-genocide/.

Blakemore, Erin. "Who Are the Rohingya People?" National Geographic. National Geographic, June 14, 2019. Available at: https://www.nationalgeographic.com/culture/people/reference/rohingya-people/.

Chalk, Frank Robert, and Kurt Jonassohn. *The History and Sociology of Genocide: Analyses and Case Studies*. Yale University Press, 1990.

"Country Policy and Information Note Burma: Rohingya (Including Rohingya in Bangladesh)." Country of Origin Information. UK Home Office, February 6, 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790310/Burma_-_Rohingya_-_CPIN_-_v2.0__March_2019_.pdf.

Goldsmith, Katherine. "The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach." *Genocide Studies and Prevention* 5, no. 3 (2010): 238–57. Available at: https://doi.org/10.3138/gsp.5.3.238.

Islam, Md. Rizwanul. "Gambia's Genocide Case Against Myanmar: A Legal Review." The Diplomat. The Diplomat, November 26, 2019. Available at: https://thediplomat.com/2019/11/gambias-genocide-case-against-myanmar-a-legal-review/.

Kirby, Jen. "The Top UN Court Ordered Myanmar to Protect the Rohingya. An Expert Explains What It Means." Vox. Vox, January 24, 2020. Available at: https://www.vox.com/world/2020/1/24/21078774/icj-myanmar-roghingya-genocide-gambia.

Kreß, Claus. "The Crime of Genocide under International Law." *International Criminal Law Review* 6, no. 4 (2006): 461–502. Available at: https://doi.org/10.1163/157181206778992287.

Lemkin Rafaël. *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress.* Washington: Carnegie endowment for international peace, Department of international law, 1944.

Lewis, Simon. "Special Report - The Shock Troops Who Expelled the Rohingya from Myanmar." Reuters. Thomson Reuters, June 26, 2018. Available at: https://uk.reuters.com/article/uk-myanmar-rohingya-battalions/special-report-the-shock-troops-who-expelled-the-rohingya-from-myanmar-idUKKBN1JM1YA.

Longobardo, Marco. "Genocide, Obligation Serga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence." *The International Journal of Human Rights* 19, no. 8 (2015): 1199–1212. Available at: https://doi.org/10.1080/13642987.2015.1082834.

Lumpur, Kuala, Shamlapur, and Sittwe. "The Most Persecuted People on Earth?" The Economist. The Economist Newspaper, June 13, 2015. Available at: https://www.economist.com/asia/2015/06/13/the-most-persecuted-people-on-earth.

Meiches, Benjamin. *The Politics of Annihilation: A Genealogy of Genocide.* Minneapolis: University of Minnesota Press, 2019.

"Myanmar Finds War Crimes but No Genocide in Rohingya Crackdown." Al Jazeera. Al Jazeera, January 21, 2020. Available at: https://www.aljazeera.com/news/2020/01/myanmar-finds-war-crimes-genocide-rohingya-crackdown-200121012116763.html.

"Myanmar Rohingya: What You Need to Know about the Crisis." BBC News. BBC, January 23, 2020. Available at: https://www.bbc.com/news/world-asia-41566561.

Nachemson, Andrew. "Myanmar to Release Its Rohingya Crackdown Investigation Results." Al Jazeera. Al Jazeera, January 16, 2020. Available at: https://www.aljazeera.com/news/2020/01/myanmar-release-rohingya-crackdown-investigation-results-200115232104648.html.

Nice, Geoffrey, and Francis Wade. "Preventing the Next Genocide." Foreign Policy, May 12, 2014. Available at: https://foreignpolicy.com/2014/05/12/preventing-the-next-genocide/.

"Independent Commission of Enquiry." *Independent Commission of Enquiry*. National Reconciliation and Peace Centre, January 20, 2020. Available at: https://www.icoe-myanmar.org/icoe-pr-final-report.

"Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice." Human Rights Watch, December 9, 2019. Available at: https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court.

Quran, Layla. "Whats the Difference between Genocide and Ethnic Cleansing?" PBS. Public Broadcasting Service, October 24, 2017. Available at: https://www.pbs.org/newshour/world/whats-the-difference-between-genocide-and-ethnic-cleansing.

"Responsibility to Protect." United Nations Office on Genocide Prevention and the Responsibility to Protect. United Nations. Accessed April 15, 2020. Available at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.

Savoie, Pierre-Olivier, and J Morgan-Foster . "World Court Finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide." The American Society of International Law. The American Society of International Law, April 3, 2007. Available at: https://www.asil.org/insights/volume/11/issue/9/world-court-finds-serbia-responsible-breaches-genocide-convention-not.

Schaack, Beth Van. "Determining the Commission of Genocide in Myanmar." *Journal of International Criminal Justice* 17, no. 2 (January 2019): 285–323. Available at: https://doi.org/10.1093/jicj/mqz008.

Schabas, William A. *Genocide in International Law: The Crime of Crimes*. Cambridge: Cambridge University Press, 2000.

Smith, Matthew. "Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar." Fortify Rights, 2014.

Smith, Matthew. "'All You Can Do Is Pray': Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State." Human Rights Watch, October 3, 2017. Available at: https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims.

United Nations, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, A/HRC/39/64, September 12, 2018. Available at: undocs.org/en/A/HRC/39/64.

UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, New York, United Nations, Treaty Series, vol. 78, p. 277, December 9, 1948. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

Verdirame, Guglielmo. "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals." *Genocide and Human Rights*, 2017, 111–31. Available at: https://doi.org/10.4324/9781351157568-3.

Wallace, Julia. "Myanmar Casts Minorities to the Margins as Citizenship Law Denies Legal Identity." The Guardian. Guardian News and Media, November 3, 2016. Available at: https://www.theguardian.com/global-development/2016/nov/03/myanmar-casts-minorities-to-margins-citizenship-law-denies-legal-identity.

"War Crimes, Not Genocide: Myanmar Foreign Ministry." The Daily Star, January 24, 2020. Available at: https://www.thedailystar.net/rohingya-crisis/news/war-crimes-not-genocide-myanmar-foreign-ministry-1858489.

Image Bibliography

Page 10: Illustration by Paul Kim for The Walrus depicting 'rap on trial'. Digital image. *The Walrus.* Accessed November 1, 2020. https://thewalrus.ca/rap-on-trial/.

Page 15: The Supreme Court of Canada. Digital image. *Toronto Star.* Accessed November 1, 2020. https://www.thestar.com/opinion/contributors/2020/10/18/supreme-court-nominations-have-become-a-blood-sport-our-own-top-court-shows-they-need-not-be.html.

Page 18: Black power fist with microphone. Digital image. *PNG Arts.* Accessed November 1, 2020. https://www.pngarts.com/explore/107314.

Page 22: Climate change refugees. Digital image. *Help Refugees.* Accessed November 1, 2020. https://helprefugees.org/news/7-ways-climate-change-affects-refugees/.

Page 25: Ioane Teitiota, Kiribati man who sought status as a climate change refugee. Digital image. *BBC News.* Accessed November 1, 2020. https://www.bbc.com/news/world-asia-34674374.

Page 28: United Nations Headquarters in New York City. Digital image. *United Nations.* Accessed November 1, 2020. https://www.un.org/en/un-chronicle/maintaining-inspiration-and-motivation-while-working-build-sustainable-world-peace.

Page 32: The Gambia's Justice Minister, Abubacarr Tambadou, speaks in front of the International Court of Justice on December 10, 2019. Digital Image. *The World.* Accessed November 8, 2020. https://www.pri.org/stories/2019-12-12/gambian-minister-brought-myanmar-hague-name-humanity.

Page 35: Rohingya refugees in Bangladesh on August 28, 2017. Digital image. *The New York Times.* Accessed November 8, 2020. https://www.nytimes.com/2019/09/24/opinion/rohingya-refugees-myanmar-return-bangladesh.html.

Page 36: Raphael Lemkin, Polish lawyer and linguist who coined the term "genocide". Digital image. *NPR.* Accessed November 8, 2020. https://www.npr.org/2014/10/18/356423580/the-man-who-coined-genocide-spent-his-life-trying-to-stop-it.

The University of Toronto Pre-Law Society