Episode Book

EPISODE #6675

How the ICJ proved genocidal intent in Myanmar

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SYNOPSIS

By a 9-6 vote, the International Court of Justice found Myanmar responsible for committing genocide against the Rohingya, marking the first time an international court has held a state liable under the 1948 Genocide Convention. This episode traces the decades-long stripping of Rohingya citizenship, the 2017 Tatmadaw clearance operations, and the legal test the court used to infer genocidal intent. It also examines how the court rejected Myanmar's counter-insurgency defense using the 'only reasonable inference' standard.

TRANSCRIPT



Corn

Nine votes to six. That's the margin by which the International Court of Justice decided this morning that Myanmar committed genocide against the Rohingya — the first time in the history of any international court that a state, as a state, has been found responsible for committing genocide under the nineteen forty-eight Convention. Seven years after Gambia filed the case, two hours to read the judgment out loud.



Herman

And the prompt today comes from Hannah, which she made a point of, because she said Daniel's been talking about nothing else since the ruling came down and she wanted to hear it done properly. She wants the history — who the Rohingya actually are, who did what to them — and then the precise legal machinery: how the court got from atrocities to genocide, how it inferred intent rather than just counting bodies. And then, carefully, what that precedent does to the genocide case against Israel, which she's skeptical of, for the same reasons Daniel's been skeptical of it.



Corn

She said she doesn't want the Gaza argument relitigated. She wants Myanmar as the concrete worked example of what an actual finding looks like.



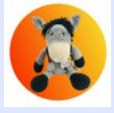
Herman

Then let's do exactly that.



Corn

So start with the threshold question, because the court's first job wasn't the killing at all. It was whether the Rohingya count as a group.



Herman

Right — and that sounds bureaucratic until you see why it had to come first. The Genocide Convention protects national, ethnic, racial and religious groups. If the Rohingya aren't a distinct group, there's no protected group, and without a protected group there is no genocide to discuss, no matter what happened. Myanmar's whole ideological position is that the group doesn't exist as such — the government refuses the word Rohingya entirely,



Herman (continued)

calls them Bengalis, meaning illegal migrants from Bangladesh. The court found the opposite: a distinct ethnic group with their own language, their own culture, self-identifying as Rohingya. Judge Iwasawa, the court's president, read that finding early in the judgment.



Corn

Which is worth pausing on, because it means the denial of the group's existence was itself part of the architecture of what followed. You can't strip a people's citizenship if you've conceded they're a people.



Herman

And they did strip it — nineteen eighty-two, the nationality law. The Rohingya, who are a mostly Muslim, Indo-Aryan ethnolinguistic group from Rakhine State in the west, right on the Bangladesh border, went from being citizens to stateless inside their own country. About one point four million of them before twenty seventeen. No citizenship, restricted movement, restricted education, shut out of civil-service jobs. Some analysts have compared the legal regime to apartheid, and it's not a lazy comparison — it was a codified, layered system of subordination.



Corn

You know what strikes me about the whole setup, Herman? It's the patience of it. Citizenship stripped in eighty-two, then crackdowns in seventy-eight, ninety-one, ninety-two, twenty twelve, twenty fifteen, and then the final one. That's a machine running for decades, not an eruption.



Herman

That's the frame most coverage gets wrong, actually — this gets described as a twenty seventeen crisis, and the clearance operations were twenty seventeen, but the persecution has a half-century rhythm. The twenty twelve riots were a real turning point: thousands driven from their homes into displacement camps that were, by every account, squalid, and many people were still in them five years later when the military phase began.



Corn

And the two sides of the origins dispute — the Rohingya saying they've been in western Myanmar for over a millennium, the state calling them colonial-era migrants. Is that a dispute the court had to resolve?



Herman

No, and that's the elegant part — it didn't have to. The protected-group finding turns on objective distinctness and self-identification, not on whose historical narrative wins. The Rohingya claim indigenous heritage going back over a thousand years; the government says they're postcolonial arrivals from Chittagong. The court didn't referee the history. It asked whether they're a group, and they plainly are.



Corn

The government's position is essentially "you can't destroy what was never here."



Herman

That's the ideological foundation, yes. And the person who built the mechanics on top of it was the Tatmadaw — the Myanmar military. The operations had two phases: a first crackdown from October twenty sixteen to January twenty seventeen, then the major one from August twenty seventeen onward. The trigger for the August phase was a coordinated attack by the Arakan Rohingya Salvation Army, a Rohingya militant group, on police and military installations. And Myanmar's defense in court, from Aung San Suu Kyi's appearance in twenty nineteen right through, was counter-insurgency: we were responding to armed attacks.



Corn

Which is a defense that deserves to be tested, not dismissed. Armies do fight insurgents. What made the court unpersuaded?



Herman

The conduct. In roughly two and a half months, the military razed nearly four hundred villages in northern Rakhine. The court's own summary — Iwasawa reading it this morning — was that security forces "killed thousands of Rohingya civilians, perpetrated widespread acts of sexual violence as well as acts of extreme violence against children and attacked fleeing Rohingya as they sought to flee in large numbers to Bangladesh." That last clause



Herman (continued)

matters. Attacking people as they flee is not counter-insurgency. There's no military objective on the road to Bangladesh.



Corn

No.



Herman

The numbers — the court cited evidence of about ten thousand killed, drawn from the UN fact-finding mission. At least six thousand seven hundred of those died in the first month alone, late August to late September. A separate statistical extrapolation published in January twenty eighteen, built from surveys of over three thousand refugee households, estimated much higher — at least twenty-five thousand killed, eighteen thousand women and girls subjected to gang rape and other sexual violence, over a hundred thousand beaten, thirty-six thousand thrown into fires.



Corn

The gap between ten thousand and twenty-five thousand — is that the court being conservative, or the two sides counting different things?



Herman

Probably both. The court's figure is the one it could ground in the fact-finding mission's evidence, and the judgment's scope is northern Rakhine and a defined window. The household surveys covered self-reported experience across the refugee population, which captures more but rests on extrapolation. What I'd say is the exact number almost doesn't matter to the legal finding — which we'll get to — but the displacement figure is its own fact: more than seven hundred thousand fled to Bangladesh in a matter of months. Over a million Rohingya live in Bangladesh to this day, the largest refugee camp in the world. Fewer than six hundred thousand remain in Myanmar.



Corn

A village called Tula Toli keeps coming up in the coverage.



Herman

It's the emblematic one. Survivors described systematic shooting of civilians, mass graves, children drowned in the river. Satellite imagery later showed the village burned to the ground — that combination, testimony plus satellite, became the template for how investigators built the case when the country itself was closed to them.



Corn

There was a detail I can't shake from the pre-operation period. The military arresting people who could read and write, weeks before the crackdown. A fourteen-year-old survivor, Lucky Karim, said it was "to leave the rest of the community in darkness."



Herman

You target the literate first so no one can document what follows. That's not brutality spilling over — that's sequence.



Corn

And it wasn't only soldiers. Local Rakhine civilians took part too, didn't they?



Herman

They did, and the court handled that with real care. Iwasawa said some civilian participation "could not necessarily be considered state-ordered or state-sanctioned behavior" — but that the government and security forces "made no meaningful efforts to prevent non-Rohingya civilian atrocities and if anything fanned the flames of ethnic and religious tension." So the state isn't liable for every villager's act, but it's liable for standing by and for stirring it. There's a twenty eighteen survey of refugee households that attributed killings to the military and the local Rakhine population together, so both things are true at once.



Corn

We've been so deep in the facts I nearly forgot — before we get into the ruling itself, it looks like we have a call from Dorothy's Kitchen.

D

Dorothy

Hello dear, it's your mother. I'm doing Dorothy's Kitchen today.



Herman

Mum! Wonderful.

D

Dorothy

The recipe is a glass of tap water. Ingredients: water, from the tap, and a glass. That's it. That's the whole list, and I still manage to worry about it.



Corn

You're in good company there, Mum. The court today worried about nearly everything.

D

Dorothy

Method. Take the glass down from the shelf, gently, because things have gone wrong before and I would rather not say how. Hold it under the tap. Turn the tap, slowly, and watch it fill. Do not walk away. The water must be watched, like bread, or butter, which can turn on you.



Herman

How slowly are we turning the tap, Mum? A quarter turn?

D

Dorothy

When it's full, turn the tap off. Timing is everything. Then drink it. That's the hard part, dear, the drinking.



Corn

We'll be careful with the glass.

D

Dorothy

Anyway. Wear a cardigan, it's chilly. Ring me back when you've eaten something.



Herman

She hung up before I got the quarter-turn answer.



Corn

She knows you'd have asked a follow-up about the shelf. Okay — the legal core. How does a court get from that factual record to the word genocide?



Herman

The structure is everything here. Genocide under the Convention has two components, and both are needed. The acts — killing, causing serious bodily or mental harm, deliberately inflicting destructive conditions of life, imposing measures to prevent births — and then specific intent, the intent to destroy a protected group in whole or in part. The acts alone make war crimes or crimes against humanity. The intent is what makes it genocide. Same bodies, different crime, depending on what was in the perpetrator's mind.



Corn

Which is the whole difficulty, because nobody writes "we intend to destroy the group" in the operations order.



Herman

Occasionally somebody does, and it makes the case easy. The Rohingya case wasn't easy — Myanmar never conceded intent, and its defense at the merits hearings in January was precisely that the operations had non-genocidal explanations. So the court used the test it's been building since Bosnia versus Serbia in two thousand seven and Croatia versus Serbia in twenty fifteen: intent may be inferred from a pattern of conduct, but only when



Herman (continued)

that pattern "only points to" genocidal intent — the only reasonable inference test. And notably, both parties in this case accepted the formula. The fight was over what it means.



Corn

Over what "only" does the work in that sentence.



Herman

If a non-genocidal explanation is articulable, does that defeat the inference? Does counter-insurgency count as a competing inference about intent, or just a motive? Must the alternative be supported by evidence, or is saying it enough? Those were the live questions at the hearings.



Corn

And the court's answer, this morning?



Herman

The operative sentence: "On the basis of all the evidence taken together, the Court is of the view that the only reasonable inference that can explain Myanmar's actions is an intention to destroy a substantial part of... the Rohingya population in northern Rakhine State." And then — the court was, in Iwasawa's words, "fully convinced" Myanmar committed acts under the Convention with that intent.



Corn

The word I want to pull at is "substantial." Northern Rakhine specifically, not the whole group.



Herman

That's a quantitative finding as well as a qualitative one — the intent was to destroy a substantial part of the group as located, not the group everywhere. And here's the number that legal analysts were already fighting about within hours: the Jerusalem Post's read of



Herman (continued)

the judgment is that killing roughly ten thousand out of a population of eight hundred fifteen thousand — about one point two percent — plus widespread destruction of housing sufficed. If that characterization holds up, the threshold is not proportional scale. It's who was targeted, why, and whether the group's continued existence on that territory was the point.



Corn

One point two percent. People carry a mental image of genocide as industrial killing — the Holocaust, Rwanda — and this finding says the number is nearly beside the point.



Herman

Which cuts against the intuition, yes. And it cuts in both directions politically, which we'll come to. But first — the move I find important is what the court did with Myanmar's alternative explanations. It rejected the counter-terrorism claim, and then it went further and rejected the softer claim too: that this was punishment or forcible displacement — ethnic cleansing — without genocidal intent. The court looked at the pattern of killing, the sexual violence, the village destruction, the attacks on the fleeing, and said a non-genocidal intent cannot reasonably explain this evidence.



Corn

So ethnic cleansing was on the table as a lesser finding, and the court said the evidence outruns it.



Herman

That's the heart of it. The test isn't "did the death toll cross a line." It's "can a non-genocidal motive survive the evidence." In Croatia versus Serbia, the same test led the court to find rape and sexual violence were capable of being genocidal acts — but that genocidal intent wasn't the only reasonable inference. Myanmar is the case that crossed the line Serbia never did. It's worth remembering the two Balkan cases at the ICJ both fell short: Serbia was responsible for failing to prevent Srebrenica, not for committing genocide. Only the fourth time since the Holocaust that any international court has found the legal threshold met — Cambodia, Rwanda, Srebrenica, now this.



Corn

And the evidence that carried the inference — you mentioned sexual violence was central in a new way.



Herman

This is the least covered and most doctrinally novel part of the judgment. Article Two of the Convention includes "imposing measures intended to prevent births within the group," and the court found the military used sexual violence to, in its words, "physically and mentally impair the willingness and ability of the population to procreate" — referring to the cultural stigma that follows rape survivors in that community. Alongside that, Myanmar imposed a two-child limit on Rohingya families, which the court treated as a birth-restriction measure. Investigators described gang rapes and mutilation carried out systematically to stop reproduction. Legal scholars at the Global Justice Center had framed this case as the first real test of whether genocide can be committed through reproductive violence, and the court engaged with it squarely.



Corn

So a birth-control policy... no. That's not the right phrase, is it. A policy aimed at one group's reproduction specifically.



Herman

Precisely the distinction. It's not family planning, it's demographic engineering aimed at whether a protected group continues. And then there's the evidentiary holding that I suspect will travel furthest: the court drew adverse inferences from Myanmar's obstruction. Iwasawa cited the "extensive destruction of evidence," the failure to investigate, the refusal to facilitate access to witnesses or provide information. And the court frankly acknowledged the consequence — it may not have reliable knowledge of things only knowable from inside Myanmar, and it held that against the state that made it so.



Corn

Burn the records, and the burning counts against you.



Herman

Destroying evidence becomes evidence. And Iwasawa also noted the failure to investigate and prosecute perpetrators, which compounds across the findings. Then the orders: reparations by ten to five — compensation for what restitution doesn't repair, with the amount to be settled by the court itself. Assurances of non-repetition, nine to six. Restitution, ten to five, including safe return, property, family reunification, rehabilitation. The obligation to investigate and punish suspects passed thirteen to two — the easiest vote on the day. And fourteen to one that Myanmar violated its duty to enact implementing legislation for the Convention.



Corn

Thirteen to two on investigating, nine to six on the core finding. That split deserves more than a shrug.



Herman

Six of fifteen judges dissented from the genocide finding — the joint dissent from Vice-President Sebutinde and Judges Tomka, Abraham, Xue, Nolte, and Kress. The separate opinions are up on the court's site but the substance of the dissent wasn't in the coverage today, so I can't tell you whether they broke on the facts or the standard. But on a question this consequential, six judges saying no is not noise. It's precisely the ground the Israel case will be fought on.



Corn

Which takes us to what Hannah actually flagged as the point of it all. Everyone was watching this ruling for a reason, and it wasn't Myanmar.



Herman

No. Governments were described as anxiously awaiting it because it's the strongest available hint of how this same bench will assess South Africa's case against Israel over Gaza. A decision there isn't expected for a few more years. And the immediate reaction split exactly along the line you'd predict. William Schabas, the international law professor who was on Myanmar's own defense team until he resigned after the twenty twenty-one coup, said that in Gaza the Palestinians were subject to killing and violence "on a scale that considerably exceeds that of Myanmar," and that a finding against Myanmar therefore makes a finding against Israel much more likely. The Jerusalem Post's read was more balanced — parts of the ruling harmed Israel's defense by lowering the standard of proof for genocide, while parts boosted Israel's defense options, and it's too early to know comprehensively.



Corn

Schabas saying that carries weight precisely because he was defending Myanmar.



Herman

It does. But the Jerusalem Post's both-ways assessment is the honest one, because the judgment contains real material for both sides. For Israel's defense, the disanalogies are stark. The Rohingya were a stateless, legally subordinated minority with no armed force capable of threatening the state's existence. Gaza is a territory with a governing authority that carried out the October seventh attacks, and the operations there are framed as urban warfare against an embedded enemy. The court in Myanmar also made a point of distinguishing what the state ordered from what civilians did on their own — that's a doctrine that cuts toward examining actual state conduct closely, which is what Israel's defense wants.



Corn

And the material running the other way?



Herman

The court held, in effect, that counter-terrorism is not a competing inference if the pattern of conduct points elsewhere — and the analysts' phrase "a more relaxed approach to proving genocidal intent" is already circulating. Plus the one point two percent finding, if the Jerusalem Post characterized it fairly, removes any comfort from scale arguments. You can't stand up in that courtroom and say the percentage is too small.



Corn

We covered the Gaza case itself back when we did the episode defining the "crime of crimes," and I said then the definition is tighter than most people applying it to Israel behave as if it is. This Myanmar judgment is the first time I've seen the actual finding the word requires, side by side with the accusation. It concentrates the mind on what the court demands: not destruction, but proof that destruction of the group as such is the only reasonable explanation of the conduct.



Herman

That's the standard that now travels. And notably the reproductive violence holding — the two-child limit, the impairment of the group's ability to procreate — has no direct analogue in the Gaza case. That's a doctrinal expansion specific to Myanmar's facts. What travels is the principle behind it: patterns of conduct, not statements, can establish intent, and the court will infer from what was done rather than what was said.



Corn

Which is exactly why Hannah's framing was the right one. Compare the reasoning, not the suffering — because a reasoning that infers intent without stated policy is a reasoning that will be applied to facts as different as these two.



Herman

The other thing I'd insist on before we close the analysis is the enforcement gap, because it's where the celebration in Cox's Bazar meets reality. Tom Andrews, the former UN special rapporteur for Myanmar, put it flatly: an ICJ ruling does not by itself deliver justice; that requires member states to act, starting with the Security Council, which could refer those responsible to the International Criminal Court — and the political will doesn't exist. China and Russia would likely block it. Meanwhile Min Aung Hlaing, who headed the military during the operations, faces a pending ICC arrest warrant for crimes against humanity, and was installed as civilian president in April after elections nobody considers legitimate. He's coming out of diplomatic isolation, with the US having lifted some sanctions.



Corn

The man found responsible for the first state genocide in legal history is currently being welcomed back.



Herman

And there's a further layer — the Guardian reports the judgment has been predicted to trigger US sanctions on ICJ judges themselves, including this year's Nobel peace prize winner, Navi Pillay, with the Trump administration already having sanctioned the ICC. So the political surround is the court's enemies punishing it for ruling, and its beneficiaries declining to enforce it. The ruling is final, binding, unappealable — and it has no bailiff.



Hilbert

Hafco water meter, the domestic brass one, about forty shekels. Unrelated. On the two-child limit — you've both been calling it a birth-control policy and it wasn't that. I've seen one of these run. Not in Myanmar. Somewhere with a similar arrangement, and I'll say only that I was there fixing a grain dryer for a man named Bakri and the rule came for the family next door to his yard.



Corn

What did you actually see, Hilbert?



Hilbert

A man from the office came round with a green form. Green, one page, two copies. He didn't explain it, he read it out, and the phrase was "current and future." Current children, future children, one line each. Whether you'd had your two already decided what happened next, and the office man held the pen for you — that was the part that stayed with me, Corn. You didn't fill it in yourself. And the check came twice a year, the same man counting shoes at the door. Herman, your levels drifted on the last ten minutes of the news section, I pulled them down, no need to touch it now. Anyway. When I left I took the carbon copy of one of the green forms off the spike in Bakri's office. Not mine to take, particularly. It's in the drawer here, under the cable ties. I've never worked out what I intended by that. The paperwork of that sort of thing is smaller than anyone expects. One page, a man with a pen, and everybody in the room knowing exactly what it means.



Herman

That's the part I'd underline — we spent this episode on a two-hundred-page judgment, and the thing on the ground was a green form somebody else held the pen for.



Corn

And the court this morning turned exactly that into a genocidal act. A two-child limit, one page, man with a pen.



Herman

It's also the detail nobody reporting on the judgment will have — the pen. The judgment will say "measures were imposed." The measures were a man counting shoes twice a year.



Corn

So where does this leave the question Hannah asked? The Myanmar judgment tells us a state can be found to have committed genocide without stating it, through conduct alone — killing, displacement, sexual violence, destruction of villages, birth restriction, obstruction of evidence, all read together, with the alternatives given a genuine run and rejected. Nine to six, with six judges not convinced, and their reasons still to be read.



Herman

And the Israel case will test whether that standard travels to a context as different as Gaza — a stateless minority under a military junta on one side, a governing authority that launched an attack and an urban war on the other. The judgment establishes the test. It does not predict the outcome, whatever Schabas expects.



Corn

The open question I'm left with is the one Andrews named. If the first state-genocide finding in history arrives and the Security Council does nothing because two permanent members won't move, and the judges who issued it get sanctioned for their trouble — what exactly has the word been given teeth by?



Herman

And yet a million people in Cox's Bazar watched the reading this morning and celebrated, and they know more about the gap between a ruling and justice than either of us. Worth sitting with what they were celebrating: that it was said, on the record, by the highest court there is, using the heaviest word there is.



Corn

Thanks as always to Hilbert Flumingtop at the desk for producing the show.



Herman

If you want more of this, try episode seven ten, Defining the Crime of Crimes; episode fourteen oh eight, Israel Wartime Readiness Field Guide; and episode sixteen, On Deepfakes, SynthID, And AI Watermarking. This has been My Weird Prompts — where no question is too obscure and no rabbit hole too deep. If today's episode was worth your time, the review that helps us most is the honest one.



Corn

We'll be back soon. See you then.



Herman

See you tomorrow.

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