# Human Rights 'Fact' Production and Why It Matters: Myanmar as a Case in Point

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*Abstract:* Ken MacLean's Crimes in Archival Form *(University of California Press, 2022) explores the many ways in which human rights 'facts' are produced rather than found. Using Myanmar as a case study, the book examines the fact-finding practices of a human rights group, two cross-border humanitarian agencies, an international law clinic, and a global campaign led by a nongovernmental organization. Foregrounding fact-finding in critical yet constructive ways prompts overdue conversations about the possibilities and limits of human rights documentation as a mode of truth-seeking. In raising these issues, the book calls on practitioners and scholars alike to be more transparent about how human rights 'fact' production works, why it is important, and when its use should prompt concern.*

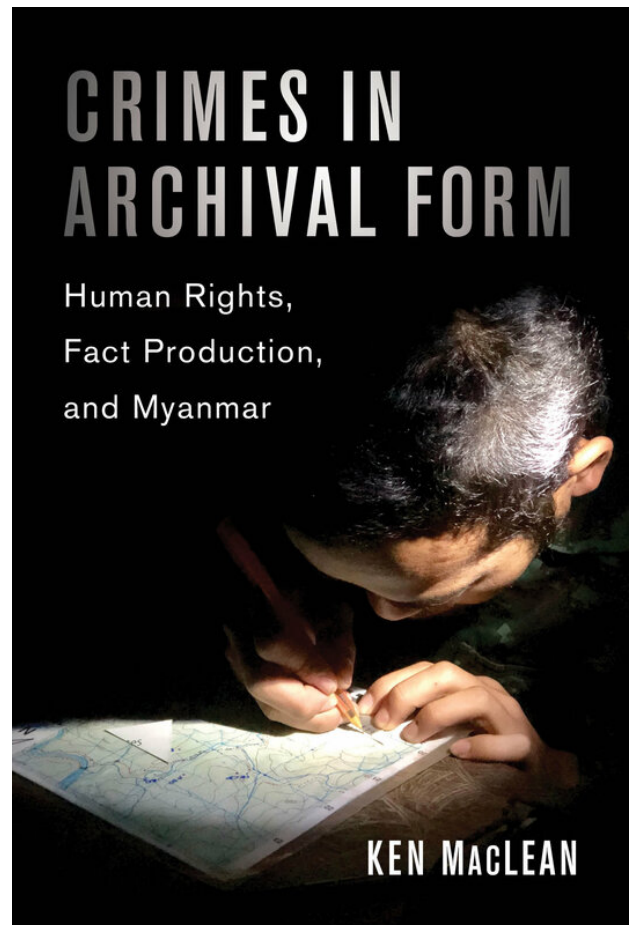*Keywords: Myanmar; Human Rights; Advocacy; Fact-Finding; Archive*

Figure 1: Cover Ken MacLean's *Crimes in Archival Form: Human Rights, Fact Production, and Myanmar*, published by University of California Press in 2022.

Human rights fact-finding, as conventionally understood, entails the objective determination of what transpired, who bears responsibility for

it, and what actions are recommended in response. But how answers to these questions are reached rarely receives critical reflection, except in the form of informal conversations among practitioners. The neglect of these issues is unfortunate because close attention to the investigative decisions made, the field methods employed, the analytical practices utilized, and the advocacy strategies mobilized demonstrates both how 'fact' production occurs and why it matters to human rights 'truth' claims.

Myanmar is the geographic focus of my latest book, *Crimes in Archival Form: Human Rights, Fact Production, and Myanmar* (MacLean 2022); however, my arguments are far from limited to that country. Sociologist Howard Becker, in a recent work on the philosophy of knowledge, makes an important point that supports my contention: 'The word *accepted* in accepted fact reminds us that the evidence has to convince someone of its validity, its weight, to become evidence' (2017: 5). Persuasion, in other words, is an inescapable element of human rights documentation from the very start. Becker's point is a useful reminder that the issue is not information *per se* that matters, but rather 'what kind of information, produced by whom, and authorized by what symbolic and material powers that make it persuasive' (Becker 2017: 5). Or, to restate the point more bluntly, as put forward by human rights philosopher Frédéric Mégret: 'Facts are argumentative practices' (2016: 38).

For these reasons, a process-oriented account of 'fact' production is needed to better illustrate the interplay between what happened in empirically verifiable terms and what is interpretatively said to have happened. The interplay, which can at occur at several different moments in the lifecycle of a human rights 'fact', consequently disrupts conventional understandings that sharply distinguish positivist approaches to human rights documentation as being inherently 'true'

and constructivist ones as politically biased at best. Conversations about 'fact' production are thus urgent in our contemporary moment, given that perpetrators of large-scale human rights violations exploit misinformation, weaponize disinformation, and employ outright falsehoods, including deep fakes, to undermine the credibility of those who document abuses and demand accountability.

To offer one contemporary example unrelated to Myanmar, the Russian Government has persistently used disinformation to generate foreign support for its 'special operations' in Ukraine. Russian efforts include fake news reports to delegitimize Ukraine as a separate nation and legitimate independent state. These have included claims of Ukrainian and NATO aggression, of the threatened use of biological weapons against Russia in the form of a 'dirty bomb', and of acts of genocide against Russian-speakers in the Ukrainian region of Donbas. The US Department of State has since published educational guidebooks as a response to Russian disinformation, Twitter has blocked all Russian ad campaigns, and the European Union has instituted an EU-wide ban on the Russian state-sponsored *RT* and *Sputnik* news channels (Wikipedia 2022). Considering this case and many others around the world, the UN Human Rights Council has also issued a new resolution on disinformation and authorized a high-level panel to develop a more comprehensive human rights–based response to this global epidemic (Article 19 2022).

## Collecting Evidence and Dissecting Narratives

How should we undertake such a processual approach? In my view, efforts to document how 'fact' production occurs and why it matters in epistemological, methodological, ethical, and legal terms require a double movement. First, one must tell the story as presented by the fact-finders, the analytical specialists who assist

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them, and those involved in advocacy efforts. Such stories are outwardly linear: they have a beginning, middle, and end—one that culminates in recommendations often couched in the language of international human rights, refugee, and/or humanitarian law. Second, one must also unwrite these same stories to illustrate how the tactical use of quotations, enumeration, narrative devices, citations, and redaction, among other techniques, fashioned the findings for different audiences (for example, diplomats, courts of law, public opinion, and funders).

To offer an example, satellite images are not straightforward photographs taken from space. On the contrary, the images are analytical products. That is, the visuals do not 'speak for themselves'. Rather, they must be spoken for. In legal settings, this means that the satellite expert must explain why they chose one type of active or passive sensor over another. The expert must also testify as to why they selected a particular set of images for comparison over time; how they assessed what the content differences between them allegedly indicate; how they managed version control (for example, file, imagery, and data updates); and how they reached their final conclusions. In short, they must disaggregate the 'fact' production process and justify their decision-making, which may then be subject to cross-examination in an adversarial setting like a courtroom.

My points about 'fact' production are not solely academic ones. Human rights 'fact' production has real-world implications. For example, both the International Criminal Court (ICC) and the International Court of Justice (ICJ), which is a UN body, have adopted legal approaches to seek criminal accountability regarding Myanmar. The ICC has charged high-ranking military and government officials with alleged crimes against humanity for the forced deportation of more than 700,000 Muslim Rohingya to Bangladesh during 2017–18

(UNHCR 2022). Myanmar is not party to the Rome Statute—which authorizes the ICC to prosecute the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression—but Bangladesh is, which gave the ICC legal standing to hear the case as forced deportation inherently is a transborder crime. While the military regime has not permitted ICC investigators to carry out fact-finding missions inside the country, the *prima facie* evidence that such crimes occurred during what the military termed 'clearance operations' is both compelling and convincing. Observers are thus optimistic that a guilty verdict will be handed down once the trial has run its course. In contrast, the ICJ case is far more complicated because it involves the charge of genocide. Proving the crime of genocide has a very high evidentiary bar. Most fundamentally, the crime requires proof of *mens rea*—that is, the demonstrated intent to destroy a group either in whole or in part as defined in the 1948 Convention against Genocide. The military regime's efforts to have the ICJ case dismissed failed in August 2022, so the legal proceedings will continue to move forward. But, as with the ICC case, it will likely be years before we have a court judgment. The proverbial wheels of justice turn slowly.

In the meantime, the UN's Independent Investigative Mechanism for Myanmar (IIMM), which began its work in September 2018, continues to inform both legal efforts. Created by the UN Human Rights Council and located in Geneva, the IIMM does not have its own police force, prosecutors, or judges; its staff instead comprises a small team of country and subject-area experts. Due to lack of access to the country, the IIMM has devoted significant resources to the collection and analysis of human rights 'facts' circulating outside the country. As of August 2022, the IIMM archive reportedly contains more than 3 million of what it terms 'information items'. The items include interview statements, videos, photographs, geospatial imagery, as well as social media

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posts of various kinds, along with other types of unspecified documentation. Such contemporaneous efforts, particularly regarding social media, are critical due to the ephemeral nature of posts, especially where overzealous content moderators are concerned. Facebook—to provide a well-known example—failed to detect and take down anti-Rohingya hate speech before the widespread and systematic attacks on that group. In response, Rohingya refugees in the United Kingdom and the United States filed a class-action lawsuit against Facebook in 2021, demanding US$150 billion in damages for the harm its alleged failure in this regard caused (Milmo 2021). Facebook, however, continues to resist calls by IIMM investigators to hand over materials it later removed from its platform on *privacy grounds* (McPherson 2021).

Both the ICC and the ICJ investigations are ongoing. Consequently, the IIMM archive will continue to grow significantly, if not exponentially, due to the continuing flood of user-generated content on post-coup violence, which ranges from indiscriminate attacks on civilians via airstrikes, mortars, and arson, to extrajudicial killings, forced labor, torture, rape, and the large-scale forcible displacement of populations. The IIMM for this reason forms a crucial point of connection between civil society documentation, which is investigative in nature, and the ICC and ICJ processes, which are prosecutorial in form.

The IIMM is not the first organization to adopt such a multi-pronged, social media–heavy approach to fact-finding. The Syrian Archive has also generated a collection of similar magnitude, and it has carefully detailed the methodologies used, which its staff developed with experts. The IIMM, by contrast, has not. The IIMM simply notes that its investigative work is consistent with the UN Charter, rules, regulations, policies, and good practices, relevant international law, and jurisprudence, without noting that many of the items that are

part of this list are contested or remain unsettled—especially at the ICC and ICJ levels. Admittedly, it is necessary to keep the *content* of the case file secret until elements of it are submitted as evidence at future trials. (The IIMM has taken this to extremes, however. A colleague who spoke with a couple of IIMM team members was not allowed to take a photo of the outside of the building in which they work reputedly for security reasons.) But there is no compelling reason the IIMM cannot disclose the architecture of its archive, such as its collection protocols, verification procedures, organizational logics, data management systems, and so on. The architecture matters not just for credibility purposes. Archives possess an important 'historiographic function in addition to a preservationist one', as Kate Eichorn (2008: 7) has pointed out. Restated, an archive's architecture shapes what kinds of questions can be asked about its contents and what kinds of histories can be written. If no further details are forthcoming, it will remain impossible to identify how the 'facts' included in the case file(s) were fashioned over the course of their respective lifecycles and what this means in terms of their interpretation.

## A Prosecutorial Turn in Human Rights Advocacy?

Given these high-profile legal efforts and others before them, some scholars, like Karen Engle (2015), have criticized nongovernmental organizations (NGOs) for what they label the prosecutorial turn in human rights advocacy. As a result of this turn, human rights 'fact' production has become increasingly geared towards satisfying the standards of proof on which lawyers insist—a development that has helped international criminal law further colonize the field of human rights. I fully support efforts to hold perpetrators legally accountable for their crimes. For this reason, it is important for human rights NGOs to

understand what qualifies as probative evidence in legal contexts and what kinds of documentation are needed for it to be admitted as such (for example, time stamps, proof of authenticity, chain of custody, etcetera). At the same time, the prosecutorial turn has narrowed what types of abuses are focused on, further minimizing the importance of social, cultural, and economic rights in the process.

For example, the decades-long effort to end the widespread and systematic use of forced labor in Myanmar by previous military regimes marginalized other aspects of the abuses associated with the practice. As one fact-finder put it: 'The abuse [forced labor] lacks the sensational ring of rape, torture, and mass killings, yet the implications on the lives of tens of millions of people are nonetheless atrocious' (Karen Human Rights Group 2007: 4). The practice 'undermines the livelihoods of whole communities leading to complete collapses of village economies; creates large-scale displacement and refugee flows; and functions to support the structures of military power' (Karen Human Rights Group 2007: 4). Contemporary legal approaches thus remain woefully inadequate for pursuing the people responsible for large-scale structural violence, which as this example shows, has cascading social, cultural, and economic effects well beyond the physical violence those the direct victims of forced labor suffered.

The colonization of human rights by law has other deleterious effects as well. Fact-finding, which is one way of making the 'right to truth' possible, is fundamentally concerned with documenting 'what happened'. But 'what happened', when expressed in idiomatic form, is not always intelligible to influential actors in a position to take action in response to the stated 'facts'. The cultural specificity of 'what happened' typically needs to be stripped away to recast separate incidents of violence into patterns, such as crimes against humanity, which are then communicated through the

frameworks and procedures provided by international criminal law. The process of decontextualization (the removal of idiomatic expression and interpretation) followed by recontextualization (the introduction of legalistic expression and interpretation) arguably impoverishes our understanding of how affected populations understand the meaning of what took place. It does so by making the recontextualized descriptions intellectually inaccessible to the people who experienced and/or witnessed the violations. It means that we also miss the opportunity to understand how non-lawyers conceive of their rights in ways that may have little or nothing to do with Western ones, as is arguably the case in Myanmar. Such conceptions are important for a variety of reasons, particularly where populations affected by decades of state-sponsored violence desire forms of transitional justice beyond legalistic approaches.

## Towards New Professional Standards

To close, why does human rights fact production matter to me? My book was cathartic in many ways, though I did not write it for this reason. I have long felt uncomfortable about and sometimes complicit in the more questionable 'fact' production practices that I analyze in the volume. At the same time, my overarching goal was not to 'throw the baby out with the bathwater'. Documenting how we document human rights crimes is critical—especially in the contemporary 'post-truth' era. Disclosing what lies behind the conclusions—the research design, methodologies used, analytical decisions made, representational strategies chosen, and so on—strengthens rather than weakens our work. Doing so will counter critiques that our fact-finding conclusions lack an empirical basis by carefully detailing the processes by which they were reached. Such details also expand the ability of other fact-finders to corroborate

whether similar patterns of abuses exist elsewhere.

This is not to say that human rights fact-finders should be completely transparent. The disclosure of important details generally regarded as essential to establishing credibility can inadvertently reveal the identity of sources (victims and witnesses) and methods (such as telecommunications eavesdropping capabilities). Nonetheless, much more can be done to establish more uniform codes, manuals, and guidelines to help establish widely accepted 'at minimum' professional standards. As a start, leading organizations, such as Human Rights Watch and Amnesty International, could disclose how they train their own fact-finders; at present, neither does.

The issues the book raises regarding human rights 'fact' production are not limited to the Myanmar case for these reasons. They are relevant everywhere, and it is my hope that the arguments I make will prompt introspection and constructive debate among practitioners, policymakers, and scholars alike.

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