

Genocide in Myanmar: A Call for Trial by the International Criminal Court

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Introduction:

Ethnic Rohingyas have long undergone decades of discrimination and disenfranchisement in Myanmar, albeit never to the degree they are currently facing. They are denied citizenship in their own ancestral land, forced to leave their crops on the cultivating paddy fields, having their hamlets burnt to ashes and loving families for generations, all of which is now lost, along with everything that is granted by the haven on this earth. The most current and continuing exodus was flickered by a military crackdown following an alleged raid by so called Rohingya insurgent group, the Arakan Rohingya Salvation Army (ARSA), formerly known as Harakah al-Yaqin, at police posts in Myanmar's Rakhine state on August 25, 2017, on the plea as alleged the Burmese military force responded with the ongoing "clearance operations".

According to the Office of the High Commissioner for Human Rights (OHCHR), United Nations, Zeid Ra'ad Al Hussein, "The "clearance operations" in Rohingya started before 25 August 2017, and as early as the beginning of August¹. It is an organised wide spread and systematic attack carried out by the Myanmar security forces against the entire Rohingya population across northern Rakhine State which led to a mass exodus of approximately 6,03,000 people fleeing to Bangladesh as estimated by UN till the date of 22 October 2017 since 25 August 2017² and invariably, the columns of tortured and displaced Rohingyas continue to swell each day, now exceeded almost a million being treated as inhuman. The testimonies gathered by OHCHR indicate that the attacks against Rohingya villages constitute serious human rights violations.

Whilst there are closely related terms used for defining and distinguishing 'Genocide' and 'Ethnic Cleansing', this paper emphasises on reasons why Rohingya crisis overwhelmed the definitions of 'Genocide' according to the International Law. The decade long massacre against Rohingya can no longer be termed as "Textbook Example of Ethnic Cleansing"³ as recently termed by Zeid Ra'ad al-Hussein, United Nations High

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<http://www.daily-sun.com/printversion/details/265126/Recurrence-of-Systematic-and-Widespread-Persecution-of-Rohingyas:-A-Thorn-on-the-Global-Conscience>

¹Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, released 11 October 2017, U.N. Office of the High Commissioner for Human Rights, United Nations, retrieved 12 October 2017.

²https://article.wn.com/view/2017/10/22/UN_group_says_over_600000_Rohingya_Muslims_have_fled_to_Bang/

³'Myanmar treatment of Rohingya looks like 'textbook ethnic cleansing', says UN', *The Guardian*, 11 September 2017, accessed 18 October 2017, <<https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing>>.

Commissioner for Human Rights. The facts as are available, ventilated through international media and Satellite images of the massacre are clear evidence of the ‘Clinical Illustration of Genocide’.

Understanding Genocide in Myanmar:

The term ‘genocide’ was first coined by a Polish jurist, Raphael Lemkin, who confounded from witnessing the devastation of the Holocaust in Rwanda, and subsequently campaigned for Genocide to be recognised as a crime under international law. He defined it as “the destruction of a nation or an ethnic group”, further identifying that “Genocide has two phases: one, the destruction of the national identity of the oppressed group, the other, the imposition of the national identity of the oppressor”⁴.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly in 1948⁵ which was notably ratified by the state of Myanmar in 1956, codified as the notion of genocide⁶. This was later incorporated in the Rome Statute for the International Criminal Court in 1998, Article 6 of the Rome Statute defines “genocide” as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group”⁷. Lemkin and the Convention identified a distinctive feature of genocide, in which, perpetrators aim to destroy a group rather than the individuals who creates the group along with an ultimate purpose to destroy the group’s identity. A useful insight into the working of modern power systems comes to light from this idea, particularly as the state of Myanmar, now under scrutiny.

Substantiated facts as are now on record within the full view of the world community including the satellite pictures along with past records of Burma’s military Junta engineering the recent Rohingya crisis, it is apparent that the general intent of the Myanmar government has always been to extinguish the identity of minority groups such as Kachin, Rohingya and other religious groups. Destruction of Rohingyas through non-stop and continuous persecution in various forms, the mass scale drive occurred recurring since in a regular interval and other form of denial of human treatment remains unceasing deprivation and segregation including denial of citizenship. The general and common target, the intention is obvious, and the facts as revealed would fall within the definition of genocide under the Genocide Convention. There is a need for identifying three of the five practices of the UN Genocide Convention applicable with the ‘specific intent to destroy’ the Rohingya population by:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;

⁴Lemkin, R, Schabas, W and Power, S 1944, Chapter IX Genocide in *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Foundations of the Laws of War)*, Washington, DC : Carnegie Endowment for International Peace, pp. 79-95.

⁵Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948,

⁷Convention on the Prevention and Punishment of the Crime of Genocide (1948), approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, entered into force on 12 January 1951, in accordance with article XIII.

- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Persecution of minorities including the Rohingya in Myanmar has been incessant since 1962 when a military coup was installed. Such systematic operation of Myanmar's military groups against Rohingya since 1978 resulted in mass murder, rape, arson, destruction of their houses, mosques, sanctuaries they built since time immemorial. The persecution process was expedited over a long course of time, reaching its peak when the recent deadly oppression and pogroms took place in August 2017. On top of the denial of citizenship, the Rohingyas have been subjected to such atrocious including state-sponsored human rights abuses in form of forced displacement, forced labour, restricting freedom of movement and confinement in the Concentration Camps, denying citizenship under fascist regulation, committing rape and other sexual violence, extra judicial killings, arson, extortion, police harassment, land confiscation, arbitrary taxation, inequitable marriage regulations, exclusion from Human Rights denying access to jobs, education and healthcare, and eviction and destruction of their homes and hamlets of Rohingyas in a systematic manner which is widespread, by targeting Rohingya Population as a whole in Myanmar. There were serious restrictions on Rohingyas freedom of movement for which they require official authorisation to move between places from one place to another, limiting movement between dusk to dawn reminds one of the apartheid era of South Africa. As a matter of fact apartheid practices in Myanmar are even worse than what was practiced in South Africa. Violation of such onerous and time-consuming procedures to secure travel otherwise would result in arrest, detention and prosecution⁸.

Genocide Emergency Alerts for Myanmar have been issued annually by Genocide Watch since its founding in 1999, with major updates in 2006, 2012, 2013, 2015 and 2017, at times during unending genocidal exterminations. Rohingyas are being targeted much like the Tutsis minority of Rwanda, who were targeted for destruction by the extremists of the Rwandan Hutu ethnic majority group under the facade of a war.

A ten-stage model by Genocide Watch identifies the processes that lead to genocide, some or all of which might occur simultaneously⁹. It provides a logical paradigm for uncovering the early warning signs of genocide and comprehension to adopt the strategy on how to prevent it by counteracting it at each stage. They are as follows:

1. "Classification divides the society into "us" versus "them." The Rohingya and Kachin are classified as non-Burmese ethnic groups, with religions other than Buddhism. Most Rohingya are denied citizenship. The 1982 Citizenship Law holds that only members of the 135 groups named in the law that were deemed to be in Burma prior to 1823 can be citizens.
2. Symbolization provides ways to identify the groups. Rohingya and Kachin speak their own languages, have their own clothing, and have their own places of worship. The identity cards that Rohingya once held were taken away in 1989, and new ID's have only been issued to around 4000 Rohingyas on the condition that they say they are "Bengali," validating the government's false narrative that they are immigrants from Bangladesh.
3. Discrimination against Rohingya includes denial of government jobs, health care, education, and confiscation of land and property.
4. Dehumanisation includes propaganda that Rohingya are jihadists, terrorists, murderers, and thieves. The leader of the 969 Movement, Monk Ashin, Wirathu, has said that he wants to

⁸A/HRC/32/18 para 28-30 and Amnesty International report nr ASA 16/5362/2016 of 20 December 2016.

⁹Genocide Watch, *The Ten Stages of Genocide* by Dr. Gregory Stanton, Genocide Watch, accessed 18 October 2017, <<http://www.genocidewatch.org/genocide/tenstagesofgenocide.html>>.

- lead a campaign to purge Burma of all Muslims -“starve them to death, make them homeless.” He was jailed for his involvement in burning alive an entire Muslim family -a well- to-do grocer and a Haj returnee- in his birthplace.
5. Organisation includes the 969 movement, extremist orders of monks, and the Tatmadaw government army and police. They carry out the murders and disappearances, torture, rapes, and arson of Rohingya villages.
 6. Polarization has resulted in creation of concentration camps for Rohingyas and separation of them from the Rakhine Buddhist population.
 7. Preparation has included planning for aggression and arson against Rohingya villages, and recently the build-up and invasion by large numbers of Tatmadaw troops in Rakhine state, with trucks and heavy weapons.
 8. Persecution [itself a crime against humanity] has included forcing the Rohingya into concentration camps, denying them medical care, food, and water, torture, and mass rape. Many Rohingya have fled in rickety boats and large numbers have drowned while fleeing.
 9. Genocidal massacres have resulted in thousands of deaths. Starvation and death from disease in concentration camps, especially of children and the elderly, have cost thousands of lives. Births are restricted through limits on family size to two children. Others cannot get birth certificates, a violation of the Convention on the Rights of the Child, to which Myanmar is a state-party.
 10. Denial permeates government statements, including the statements of Aung San Suu Kyi. The UN Commission of Inquiry, UN Special Rapporteur and other neutral observers have been barred from the country.”¹⁰

It is clear that all of the above ten stages are manifest in the treatment of the Rohingya in Myanmar. The Rohingya are systematically discriminated against having denied citizenship, rights to vote, employment, to health care amongst other Constitutional and universal Human Rights. Persecution is flagrant, as Rohingyas are denied freedom of movement, had their dwellings burned, and have been tortured, raped, and beaten and many killed without any redress. Denial always runs throughout the genocidal process as Myanmar government have refused to acknowledge the violence against Rohingyas as Genocide nor as Ethnic Cleansing that have been taking place for decades whereas the denial continued to increase when Aung San Suu Kyi joined the chorus of Burmese deniers after her release from house arrest.

The International State Crime Initiative (ISCI) at Queen Mary University of London Report¹¹ refers explicitly to the Rohingya Muslim community of the military-dominated Southeast Asian nation Myanmar, as has been systematically persecuted and expunged from the national narrative - often at the behest of powerful extremist groups from the country’s majority Buddhist population and even government authorities at length by way of involving its Military forces in such a manner where complete extermination is a incontrovertibly concluded that “The Rohingya face the final stages of genocide”¹². ISCI uses notes of genocide expert Daniel Feierstein’s framework of the six stages of genocide, outlined in his 2014 book “*Genocide as Social Practice*”¹³ as a lens through which to view

¹⁰Ibid.

¹¹Green, P, MacManus, T and Cour Venning, A 2015, *Countdown to Annihilation: Genocide in Myanmar*, London : International State Crime Initiative, School of Law, Queen Mary University, London.

¹²Iyengar, R 2015, ‘Burma’s Million-Strong Rohingya Population Faces ‘Final Stages of Genocide,’ Says Report’, *Time*, 29 October, accessed 18 October 2017, <<http://time.com/4089276/burma-rohingya-genocide-report-documentary/>>.

¹³Shaw, M. 2016 "Book Review: *Genocide as Social Practice: Reorganizing Society under the Nazis and Argentina’s Military Juntas*," *Genocide Studies and Prevention: An International Journal*: Vol. 9: Iss. 3: 183-187

Myanmar. Through interviews with stakeholders on both sides of what it describes as ethnic cleansing, as well as media reports and leaked government documents, the report enumerates how the Rohingya have experienced the first four stages of Genocide: (stigmatisation and dehumanisation; harassment, violence and terror); isolation and segregation; systematic weakening-and are on the verge of “mass annihilation.” The sixth stage, which involves the “removal of the victim group from collective history,” is already under way in many respects, the report says. However, as Rohingya faced its deadliest attack in its history erasing over 90% of Rohingya from Rakhine State occasioning mass killing of thousands innocents and force them to flee an exodus of more than 500,000 from Myanmar in addition to 900,000 already fled before 2017 out of 1.1-1.3 millions of Rohingyas who used to live in Rakhine State, it is no doubt that Myanmar has crossed the final i.e. sixth stage of Genocide as quoted above by Daniel Feierstein.

Propensity of Establishment of a Tribunal in Myanmar

Despite many exemplary and successful prosecutions against International Crimes held under the Domestic Trial Court across the globe, it seems improbable for the Government of Myanmar to request the UNSC to establish a tribunal within the State, in which many State leaders themselves fall vulnerable to be prosecuted for the alleged crimes. Since the world has its permanent international criminal court to prosecute and punish individuals responsible for the crimes of genocide, war crimes and crimes against humanity committed after July 2002, there is no need for establishment of a domestic tribunal to deal with the present crisis amounting to genocide committed against the Rohingyas.

The ICC has jurisdiction to try cases on the crimes of genocide as provided under Article 6(1) of the Rome Statute. In addition, Myanmar is also a Party to the Genocide Convention 1948 which require similar obligation from Myanmar to prevent and punish individuals responsible for the crime of genocide. However, the problem is that the Government of Myanmar itself has been committing the crime leaving no position for Rohingyas, who are alive and able, other than to flee to other neighbouring countries such as to Bangladesh, Malaysia, Indonesia and Thailand seeking shelter and protection.

Myanmar is not yet a State Party to the Rome Statute. On the ground that the perpetrators can nevertheless walk scot-free, leaving Rohingyas with denied access to justice. ICC has jurisdiction to exercise it over States which are non-Parties but with conditions as provided under Articles 13 (b) and (c) of the Rome Statute¹⁴ as follows:

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- b) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

The ICC Prosecutor can initiate his/her own investigation provided that, information from individuals or organisations involved such as the United Nations High Commissioner for Refugees (UNHCR) must supply to initiate the investigation. In regard under Article 13(b) of the Rome Statute, much like what occurred in Darfur, in Sudan, and Libya, where these two countries are also non-Parties to the Rome Statute, UNSC could also refer the situation in Myanmar to the ICC for bringing prosecution against the crimes. Although such

¹⁴Rome Statute of the International Criminal Court by resolution ICC-ASP/2/Res.3, adopted at the second session of the Assembly on 12 September 2003, entered into force on 1 July 2002.

procedures require political involvement from other UNSC Members, the ICC must not be vetoed by any of the “big five” (China, USA, Russia, UK and France) member states for seeking justice for the Rohingyas through UNSC¹⁵. This might take long for the global community to consider as a legal action to be undertaken to end the plight of the Rohingyas.

It is important for Bangladesh to initiate a discussion with other affected countries such as India, Malaysia, Indonesia and Thailand. China and Russia might be brought into attention of such crisis to be resolved. Simultaneously Bangladesh should open an active discussion with ICC. Considering that there is support from the world community as a whole, there is still a ray of hope that justice can be brought to the Rohingyas through the ICC, only if members of UN Security Council can persuade themselves in compliance with the Genocide Convention.

Concluding Remarks:

From the very birth of Myanmar as an independent country, the seeds of disharmony and destruction in the name of religion and ethnicity coupled with violence, assassination, destroying political apex leaderships, including the first democratic nationalist leader, Aung San (Father of Daw Aung San Suu Kyi, the current State Counsellor of Myanmar) who achieved independence from British Government and later assassinated along with other top democratic leaders consisting of six cabinet ministers, cabinet secretary and a bodyguard by his Political Rival Gen U Saw, thus culminating a void and vacuum in the political process which, ever since, could not be revived. This continues to haunt Myanmar not having been allowed to establish its political stability due to pursuing a policy towards fragmenting the society by fuelling and formulating ethnic and religious conflict and in that process keeps on pulling the way for hate, divide and destruction, under the tutelage of the Military as ‘Tatmadaw’ as a consequence of which, socio-political and economic distortion further multiplied the crisis, which has become a ‘Live Volcano’. Present exodus is such a seasonal eruption in form of a large-scale persecution policy against Rohingyas with a potential risk of destabilizing the region, a phenomenon of crisis cannot be stopped or be eradicated without a superior legal authority under international law by holding an enquiry followed by trial.

Mobilisation of global opinion, based on International Laws and jurisprudence on genocide must be pursued by academics and jurists across the globe along political leaders from all over the world. Global initiative towards holding a trial of this chronic disease that is deep-rooted in form of fascist practices in a widespread and a systematic manner committing crimes against humanity over a period of nearly 70 years, must be addressed by global leaders. It has become an imperative for the international community to find a way for prevention of further recurrence of these crimes, which, if not stopped might ultimately destroy the prospect for huge economic development and potential in Myanmar as advanced by Kofi Annan in the ‘*Final Report of the Advisory Commission’s on Rakhine*’ State dated August 2017. Unless those recommendations of the Final Report are implemented, the prospect for democratic and political process will never be able to sprout in Myanmar.

¹⁵Hassan, F and Rusli, M 2015, ‘Seeking justice for the Rohingyas: Will the ICC work?’, *The Malay Mail Online*, 29 May, accessed on 18 October 2017, <<http://www.themalaymailonline.com/what-you-think/article/seeking-justice-for-the-rohingyas-will-the-icc-work-fareed-mohd-hassan-mohd#P8LvodyPh52jDkwt.99>>.