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ROHINGYAS OF MYANMAR: WHETHER THE PERSECUTIONS CONSTITUTE GENOCIDE (!)

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Abstract

The persecutions of the Rohingyas were being committed by the Myanmar army and other security forces under the guise of maintaining “national security” since years. Recently, one United Nations Special Rapporteur visited Myanmar and published a report on the interviews of 204 respondents who left Myanmar and are living at Cox’s Bazar, Bangladesh as refugees. This report gives indication of the violations of human rights as “Crimes against Humanity” occurring in Myanmar against the Rohingyas. The author of this paper, however, would endeavour to critically analyze the factual circumstances of the report and find the elements of the “crime of genocide” spelled out under the 1948 Genocide Convention referring to the relevant judicial precedents.
I. Introduction

The United Nations (UN) Special Rapporteur, Yanghee Lee, very visited to Myanmar to experience the situation of the Rohingyas viewed as the de facto “stateless” Muslim minority people. She also visited certain locations of Cox’s Bazar in Bangladesh to understand the situation of the Rohingya “refugees” who were forced to flee Myanmar. During her stays in Myanmar, she visited to the “Internally Displaced Persons (IDPs)” camps in its Kachin State as well. She indicated about the occurrences of gross “human rights violations” taking place in Myanmar against the Rohingyas and urged for establishing an Committee of Inquiry (CoI) by the competent UN agency. This indication of the violation of human rights has been termed as either the “Crimes against Humanity (CaH)” or the “crime of genocide” or simply “human rights violation” itself committed by the military personnel. As a whole, the UN reemphasized on the recognition of the Rohingyas as one of the most persecuted minority groups in the present world.

1 The Citizenship Law 1982 made as “stateless” by designating that only the members of officially recognized ethnic groups are eligible while the government do not recognize the Rohingyas as an ethnic group despite they live in Myanmar for generations; See Nour Mohammad, ‘International Refugee Law Standards: Rohingya Refugee Problems in Bangladesh’ [2011] 1 ISIL Year Book of International Humanitarian & Refugee Law 401, 402.


5 Ibid.

II. Research Objective and Methodology

The UN Office of the High Commissioner for Human Rights (hereinafter referred as UNOHCHR Report) issued a “Flash Report” on 3 February 2017 on the interviews of 204 Rohingya refugees in Bangladesh who narrated their dreadful experiences of the crimes committed against them by the Myanmar army. This report considered the crimes committed against the Rohingyas as the “CaH”. However, taking into account the relevant circumstances and consistent pattern of crimes, described in the UNOHCHR Report, committed against the Rohingyas, it would be endeavored in this paper to concretely establish that the crime of genocide, *inter alia*, has been taking place in Myanmar.

For this purpose, various relevant reports and situation papers prepared by the concerned authorities of the UN have been primarily taken into account. Besides, the definition of “genocide” given in the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948 (hereinafter referred as the *Genocide Convention*) will be referred to along with other international instruments and judicial precedents to contemplate that the killings of the Rohingyas amount to the “genocide”.

III. Persecution of the Muslim Rohingyas and the Crime of Genocide

The *Genocide Convention* defined the “genocide” for the first time denoting the same as a punishable offence.7 Under the purview of Article II of this *Convention*, the definition of genocide can be characterized by two constitutive elements namely: (i) the *actus reus* of the concerned crime; and (ii) the *mens rea* of the crime that is specifically “intent to destroy” wholly or partly an indelible group *i.e.* national, ethnical, racial or religious group.8

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7 The *Genocide Convention*, Articles II and III.

8 *Ibid*, Article II reads as follows:

‘In the present Convention, genocide means 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.’

[A] Do the Rohingyas Belong to an Indelible Group?

As of 15 December 2016, an estimated 1 million Rohingyas live in Myanmar, the Buddhist-majority nation of 50 million people, who are known as the indigenous people to the Burmese State of Rakhine. They purportedly trace their origin to Arabs, Bangalees, Moors, Moghuls, Persians, Patthans and Turks. Most of the Rohingya people practice Islam as their religion albeit there are a few Rohingya language speaking Baruas and Hindus. They speak Rohingya, an Indo-European language nearly linked with the Chittagonian language, and have common cultural trials.

As regards the protected group(s), there is no generally or internationally accepted definition of the term “group”. Earlier the term “group” would refer to mean only a stable and permanent group. However, the ICTY in the cases of Blagojovic & Jokic, Brdjanin, Jelisic and Stakic and the ICTR in the cases of Muvunyi, Gacumbitsi, Semanza, Rutaganda, Musema, Kamuhanda, Seromba, Ndindabahizi and Kajelijeli


16 Prosecutor v. Goran Jelisić Case No. IT-95-10, (14 December 1999), para. 70.


established that the determination of a group is to be made on a *case-by-case* basis, consulting both objective and subjective criteria. As far as ethnic group is concerned, the ICTR defined ethnic in the cases of Akayesu,27 Kayishema and Ruzinadana,28 and Nahimana29 as a group whose member shares a common bond, common language and culture. In other words, an ethnic group is generally understood as one whose members share a “common language and culture” and a group identified by others including the perpetrators of the alleged crimes.30

Hence, in view of the use of common language and share of common culture, it is categorically contemplated that the Rohingya population primarily belong to the “ethnic group” for their distinctive culture and language, and substantially to the “religious group” which is Islam.

**[B] Are the Actus Reus Elements of Genocide Committed against the Rohingyas Present in Myanmar?**

Based on the incidents of the crimes committed against the Rohingyas, apparently the first three methods of committing genocide discussed in the following are relevant to explore the issue of presence of *actus reus* of genocide in Myanmar31:-

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27 *Akayesu*, op. cit. no. 13.


30 *Kayishema*, op. cit. no. 28; *Akayesu*, op. cit. no. 13, para. 513.

[i] Killings of the Muslim Rohingyas

The legal perspective of committing genocide by “killing” requires proving that the perpetrator intentionally killed one or more members of a particular group. In the cases of Bagosora, Ntagerura, Simba, Muvunyi, Seromba, Gacumbitsi, Kamuhanda and Semanza the ICTR held that in cases of genocide the prosecution bears the burden of proof to show that the perpetrator participated in the killing of one or more members of the protected group. In the case of Blagojevic & Jokic the ICTY held that the term “killing” can be equated with murder.

From the UNOHCHR Report, it has been brought into being that the Myanmar military forces have been committing ‘mass gang-rape, killings including of babies and young children, brutal beatings, disappearances and other serious human rights violations’ against the Rohingyas in the northern Rakhine State to a greater magnitude. Most of the respondents reported witnessing killings of their family members. Many reported that some of their family members were still missing. They also expressed that many children


35 Muvunyi, op. cit. no. 18, para. 486.

36 Seromba, op. cit. no. 24, para. 317.

37 Gacumbitsi, op. cit. no. 19, para. 255.

38 Kamuhanda, op. cit. no. 23, para. 632.

39 Semanza, op. cit. no. 20, para. 319.

40 Blagojevic & Jokic, op. cit. no. 14, para. 642.

41 The UNOHCHR Report, op. cit. no. 3.

42 Ibid.

43 Ibid.
‘including an eight-month old, a five-year-old and a six-year-old’ were ‘slaughtered with knives’. ⁴⁴

Hence, it can certainly be depicted that the “killing” element is present in the first place to cause genocide against the Rohingyas by the Myanmar army.

[iii] Causing Serious Bodily or Mental Harm to the Muslim Rohingyas

As per the incidents of rape of Rohingya women, another method of committing genocide which entails an intentional act or omission causing serious bodily or mental suffering can be taken into account. ⁴⁵ The “harm” inflicted needs to be serious only; however, it does not require being permanent and irremediable in nature ⁴⁶ that would necessarily cause death of the victim. ⁴⁷ Concerning “bodily harm”, it is well-established that causing serious injury to the health or disfigurement or any other serious injury to the external, internal organs or senses would amount to bodily harm. ⁴⁸ In contrast, the terms “mental harm” means causing hurt on the mental aptitudes which leads to create strong fear or terror, intimidation or threat among the population of a particular group. ⁴⁹ For illustration, it has been settled that the serious bodily or mental harm may include: the ‘acts of torture, inhuman or degrading treatment, sexual violence comprising rape,’ ⁵⁰ ‘interrogations combined with beatings, threats of death,’ ⁵¹ ‘forcible transfer’ ⁵² and ‘deportation.’ ⁵³

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⁴⁴ Ibid.


⁴⁶ Brdjanin, op. cit. no. 15, para. 690; Stakic, op. cit. no. 17, para. 516.

⁴⁷ Muvunyi, op. cit. no. 18, para. 487.

⁴⁸ Blagojevic & Jokic, op. cit. no. 14, para. 645; Muvunyi, op. cit. no. 18, para. 487; Gacumbitsi, op. cit. no. 19, para. 291; Prosecutor v. Mikaeli Muhimana, ICTR- 95-1B-T, (28 April 2005), para. 502; Ntagerura, Bagambiki & Imanishimwe, op. cit. no. 33, para. 664; Seromba, op. cit. no. 24, para. 317; Kayishema, op. cit. no. 28, para. 109.

⁴⁹ Seromba, op. cit. no. 24, para. 46; Kamuhanda, op. cit. no. 23, para. 634; Kajelijeli, op. cit. no. 26, para. 815; Semanza, op. cit. no. 20, para. 321; Muvunyi, op. cit. no. 18, para. 487; Muhimana, op. cit. no. 48, para. 502; Gacumbitsi, op. cit. no. 19, para. 291.

⁵⁰ Seromba, op. cit. no. 24, para. 46; Akayesu, op. cit. no. 13, para. 688.

⁵¹ Akayesu, op. cit. no. 13, paras. 711-12.
Taking into account the UNOHCHR Report, it is noted that ‘of the 101 women interviewed, more than half reported having suffered rape or other forms of sexual violence.’ Specifically, a respondent testified that her five-year-old daughter was trying to protect her from rape when a man killed her by slitting her throat using a long knife. Likewise, another respondent reported that when she was gang-raped by five security officers, her eight-month-old baby was killed.

Thus, the happenings of rape of Rohingya women indeed cause both “physical and mental harm” to the members of the Rohingyas which would ultimately lead to the destruction of the group.

[iii] Deliberately Inflictions of the Conditions of Life of the Rohingyas’ to Destroy the Group

From the legal point of view, concerning the above-mentioned circumstances, it can be argued that the Myanmar army deliberately inflicted the conditions of life to destroy the group. In the case of Stakic, the ICTY held that the expression i.e. “calculated to bring about its physical destruction” does not necessarily mean that the perpetrators would directly kill the members of a group. Rather, the ICTY in the Brdjanin case and the ICTR in the Kayishema and Razindana cases held that the creation of a situation that would lead to slow death due to ‘lack of proper housing, clothing and hygiene, or excessive work or physical exertion’ suffices to establish this method.

54 UNOHCHR Report, op. cit. no. 3.
55 Ibid.
56 Ibid.
57 Stakic, op. cit. no. 17, para. 518.
58 Brdjanin, op. cit. no. 15, para. 691.
59 Kayishema, op. cit. no. 28, paras. 115-16; Akayesu, op. cit. no. 13, paras. 505-06; Musema, op. cit. no. 22, para. 157; Rutaganda, op. cit. no. 21, para. 52.
At this instant, according to the UNOHCHR Report, the Myanmar army, police and the civilian mobs burned hundreds of Rohingya houses, schools, markets, shops, madrasas and mosques in different times.\textsuperscript{60} They also confiscated the livestock and ruined the foods as well as the sources of foods containing paddy fields.\textsuperscript{61}

Therefore, the destruction of the properties of the Rohingyas which are necessary to meet their basic requirements leads to conclude that the said element of genocide committed against the Rohingyas in Myanmar is present.

\textbf{[C] Are the Elements of Mens Rea of Genocide Committed against the Rohingyas Present in Myanmar?}

As regards the “\textit{mens rea}” of genocide, two elements have to be satisfied as discussed below \textit{i.e.} whether the perpetrator intended to destroy any of the protected group(s) wholly or partly; and whether the conducts are being committed in the context of a manifest pattern of similar conduct directed against that group\textsuperscript{62}:

\textbf{[i] Intention to Destroy the Rohingyas}

In relation to the goal of genocide to destroy the target group, wholly or partially, in the ICTR cases of \textit{Seromba},\textsuperscript{63} \textit{Simba},\textsuperscript{64} \textit{Gacumbitsi},\textsuperscript{65} \textit{Bagosora},\textsuperscript{66} \textit{Ndindabahizi},\textsuperscript{67} \textit{Nahimana},\textsuperscript{68}

\textsuperscript{60} The UNOHCHR Report, \textit{op. cit. no.} 3.

\textsuperscript{61} \textit{Ibid.}


\textsuperscript{63} \textit{Seromba}, \textit{op. cit. no.} 24, para. 176.

\textsuperscript{64} \textit{Aloys Simba v. Prosecutor}, ICTR-01-76-A, (27 November 2007), para. 264.

\textsuperscript{65} \textit{Gacumbitsi}, \textit{op. cit. no.} 19, para. 40.

\textsuperscript{66} \textit{Bagosora}, \textit{op. cit. no.} 32, para. 2116.

\textsuperscript{67} \textit{Ndindabahizi}, \textit{op. cit. no.} 25, para. 454.

\textsuperscript{68} \textit{Nahimana}, \textit{op. cit. no.} 29, para. 524.
Nchamihigo, Rutaganda, Muvunyi, Kamuhanda, Kajelijeli, Kayishema & Ruzindana, Mpambara and Muhimana and in the ICTY cases of Krstic, Brdjanin and Jelisic it was decided that the intent of the perpetrators to destroy such group(s), wholly or partially, can be inferred from the facts and circumstances of the case. As per Brdjanin case of the ICTY, the existence of “destructive intent” gives the crime of genocide particular character.

Now, insofar as the intention of the Myanmar military is concerned, it is stipulated in the UNOHCHR Report that the UN Human Rights officers visited Bangladeshi border with Myanmar where approximately 0.066 million Rohingyas have fled since 9 October 2016 after the intense military operations. The military indicated the operations as “area clearance operations” with the purpose of substantially destroying the Muslim “religious group” as well as Rohingya “ethnic group” of Myanmar in the name of upholding “national security (!)”.

70 Rutaganda, op. cit. no. 21, para. 525.
71 Muvunyi, op. cit. no. 18, para. 480.
72 Kamuhanda, op. cit. no. 23, para. 625.
73 Kajelijeli, op. cit. no. 26, para. 806.
74 Ruzindana, op. cit. no. 59, para. 93.
76 Muhimana, op. cit. no. 48, para. 496.
77 Krstic, op. cit. no. 45, para 34.
78 Brdjanin, op. cit. no. 15, para. 704.
79 Jelisić, op. cit. no. 16, para. 78.
80 Brdjanin, op. cit. no. 15, para. 699.
82 Ibid; Kelley, op. cit. no. 3, 404-5; Penny Green, Thomas MacManus, and Alicia de la Cour Venning, ‘Countdown to Annihilation: Genocide in Myanmar’ [2015] International State Crime Initiative (Online),
[ii] Manifest Pattern of Similar Conducts

Regarding the requirement of “manifest pattern of similar conduct”, in Al Bashir\(^83\) case, the ICC held that the ‘the crime of genocide is completed when the relevant conduct represents a concrete threat to the existence of the targeted group, or a part of thereof.’ The ICTR in Rutaganda\(^84\) case held that the evidence of genocide can be demonstrated from the consistent pattern of similar conduct by the accused. Alternatively, the ICTY in Krstic\(^85\) case and the ICTR in Muvuny\(^86\) and Seromba\(^87\) cases held that there is no numeric threshold of victims necessary to establish genocide. The ICTR cases Ndindabahizi\(^88\) and Gacumbitsi\(^89\) further held that killing of only one person may amount to genocide in appropriate cases.

Now, it has been quoted in the UNOHCHR Report that:

‘[m]any witnesses and victims also described being taunted while they were being beaten, raped or rounded up, such as being told “you are Bangladeshis and you should go back” or “What can your Allah do for you? See what we can do?”’

In view of this, such respondents’ testimonies can be pointed out that the operations of 9 October 2016 follows a continuing “pattern of violations and abuses”, “systematic and systemic discrimination”; and various policies of “exclusion and marginalization” executed against the Rohingyas for decades in the northern Rakhine State.\(^90\) Hence, it is also irrefutable

\(^{83}\) Prosecutor v. Al Bashir, ICC-02/05-01/09 (Pre-Trial Chamber I), para. 124.

\(^{84}\) Rutaganda, op. cit. no. 21, para. 63.

\(^{85}\) Krstic, op. cit. no. 45, para. 584.

\(^{86}\) Muvuny, op. cit. no. 18, para. 479.

\(^{87}\) Seromba, op. cit. no. 24, para. 319.


\(^{89}\) Gacumbitsi, op. cit. no. 19, para. 285.

\(^{90}\) The UNOHCHR Report, op. cit. no. 3; See also Report of OHCHR Mission to Bangladesh, ‘Interviews with Rohingyas Fleeing from Myanmar since 9 October 2016’ [3 February 2017], available at
that the Myanmar military have been committing the concerned crimes against the Rohingyas following a manifest pattern of similar conducts.

IV. Conclusion

This write-up can be concluded by asserting that the assessment of the facts and circumstances enumerated in the UNOHCHR Report from the viewpoints of law, the persecutions committed against the Rohingyas amount to the “crime of genocide”. In other words, the presence of both mens rea (i.e. intention to destroy the Rohingya “ethnic group” and/or “religious group”), and actus reus (i.e. killings, causing serious bodily and mental harm, and inflicting the conditions of life of the Rohingyas) makes it clear that the Myanmar military and other security forces committed genocide. In this situation, concurring with the opinion of the UN Special Rapporteur, it would be much-admired if any one of the UN agencies (e.g. the UN General Assembly, the UN Security Council, the UN Human Rights Council, and the UN Secretary General) forms a CoI through resolution to investigate such crimes. In respect to the question of the trials of the perpetrators, either Burma itself, or the ICC can exercise jurisdiction if the UN Security Council refers. However, it should be mentioned that the former possibility is quite unlikely while the later one is possible depending on a positive vote by nine of the fifteen Members.


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