

THE PLIGHT OF ROHINGYAS: WILL THERE BE SUNSHINE AGAIN?

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ABSTRACT

There is a plethora of literature available, highlighting the plight of Rohingyas, which the media and scholars are tirelessly calling attention to. This pertains to the ‘how’ and ‘what’ answer to the degree of harm being inflicted upon these poor souls. There is no denial of the fact that there has been a consistent and grave violation of human rights law against them. Despite, the world wide coverage, the solutions to the problem is seldom discussed upon. The Rohingyas are living upon the mercy of states offering “refugee” camps to them. Their nationality of being “stateless” is only adding to their plight. The current structure of international “human rights” law does implicate moral obligations on the “United Nations” but the absence of clear “hard” law on the subject is classic case of leaving loop-holes in a system. Some might put forth the point of “humanitarian” laws being of some help but presently, there is no “state of war”.

This essay will explore what can be done to help the Rohingyas in the existing international legal regime, subsequently, suggesting new ways in which the “regime” can be expanded and what else can be done by various International Organizations and the United Nations.

Keywords: Refugees; Statelessness; Human rights law; Humanitarian law; United Nations.

THE CAULDRON OF TROUBLES

The problem for Rohingyas did not begin on the night when the Myanmar Army started hunting for the Arakan Rohingya Salvation Army ('ARSA'), which is a terrorist group and accused of killings and destruction in Rakhine state as per the State's army.ⁱ In order to hunt for these alleged terrorists the Army burnt down the villages in which the Rohingya Muslims had shelter.ⁱⁱ This onslaught was evident from the satellite images. The trouble began way back in 1948, when Myanmar became independent and passed the Citizenship Act identifying certain ethnic groups who were allowed to get citizenship, commonly known as indigenous races of Myanmar.ⁱⁱⁱ Later, in 1982 a new citizenship law came into force which succeeded the law prevalent under General Ni wing's command. The law demanded every person "to provide proof that one's ancestors had inhabited in Myanmar before 1948." This turned out to be against the Rohingyas as most of them lacked such historical records.^{iv} Neither were they educated enough to converse fluently in Myanmar's National language which barred them to proceed to the final level naturalization and suffer harsh treatment, possibly greater than any other ethnic minority in Myanmar.^v

It was only a matter of time when the seeds of violence sown by the forefathers of the Rohingya population began to show its true potential when the Myanmar Government retained their identification cards while Citizenship rights were granted to the other 135 ethnic groups.^{vi} Since decades, Rohingya Muslims have carried the weight of the military Government's inhuman State-building policies which ultimately snatched away, all kinds of political and economic rights. In 1982, on being declared Stateless, they constituted the Rohingya Liberation Front.^{vii} This was followed by initiation of the new Constitution of Myanmar which discredited the Rohingyas Muslims. Under this Constitution, 3 types of citizenship were defined.

1. Citizens of Myanmar living from a period anterior 1185 B.E., 1823 A.D.^{viii} and having ancestors there.
2. Associate Citizens (South Asian and Chinese minorities)
3. Naturalized Citizens (Non- Nationals not recognized as indigenous races^{ix})

Things got worse when, in 1991, the Myanmar army repeated its banishment, driving more than half a million Rohingyas out of Arakan State to Bangladesh, particularly Teknaf and Cox's bazaar. Bangladesh was malevolent to the new refugees and moved them to squalid refugee settlements. In 1995, rendering no further delay, the Bangladesh Government with the help of United Nations in a repatriation process forced most of the Rohingya muslims over the border. This process was noted as 'Use of Force' as it involved mass killings by Bangladeshi and Myanmar troops receiving the Rohingya. ^x The returnees were given limited rights to movement and employment in the form of Temporary Registration cards.

The survivors, and the remaining Rohingyas residing in the Arakan State, have been largely kept breathing by the United Nations High Commissioner for Refugees ('**UNHCR**') and the UN World Food Program ('**WFP**'). The living conditions in Western Arakan State were depicted in WFP's food security survey where most of the children were critically malnourished, and most households lacked independent sources of food.^{xi} In addition to this, Extra-judicial killings, destruction of mosques and other acts of religious persecution^{xii} are very common^{xiii} by Myanmar Military forces simply to force^{xiv} the Rohingyas to leave.

UNFOLDING THE CATASTROPHE AGAINST THE ROHINGYA

The Rohingya continuously face restrictions on free movement, education, employment, marriage and sanitation set by the Myanmar Government.^{xv} Being Stateless, they are called aliens and fall under the landscape of the 1864 Foreigners Act.^{xvi} Additionally, they are restricted to apply for most of the civil service positions^{xvii} and unable to carry out business between villages and districts. This has increased forced labor, confiscation of land, forced eviction from personal property and destruction of houses.^{xviii}

This curtailment is not limited to the Rohingya Muslims, it has been similarly in the same manner on the other ethnic minorities in the Rakhine State including Buddhists.^{xix} Owing to the increased militarization of the Northern Rakhine State since 1994, there have been widespread confiscations of land for the forceful construction of military installations^{xx} and

upkeep of the National Security force, or NaSaKa^{xxi} and the border army.^{xxii} Thus, the lasting struggle has highlighted the very enduring characteristic of Rohingya Statelessness.

Rights of the minorities is a prevalent issue under Human Rights. The lack of citizenship still continues today. The Rohingya Muslims are considered as an illicit community today, referred to as 'Alien' and having no entitlement to National identity cards. This lack of legal status has given Myanmar security forces, an official license to inflict daily abuses against them with liberty. The plight of the Rohingyas is never ending, Rohingyas have had their share of struggle and now International bodies, particularly the United Nations have a role to play. Discrimination against the poor Rohingyas, runs deep in Myanmar.^{xxiii} It is time, for a new beginning.

WHAT IS THE STATUS QUO OF INTERNATIONAL LAW REGIME?

Only 2 aspects of international law regime surfaces when looked upon the state of Rohingyas-

- Human Rights Law
- Humanitarian law & Criminal law

Let's look at it one at a time. International Human Rights Law is rooted in the International Bill of Rights, the most important amongst them being the UN declaration on Human Rights.^{xxiv} This particular declaration imposes an obligation upon the member states to ensure basic living conditions for all humans irrespective of race, caste, gender or place of birth.^{xxv} This means nationality is no bar when it comes these rights, but the Myanmar govt. did not adhere to this despite the fact that Rohingyas are the inhabitants of the State. The acts of Myanmar Army are in blatant violation of Art. 3^{xxvi} of the Declarations. Apart from this the acts clearly violate art. 2 & 6 of ICCPR^{xxvii} among many, art. 2-5 of ICESCR^{xxviii} just to highlight few of amongst many.

This shows the failure of the UNGA and how the UN functions. Some might argue that, the population of Rohingyas is too short to make fuss out of it but then, these are the rights given to every single human being. It will be utopian thought to think that, the world can be rid of all

such atrocities but in no way it cannot be taken as a start moving towards reaching the goals. The current issue in hand must be taken as a stepping stone to build something substantial. Every bad situation has the potential to give birth to something constructive, the best example of this, is the battle of Solferino, which urged Henry Dunant to establish the International Red Cross society.^{xxix}

ACCENTUATING THE APPLICATION INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW

The Geneva conventions along with the additional protocols^{xxx} coupled with other conventions forms the blueprint of international humanitarian law, the Rome statute^{xxxi} is the blueprint of International Criminal Law. For the purposes of the issue only the Geneva conventions and few more conventions shall be highlighted because the violation of by the atrocities against the Rohingyas encompasses all there is to be violated.

Having said that, the main aspect to be highlighted here is that, the application of Humanitarian law comes into play when there is a “state of war”^{xxxii} as the status quo. Everyone seems to take advantage of this is catch point. Whenever there comes an argument of ethnic cleansing and other issues of armed conflict, the relevant personnel gives a statement saying that, there is NO state of war.

Top U.N. officials have said that, the violence in Myanmar is certainly a case of “textbook ethnic cleansing”.^{xxxiii} The U.N. has in the past defined ethnic cleansing as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”^{xxxiv} Ethnic cleansing is not recognized as a separate crime under international law. But allegations of ethnic cleansing as part of ‘Wider’ and ‘Systematic’ human rights violations have been heard in international courts against individuals.

Coming specifically to the point of Humanitarian law, the Myanmar army is of the opinion that, a rogue group of Rohingyas the ARSA attacked the army first and their actions were in relation of the same. Enunciating on this point, the counter-act of the National army led to a

situation internal armed conflict. “As per the common Article 3 to the Geneva Conventions of 1949; b) Article 1 of Additional Protocol II:

Non -International Armed Conflicts within the Meaning of Common Article 3^{xxxv} Common Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Convention have universally been ratified now, the requirement that the armed conflict must occur^{xxxvi} "in the territory of one of the High Contracting Parties" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.

The definition clearly includes the situation in Myanmar regarding, so, the International Humanitarian law does apply to it. The acts of national do violate the provisions related to protection of civilians, as most of the Rohingyas except ARSA, are Civilians. The civilians were killed by the National army. Hence, there is war, but of internal nature, and clearly the statement that, “there is no state of war” stands in shallow waters!

TRUDGING TOWARDS THE SUNSHINE

There were suggestions like despite being stateless they should be treated like refugees and given shelter or asylum in different states^{xxxvii} but how viable are they, which remain to be seen. It is very evident that this will be of little help. Their plight can only be addressed if they are able to become nationals of a State.

The biggest role is to be played by the security council, it is clear that, their moto is to maintain world peace^{xxxviii}, some might argue that, it only relates war and aggression, but why can't its ambit be expanded to include matters like these where the security council sits and negotiate with Myanmar to give the Rohingyas its nationality? It can be easily done. It will be also act

as a precedent for any such nation that ever decides to part ways with their responsibility. There is no national devoid of an ethnic and other group that does not support its govt. but seldom there is news that, they have been stripped of their nationality. One of the, examples is- the Naxalites in India.^{xxxix} These are constantly fighting the govt. rule with arms but are the nationals of India? Yes, they are.

Myanmar is not a very big or power state which will not succumb to international pressure, it can be easily persuaded to do so. Apart from this, no one ever talked about one of the important organizations which should be have been easily linked to this matter is, the UN-Habitat Committee, its moto include, “working towards a better urban future. Its mission is to promote socially and environmentally sustainable human settlements development and the achievement of adequate shelter for all.”^{xl}

No, research work ever included any specifics about this committee whose moto is to ensure adequate shelter for all. This committee has its presence in Asia, so, it is completely inexcusable on the part of the UN for not doing anything. It is clear that, the Geneva Conventions cannot provide any sort of help for 2 reasons-

- 1.) It was majorly constituted in the year 1949, when the world as whole was still under the threat of wars any day at any time, so it focused on mainly war. Today, it is not the case, therefore; the convention requires some major amendments. The UN generally assembly must take a note of this, as it is said, “Law is dynamic in nature” why it is the case that, such an important aspect is not being resolved DYNAMICALLY?
- 2.) The situation is one of its kind, there are no precedents as to how should be resolved and every responsible nation is playing the card of SOVERIEGNITY.

Holland put forth the idea that, International Law is the vanishing point of Jurisprudence^{xli}, but it no jurist ever mentioned International Law is “vanishing point of Justice and Humanity”. It is a painful truth that, no state is willing to take bold steps to counter this injustice. Another ironic fact is that, the leader of Myanmar is a noble laureate for Peace.^{xlii}

The US never fails to impose economic sanctions^{xliii} on any state if it sees that, it not acting according to its standards, these member states of Security Council have the maximum responsibility to resolve this issue. It is very easy to play the blame game that, Myanmar should do N number of things to address the issue but, the need of the hour is that, whole community as whole must come together to join hands and address this kind of problem.

It is a moral duty upon us to not let innocent humans to suffer the wrath of faults committed by their forefathers. The plight of Rohingyas can be eradicated, it is not going to happen overnight but it is possible. There are ways to deal with the issue but these are unprecedented that's why the international community is willing to deal with it, the member nations of the United Nations need to bold, and remember that, even the Nuremburg trials happened for the first time, which paved the way for current international criminal law.

The intervention by the UNSC^{xliv} or a resolution by UNGA can pave out a way for a completely new dimension of international law. We are on the verge witnessing something ground breaking, it's just that the International community is not willing to expand the current order of law and just trying to forcefully fit the issue in the existing order of law which shouldn't happen.

Another way to ensure that the stateless persons get their nationality as mentioned under art. 15^{xlv} of the UDHR, is to apply the doctrine of *genuine and effective link*^{xlvi}. As per the concept, any person has to be eligible to receive citizenship from a state with which he/she has a substantial connection or has a genuine and effective link or at least has the closest link. The Rohingyas qualify on the essentials. A substantial link or connection to a state can be forged by long-term habitation in the state he/she has been living more than another state, descent from a state's citizen, birth with a state's territory.^{xlvii}

The doctrine is the most suitable solution to the problem of statelessness of the Rohingyas. This is for the reason that, generally it is not difficult to determine to which state an individual has a genuine effective link for the purpose of establishing national decisions. This difficulty has arisen due to legislative acts based on retribution which is absolutely wrong. This political act has failed to take into consideration the basic principles of International Law, which shouldn't be allowed. It is next to impossible to find a person without any effective or genuine link form

any state. It is not doubt that, the state has the power to determine who receives the citizenship of the country, but this needs to have a ceiling or else the effect of the same are visible to us. At a very minimum, these prohibit any state from rendering their citizens stateless and oblige the states to observe the basic human rights to all.^{xlvi}

CONCLUSION

Without a question the Myanmar govt. is undergoing a significant transition into a democracy, as their first free elections took place very recently, as early as 2015. Their first great challenge is to address the ever increasing plight of Rohingyas.^{xlix} It is a fact, that the national army is very strong and at moment enjoys more power & influence than the elected govt. which is only adding to the challenge. The main aim of the Myanmar govt. is to advancement of political tolerance- which is a central component of democratic culture.¹ By giving the Rohingyas nationality the Myanmar govt. will send a strong message of their political tolerance through the world and if it doesn't do it the UNSC can help it do so. The democratic transformation and the shifting attitude from the Myanmar govt. will hopefully serve the desperate Rohingyas, if it decides to grant Nationality on its own accord.

For the Rohingyas the walk towards the sunshine is long and dreadful at the moment. The silver lining is that, their plight has end. The amount of time to end this plight depends on primarily on the Myanmar govt. and secondly on the International community as a whole. Their plight should cause pain in everyone's heart, if not then we don't qualify to be humans and whole purpose of human rights is defeated. The solutions are up for grabs it's just when the people at responsible places give up their selfishness and resolve the issue in hand. To summarize- Yes, there will be Sunshine for the Rohingyas, it's just a matter of time.

ENDNOTES

- ⁱ Available at <https://www.reuters.com/article/us-myanmar-rohingya-qa/does-myanmar-violence-amount-to-human-rights-crimes-idUSKCN1BP0P9> accessed on 17 July 2018
- ⁱⁱ Available at <https://www.nytimes.com/2017/09/11/world/asia/myanmar-rohingya-ethnic-cleansing.html> accessed on 17 July 2018
- ⁱⁱⁱ Constitution of the Union of Burma, Chapter II, para.11(i) (1947).
- ^{iv} *Supra* at 2
- ^v See Moshe Yegar 'Between Integration and Secession. The Muslim Communities of the Southern Phillipines, Southern Thailand, and Western Burma/Myanmar' (2002), pp.79-91.
- ^{vi} See J.A. Berlie, 'Burmanization of Myanmar's' (2008), 37
- ^{vii} Available at <http://ohrh.law.ox.ac.uk/an-international-law-perspective-on-indias-response-toward-the-rohingya-refugee-crisis/> accessed on 17 July 2018
- ^{viii} *Pyithu Huttaw Law* No. 4 of 1982.
- ^{ix} *Id.*
- ^x Human Rights Watch/Asia, 'The Rohingya Muslims: Ending a Cycle of Exodus?' (1996) (Vol.8, no.8). U.S. Committee for Refugees, 'The Return of the Rohingya Refugees to Burma: Voluntary Repatriation or Refoulement?' (1995)
- ^{xi} Food and Agriculture Organization (FAO) and World Food Program (WFP), "Crop and Food Security Assessment Mission to Myanmar, "Rome, FAO and WFP, (2009)
- ^{xii} Benjamin Zawacki, 'Defining Myanmar's "Rohingya Problem"', 20 HuM. RTS. BRIEF 18, 18 (2012).
- ^{xiii} United Nations, "UN Human Rights Experts Call on Myanmar to Address Discrimination Against members of Muslim Minority in North Rakhine State. UN Press Release (2007).
- ^{xiv} *MYANMAR COUNTRY REPORT*
- ^{xv} Benjamin Zawacki, Defining Myanmar's 'Rohingya Problem', 20 HuM. RTS. BRIEF 18 (2012) 19
- ^{xvi} *CRIMES AGAINST HUMANITY IN WESTERN BURMA*, 99.
- ^{xvii} RIANNE TEN VEEN, *ISLAMIC HUMAN RIGHTS CAMPAIGN, MYANMAR'S MUSLIMS: THE OPPRESSED OF THE OPPRESSED* (2005) 9, <http://www.ihrc.org.uk/file/05OCTMyanmarPReofpdf> accessed on 17 July 2018
- ^{xviii} Zawacki 19.
- ^{xix} *Id.*
- ^{xx} *Supra* at 11.
- ^{xxi} NaSaKa is the abbreviated term for the Nay-Sat Kut-Kwey Ye, the border security force. Its purpose was to secure Myanmar's border with Bangladesh and quell a Rohingya insurgency movement in the early 1990s. See Katherine G. Southwick, 'Myanmar's Democratic Transition: Peril or Promise for the Stateless Rohingya?', 19 *TLBURG L. R.* (2014) 261, 265
- ^{xxii} *Id.*
- ^{xxiii} The Irrawaddy 'Plain Speaking' (2009) 26,27 vol.17
- ^{xxiv} UNGA Res 217 A (10 December 1948)
- ^{xxv} Available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf accessed on 18 Jul 2018
- ^{xxvi} Everyone has the right to life, liberty and security of person.
- ^{xxvii} The International Covenant on Civil and Political Rights, adopted by the UNGA Res 2200A (XXI) (16 December 1966)
- ^{xxviii} The International Covenant on Economic, Social and Cultural Rights adopted by UNGA Res 2200B (XXI) (16 December 1966)
- ^{xxix} Henry Dunant 'A Memory of Solferino'
- ^{xxx} Available at <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> accessed on 18 July 2018
- ^{xxxi} Available at http://legal.un.org/icc/statute/99_corr/cstatute.htm accessed on 18 July 2018
- ^{xxxii} See Human Rights Watch's official- Robertson
- ^{xxxiii} Available at <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar> accessed on 18 July 2018
- ^{xxxiv} A United Nations Commission of Experts mandated to look into violations of international humanitarian law committed in the territory of the former Yugoslavia defined ethnic cleansing in its interim report S/25274

^{xxxv} Establishes fundamental rules from which no derogation is permitted. It is like a mini-Convention within the Conventions as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character

^{xxxvi} Available at <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> accessed on 18 July 2018

^{xxxvii} Ramandeep Kaur 'An Assessment of the International Legal Obligations Owed to the Rohingya Refugees' ISAS Working Papers

^{xxxviii} Available at <http://www.un.org/en/sc/> accessed on 19 July 2018

^{xxxix} Available at <http://www.indiandefencereview.com/the-naxal-problem/> accessed on 19 July 2018

^{xl} Available at <https://unhabitat.org/un-habitat-at-a-glance/> accessed on 19 July 2018

^{xli} Available at <https://birkhangbrahma.2017/06/28/%E2%80%8Binternational-law-is-the-vanishing-point-of-jurisprudence-explain/> accessed on 19 July 2018

^{xlii} Aung San Suu kyi was awarded the Nobel Peace Prize in 1991

^{xliii} Economic sanctions are the commercial and financial penalties imposed by one or more countries against a specific country, group, or individual. Economic sanctions may be of various forms of trade barriers, and tariffs.

^{xliv} *Supra* at 34

^{xliv} Everyone has the right to nationality and that no one shall be arbitrarily deprived of his nationality

^{xlvi} Jeffrey L. Blackman 'State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law' 19 MICH. J. INT'L L. 1141 (1998).

^{xlvii} David Weissbrodt, Clay Collins 'The Human Rights of Stateless Persons' 28 Hum. Rts. Q. 245

^{xlviii} What is transitional justice?, INT'L CTR. TRANSITIONAL JUSTICE,

<http://www.ictj.org/about/transitionaljustice> accessed on 19 July 2018

^{xlix} Elizabeth Dias 'Will the Rohingya Exodus Be Aung San Suu Kyi's Fall From Grace?' TIME (Sept. 21, 2017)

^l Shatti Hoque, 'Myanmar's democratic Transition: Opportunity for Transitional justice to Address the Persecution of the Rohingya' 32 Emory Int'l L.Rev. 551 (2018)