

Can Bangladesh initiate Genocide charges against Myanmar? *†

1. The ongoing flashflood of brutal images, horrifying video footages and account of the survivors of the inhuman atrocities committed by the Myanmar government have become the center of attention of the world for the past few weeks. Bangladesh, which previously housed around 500,000 Rohingya people, received another 400,000 Rohingya refugees due to the *scorched earth* policy of Myanmar government.
2. Besides looking for long term solutions to address this crisis, Myanmar should be held judicially accountable for the atrocities committed on Rohingya people. Question is – can Bangladesh spearhead this action?

Determining the crime

3. Violence in Myanmar has been characterised by UN as a "*textbook example of ethnic cleansing*" but the term "genocide" has not yet been cited even by the experts. This distinction is important because, unlike genocide, ethnic cleansing has not been designated as an independent crime under international law.

Do the crimes qualify as genocide?

4. The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("**the Genocide Convention**") defines genocide as, among others, killing members of the group, causing serious bodily or mental harm to members of the group with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. This definition is also adopted in Article 6 of the International Criminal Court Statute, 1998 ("**the ICC Statute**").
5. For establishing the crime of genocide, the basic elements of criminal law i.e. *actus reus* (act of killing) and *mens rea* (specific intention) for the purpose of destroying a protected group (i.e. ethnic group) need to be proved, along with the manifest pattern of violence. Based on

the accounts of the survivors, reports from journalists, satellite images, various statements of the monks who incited the violence, it becomes evident that what has transpired in the Rakhaine province in Myanmar in the last few weeks arguably fulfills the elements of genocide.

6. Furthermore, the Permanent People's Tribunal, a civil society pressure group working as a shadow-court has recently convicted Myanmar for, *inter alia*, genocide. The trial considered eye-witness accounts from 200 victims, expert opinions and documentary evidences to reach the conclusion.

Failure to prosecute Myanmar in ICC

7. The International Criminal Court (ICC) is empowered by the ICC Statute to investigate and prosecute individuals alleged to be responsible for war crimes, crimes against humanity and genocide ("**the Crimes**"). It appears, however, that none of the ICC mechanisms would be effective to prosecute Myanmar for genocide.
8. Firstly, when the States are unwilling or are unable to investigate and prosecute the Crimes, the ICC prosecutors, under Article 13 of the ICC Statute, can initiate investigation upon request from any State party (i.e. Bangladesh). In very rare cases, pursuant to Article 15 of the ICC Statute, the ICC can initiate a criminal investigation by itself if the alleged crimes take place in the territory of or are committed by the people of a signatory State. Myanmar, apart from not being a signatory to the ICC Statute, is often backed up by regional powers. These factors decrease the likelihood of an ICC investigation.
9. Secondly, even if a country is not a party to the ICC Statute, the ICC can assume jurisdiction pursuant to a resolution in the UN Security Council. Although the Security Council adopted a resolution against Sudan (which also didn't sign the ICC Statute) to address the Darfur crisis in 2005, the political clouts growling around this issue fueled by reluctance of China and Russia to

acknowledge the crimes of Myanmar makes this possibility almost next to impossible. It is worth remembering that in 2007 an attempt to adopt a Myanmar resolution went in vain by the vetoes of China and Russia, despite garnering 9 yes votes at the Security Council.

Bypassing the political adversity

10. It appears that besides ICC two possible alternatives can be pursued to prosecute Myanmar, and Bangladesh can play a pivotal role in this regard.

Invoking Article IX of the Genocide Convention

11. Being a country directly affected by the influx of refugees, Bangladesh can proceed to the International Court of Justice (“ICJ”) against Myanmar under Article IX of the Genocide Convention which allows signatory parties to submit an application for disputes regarding responsibility of a State against genocide to the ICJ. As the Genocide Convention was signed by both Bangladesh (in 1998) and Myanmar (in 1956), a case against Myanmar at the ICJ does not pose procedural difficulties.
12. A major defence against a potential case before the ICJ shall be the question of jurisdiction. However, in the landmark verdict of Bosnia and Herzegovina vs. Serbia and Montenegro, [2007] ICJ 2, a case filed by Bosnia-Herzegovina regarding the genocide of *Bosniac* ethnic groups (including the *Sebrenica* massacre), the ICJ confirmed that it had jurisdiction over Serbia and Montenegro under Article IX of the Genocide Convention, and held that Serbia had violated its international obligations to prevent genocide.

Assuming the Universal Jurisdiction

13. Another effective alternate can be the exercise of the “*universal jurisdiction*” by the Bangladeshi national courts. Universal jurisdiction is the power of national courts permitted by the law through which it can investigate and

prosecute the Crimes outside its national territory. This concept is often hailed as an international norm which is *erga omnes* (i.e. owed to the entire world) and also *jus cogens* (i.e. binding on all States).

14. Instances of countries adopting universal jurisdiction include the courts of Spain (for crimes in South America), Israel (the trial of Adolf Eichmann for crimes in the World War II), Belgium and Finland (for crimes in Rwanda), the UK (for crimes in Chile) and Germany (for crimes in Syria) have proved the thriving acceptance of universal jurisdiction.
15. Despite having a competent court (i.e. the International Crimes Tribunal), Bangladesh has not yet recognized universal jurisdiction. However, in the plenary meeting of the Sixth Committee of the 67th UN General Assembly held on 18.10.2012, Bangladesh provided positive feedback on the acceptance of the universal jurisdiction. A small amendment to the International Crimes Tribunal Act, 1973 to widen the scope and jurisdiction of the court can be a crucial step in resolving the ongoing atrocities on Rohingya people and the refugee influxes.
16. In order to reestablish stability in the region and to emancipate the persecuted Rohingya people, Bangladesh should step up to put an end to the ongoing impunity and hold Myanmar accountable for their crimes.

***Junayed Chowdhury, Managing Partner and Shyikh Mahdi, Pupil**

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