

The Rohingya: Between a Rock & a Hard Place

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The Rohingya are an oppressed Muslim ethnic minority primarily from Rakhine State in western Myanmar. The government considers them Bengali and has removed their citizenship rights. Since 2017, over 1 million have crossed the border into Bangladesh, where they live in extensive refugee camps. Bangladesh is pushing for them to be repatriated, but the Rohingya are refusing until it is safe to do so. The situation has become more complicated since the military coup d'état of February 2021, where Ethnic Armed Organisations (EAO) and citizen groups have taken up arms against the military (Tatmadaw). Alliances between the EOAs are transactional, as are alliances between various EOAs and the military. In Rakhine state, the Arakan Army, which supports a Buddhist state, is destroying Rohingya villages, as is the Tatmadaw. Cases are proceeding against Myanmar in the International Criminal Court and the International Court of Justice concerning allegations of crimes against humanity and genocide. The legal basis for these cases is described in detail. Unless Myanmar becomes a genuinely multi-ethnic society with religious freedom, the position of the Rohingya will remain dire.

Keywords: Rohingya, ethnic conflict, sectarian conflict, genocide, crimes against humanity

Introduction¹

Myanmar (previously called Burma) has a checkered history since the end of World War II. It achieved independence from Britain on 4 January 1948 (Ibrahim, 2018, p. 35). Its borders were based on the precolonial borders extant in 1824. The new country “inherited a complex mixture of ethnic groups and religious beliefs”. These ethnic groups were mainly in the hilly/mountainous area and subsequently became part of one of the ethnic states: Kachin, Shan, Kayah, Kayan, Mon, Rakhine and Chin (see Figure 1). The majority Bamar/Buddhist areas were subdivided into what finally were called Regions: Ayeyarwady (Irrawaddy), Bago, Magwe, Mandalay, Sagaing, Tanintharyi and Yangon Region. The capital, Nay Pyi Taw, is a Union territory. The Rohingya who are the subject of this article are from Rakhine State (see Figure 2).

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Figure 1. *Map of Myanmar Showing States and Regions*



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²<https://asiapacific-archive.anu.edu.au/mapsonline/base-maps/myanmar-statesregions>

Figure 2. Map of Rakhine State Showing Majority and Minority Rohingya Centres in 2015



Rohingya people in Rakhine (Arakan) State in Myanmar

- - Rohingya majority
- - Rohingya minority

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The Rohingya are a Muslim minority who practice their own variation of Sunni Islam (Albert & Maizland, 2020). It is estimated that there are around 3.5 million worldwide, and before August 2017, around 1 million in Myanmar, the majority of

³https://commons.wikimedia.org/wiki/File:Map_of_Rohingya_people_in_Rakhine_State.png

whom were in Rakhine State, where they constituted nearly one-third of the population. They differ from Myanmar's dominant Bamar (Burman) ethnic group in terms of religion, ethnicity and language. The Bamar population follows Theravada Buddhism, as do Sri Lanka and Thailand.

Writing in 2017, after Myanmar had moved from military rule to a flawed democracy in 2015, Ibrahim (2018) wrote:

The violence against the Rohingyas is not an unpleasant, though predictable, side effect of a society moving from authoritarian rule to liberalism. The repression of Rohingyas is orchestrated, in part, by those who believe there is no place in Myanmar who is not a Buddhist (and especially if they are a Muslim), in part by ethnic extremists in other communities who want a racially pure state, and in part by the military regime, which is content to see a degree of unrest (p 3).

M. Smith (2019) contends that the 1982 Citizenship Law 1982 is the "basis for all discussion of political rights and ethnic identity in the country today" (p. 127).

Since 2017, over 1 million Rohingya refugees have been living in appalling conditions in refugee camps in Bangladesh near Cox's Bazar. As late as May 2024, those Rohingya remaining in Myanmar continue to be attacked by both the Myanmar military (Tatmadaw), Myanmar Airforce and the Arakan Army, an ethnic armed organisation (EAO) with strong Buddhist links.

According to the Council on Foreign Relations, the Rohingya have migrated to several Asian countries (Albert & Maizland, 2020):

- a. *Bangladesh*, where most of the Rohingya refugees are located, as they are able to cross via a land border. The Bangladesh authorities have forbidden formal education in the camps. The risk of disease is very high, and the water supply can be contaminated;
- b. *Malaysia*, where Rohingya travel by sea but have no legal status, are unable to work, and are cut off from education and health care;
- c. *India*, where Rohingya travel across a land border into eastern India. The BJP government considers them to be "ill immigrants" and has worked on their repatriation despite criticism from the United Nations and other human rights groups;
- d. *Thailand*, a regional smuggling hub and a transit point for Rohingya arriving by boat; and
- e. *Indonesia*, where they arrive by boat but are considered to be illegal immigrants.

The authors explore the genesis of the ongoing "Rohingya Crisis" within both Bangladesh and Myanmar. The role and limitations of international law are discussed in detail as the legal framework is complex. The roles of politics and ethnicity are driving factors, and these are discussed from the time of the coup d'état of 1962 to mid-2024.

The questions were, and remain: How can the Rohingya refugees return to Myanmar? How can all of Myanmar's Rohingya retrieve their land and citizenship

and be accepted as part of a rich multi-ethnic community under a genuinely democratic government?

Methodology

This research is based on the documentary research concept. It analyses the national and international laws that are applicable to understanding the plight of the Rohingya and possible remedies. Finally, it analyses the available contemporary reputable sources to provide information on the plight of the Rohingya in both Bangladesh and Myanmar. Accurate information has been hard to obtain, particularly since the coup d'état of February 2021. The sources usually rely on satellite imagery and clandestine interviews. Even before that, the Tatmadaw (Myanmar military) activities were secretive.

Analysis

Right to Citizenship in Myanmar

The *Constitution of the Union of Burma (1948)* clearly defined who was entitled to citizenship. It included those whose parents belonged to one of the indigenous races of Burma (art 11(i)); a person born in any of the territories that were included in the Union and had at least one grandparent from one of the indigenous races (art 11(ii)); a person born in any of the territories who at the time of the Constitution would have been a Union citizen (art 11(iii)); and finally:

every person who was born in any of the territories which at the time of his birth was included within His Britannic Majesty's dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of this Constitution or immediately preceding the 1 January 1942 and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law, shall be a citizen of the Union (art 11(iv)).

There was, however, a proviso: Parliament was given the power to make laws to include new classes of citizens or terminate the citizen of an existing class (art 12). At the time of independence there was no definition of who constituted an "indigenous race" despite comments to the contrary by the subsequent military juntas (Lintner, 2017).

Whether or not the Rohingya were considered an "indigenous race", they would be eligible to be granted citizenship under Article 11(iv), which, however, is more restrictive than for an "indigenous race".

In 1974, the military junta, through its political organisation, the Burma Socialist Programme Party, drafted what it called the *Constitution of the Socialist Republic of the Union of Burma* (Preamble). Arakan Division was re-constituted as Arakan State (art 30(e)). The definition of a citizen changed (art 145):

- (a) All persons born of parents, both of whom are nationals of the Socialist Republic of the Union of Burma, are citizens of the Union.
- (b) Persons who are vested with citizenship according to existing laws on the date this Constitution comes into force are also citizens.

The definition of a citizen remained essentially the same with the promulgation of the *Myanmar Constitution 2008* (art 345). What changed in the intervening period was the proclamation of the Burma Citizenship Law (1982), which sets out in excruciating detail the manner in which you can become a citizen. “Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period prior to 1185 B.E., 1823 A.D. are Burma citizens” (art 3). This date was prior to the 1824-1826 Anglo-Burmese War (Lintner, 2017). This article should equally apply to the Rohingya, but the wording includes the Rakhine as an example but not the Rohingya. The Law also allows for “associate citizenship” (ch III) and “naturalized citizenship” (ch IV). The documents required to apply are very comprehensive and may no longer exist.

Before the 2014 national census, the first official list of all “official” national races was prepared (Lintner, 2017). Ethnic lines were blurred.

Some suspect the military divined the supposed number of national races through numerology. When the SLORC junta declared there were exactly 135 national races, some analysts noted that the three digits — 1, 3 and 5 — summed equal the number 9, the military’s supposedly lucky number symbolizing unity (Lintner, 2017).

Regardless of how the list was developed, one thing is obvious: the Rohingya were not on the list. Most Muslims in Rakhine State could only be counted as “Bengalis”, which was anathema to the Rohingya (M. Smith, 2019). This meant that over one million people, or around one-third of the state’s population, were not counted. The following year, the Temporary Registration Certificates or “White” identity cards held by most Muslims were revoked. As a result, an estimated one million people lost their right to vote; of that number, around half identified as Rohingya.

History of Treatment of Rohingya 1962-2024

Military Rule 1962-2010

As seen above, the Rohingya were gradually losing their rights during the junta period. This culminated with the 1974 *Emergency Immigration Act* introducing ethnicity-based identity cards. The Rohingya were only eligible for Foreign Registration Cards (Ibrahim, 2018, p. 50). From around 1990, discrimination increased as Rohingya were increasingly displaced from their land to allow for the building of new villages and army bases (p. 52). The new villages were populated by Buddhists from other areas of the state.

Transition to Democracy 2010-2021

The period from 2010 to 2015 resulted in the internationalisation of the telecommunications sector and the rapid take-up of Facebook (R. Smith & Smith, 2022, p. 324). There was continuity under the Aung San Suu Kyi government of 2016-2021. These administrations did little to limit hate speech, particularly when it related to Muslims, particularly the Rohingya. During the Aung San Suu Kyi government, there was an increase in the persecution and prosecution of the critics of the regime. R. Smith & Smith (2022) detailed the use and abuse of social media by the various Government, religious, ethnic and ethnic armed organisations in Myanmar between 2010 and 2022. In 2018, Mozur (2018) called the Rohingya crisis “A Genocide Incited on Facebook, with Posts from Myanmar’s Military”.

The year 2012 saw significant violence break out in Rakhine State against the Rohingya (Ibrahim, 2018, pp. 79-86; Wade, 2017, pp. 98-122). It appeared to be planned by extremist monks and extremist political parties such as the RNDP [Rakhine Nationals Development Party] (Ibrahim, 2018, p. 83). Social media had a significant role in stoking the violence (Wade, 2017, p. 118). Attacks were not restricted to the Rakhine. March 2012 saw Buddhist monks lead attacks on Muslims in Meiktila near Mandalay, resulting in over 14,000 people being displaced (Ibrahim, 2018, p. 86). An anti-Muslim Facebook campaign preceded the attacks. The year also saw displaced Rohingya “boat people” deciding once again to make “dangerous voyages by sea, and apartheid-like conditions became normalised (M. Smith, 2019, p. 74)

Prior to handing over to the National League for Democracy (NLD) government, the Thein Sein government rushed through parliament four “Race and Religion” long promoted by the Ma Ba Tha, a nationalist Buddhist organisation (Caster, 2015). The *Population Control Act* “grants regional officials the ability to establish 36-month birth spacing for targeted groups”; Muslim couples wishing to marry have to obtain approval to marry and sign up to a two-child policy. The *Buddhist Women’s Special Marriage Act* requires Buddhist women and men of a different faith to register their intention publicly and can only get married if there are no objections. The Religious Conversion Act requires registration, an interview and a 90-day waiting period. The *Monogamy Act* “targets religious minorities who are often seen as sexual deviants.”

At the 2015 General Election, the NLD under Aung San Suu Kyi won the most seats (Kipgen, 2022, p. 151). This was quite an achievement, as 25% of the seats were reserved for the military. Aung San Suu Kyi was denied the post of President under Article 59(f) of the *Constitution* of 2008 because her sons were foreign citizens. (Her husband had passed away whilst she was under house arrest). Instead, she “was made State Counsellor, making her de facto leader, and took on the roles of foreign minister, education minister, energy minister and minister of the President’s office” (Kipgen, 2022, p. 151). This is a lady who was 70 years old and had no government or commercial experience. She was an icon for democracy but without experience in governance. One ministerial role is stressful enough; why four?

There is overwhelming evidence that the Tatmadaw “systematically used Facebook as a tool in the government’s campaign of ethnic cleansing against” the

Rohingya (Douek, 2018). Investigations have been conducted by Facebook (Gleicher, 2018, 2020) and reported by other reputable organisations (Global Witness, 2022; Irving, 2018; Mozur, 2018; Nyi Nyi Kyaw, 2019; Sakim, 2020; Stecklow, 2018). The Independent International Fact-Finding Mission on Myanmar established:

consistent patterns of serious human rights violations and abuses in Kachin, Rakhine and Shan States, in addition to serious violations of international humanitarian law. These are principally committed by the Myanmar security forces, particularly the military. Their operations are based on policies, tactics and conduct that consistently fail to respect international law, including by deliberately targeting civilians. Many violations amount to the gravest crimes under international law. . . . [The Report] makes concrete recommendations to that end, including that named senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes (UNHRC, 2018 Summary).

In a follow-up report, the Mission confirmed that “the Rohingya remain the target of a Government attack aimed at erasing their identity and removing them from Myanmar, and that this has caused them great suffering” (United Nations Human Rights Council, 2019 para 2). “[M]any of the factors that contributed to the killings, rapes and gang rapes, torture, forced displacement and other grave human rights violations . . . are still present”. It was also found that the Arakan Army was violating international humanitarian law in its fight against the Tatmadaw, although to a much lesser extent (para 15-16). Interestingly, it did not find evidence of widespread mass sexual violence committed by the Tatmadaw against the Rakhine women as part of its strategy to combat the Arakan Army (para 15). The difference being, of course, that the Rakhine are Buddhist, and the Rohingya are Muslim!

In retrospect, two well-known books written about Aung San Suu Kyi by Peter Popham (2012, 2016) appear almost hagiographic in the light of future events. Aung San Suu Kyi made a submission to the International Court of Justice on 11 December 2019 (“Provisional Measures: Public sitting held on Wednesday 11 December 2019,” pp. 12-20). The submission was analysed by (Putra, Selvanathan, Mashuri, & Montiel, 2021, p. 358) “who considered that her primary rhetorical defence was in the interpretation of the mass killings as non-genocidal”. They found four types of rhetorical denial arguments, namely: “it is not genocide when there is armed conflict; both sides are victims; both sides are perpetrators; and misconduct by law enforcement has been addressed.” The authors of the current article consider that the evidence seems to contradict the denials of Aung San Suu Kyi as will be shown below.

As far as the authors are concerned, a seminal moment occurred in late January 2017 when a delegation returned from Indonesia to Yangon (Thant Myint-U, 2019, p. 234). The group included delegates from the government, the army, the National League for Democracy (NLD), and Buddhist and Muslim leaders from Rakhine. Ko Ni, a leading member of the NLD and a constitutional advisor to the Government, was assassinated as he waited for his car at the airport. The motive is unknown. What is known is that he was a Muslim of Indian heritage (p. 234). Thant Myint-U attended the funeral attended by several leading NLD figures and thousands of

Yangon Muslims. Aung San Suu Kyi did not attend nor make any statement for several days (p. 235). What was even more impressive, as the first author of this article watched scenes of the funeral from Nay Pyi Taw, was the presence of saffron-robed monks. This tended to reinforce in the author's mind that Aung San Suu Kyi was not really interested in the plight of Muslims and lacked the leadership skills to lead a government.

In mid to late 2018, Reuters used interviews and satellite imagery to investigate the on-the-ground reality in Rakhine as the Government was promising to bring home hundreds of thousands of Rohingya refugees from Bangladesh (McPherson, Lewis, Thu Thu Aung, Shoon Naing, & Siddiqui, 2018). The investigation found that where the Rohingya previously lived was "being dramatically transformed". Hundreds of new houses were being built in villages where the Rohingya resided. Following the departure of the Rohingya, the villages were often burned, flattened and levelled by bulldozers. Their intelligence found that the new occupants were mainly Buddhist, including some from other parts of the state. New homes were being occupied mainly by Buddhists, some from other parts of Rakhine. New facilities were also being built by the security forces.

Prior to the November 2020 election, an investigation found that "Radio Free Myanmar" (RFM), which is a fraudulent copy of "Radio Free Asia", was spreading disinformation usually about the National League for Democracy and the Rohingya (Banyan Kyaw, Phone Htet Naung, Beatson, & Nachemson, 2020). While the organisation behind RFM could not be identified, the view was that it was a mouthpiece of ultranationalists and the military-aligned Union Solidarity and Development Party.

As of June 2020, it was estimated that 131,900 displaced Muslims resided in camps or camp-like settings (Bauchner, 2020). They consisted of Rohingya and "a few thousand" Kaman. The latter, also Muslims, are one of the recognised 135 ethnic groups.

Military Rule 2021-2024

Geopolitical Monitor has identified over 40 armed groups and political organisations involved in Myanmar's current civil war (Graceffo, 2024). The Ethnic Armed Organisations (EAOs) currently operating in Rakhine State are the Arakan Army (AA), Arakan Liberation Army (ALA), Rohingya Solidarity Organisation (RSO), and the Three Brotherhood Alliance.

Since the military coup, Human Rights Watch reports that "thousands" of Rohingya have been arrested for "unauthorised travel", imposed additional conditions on free movement and blocked aid to Rohingya camps and villages (Human Rights Watch, 2023b).

In early 2024, the military junta introduced conscription under the *Public Military Service Law 2010*. In Rakhine State, much of the forced recruitment and arbitrary detention has been from the state's Rohingya internment camps, and there was concern amongst the Rohingya might be stopped at government checkpoints and be forced to serve in the military (Frontier Myanmar, 2024). It is estimated that between February and May 2024, around 1,000 Rohingya have been conscripted,

which is ironic as the military considers them to be non-citizens. The conscription law applies only to citizens (Ahmed, 2024).

On 23 May 2024, CNN reported that the township of Buthidaung in northern Rakhine State had been attacked, apparently, by the [Buddhist aligned] Arakan Army the previous Saturday (Regan & Schmitz, 2024). It is claimed that about 200,000 Rohingya were forced to flee their homes, many to hide in the paddy fields. Whilst there are claims and counter-claims, it is possible that the town was attacked by junta aircraft and artillery whilst the Arakan Army entered the town and committed acts of arson. What has been independently verified by CNN from satellite imagery is that “huge fires engulfed downtown Buthidaung on the Saturday morning and continued to burn over the weekend” (Regan & Schmitz, 2024). The report also noted that “[y]oung Rohingya men also face forcible conscription from the junta, the AA [Arakan Army] and armed Rohingya insurgent groups both in Myanmar and in the sprawling Bangladesh camps where gang violence is escalating”.

Refugees in Bangladesh

In December 2020, the Bangladesh government moved 20,000 refugees to Bhasan Char, a remote silt island in the Bay of Bengal, which had only existed for around 20 years, with a plan to relocate 100,000 refugees (Human Rights Watch, 2021).

The UN High Commissioner for Refugees visited Bangladesh in August 2022 (Al Jazeera, 2022). During the visit, it was reported that the Bangladesh Prime Minister told the High Commissioner that the Rohingya refugees in the camps must return to Myanmar. Speaking to reporters during the visit, the High Commissioner advised that “the current situation across the border means that the conditions are not right for returns” and “repatriation must always be conducted in a voluntary and dignified manner, only when safe and sustainable conditions exist in Myanmar”.

At a January 2023 seminar on restoring peace in Myanmar, a retired Brigadier-General of the Bangladesh army claimed that the Rohingya crisis was creating internal security threats and options other than diplomacy, which has not worked, need to be explored (Staff Correspondent, 2023, p. 4). At the same seminar, Prof Zaw Wai Soi, minister of Myanmar’s National Unity Government (in exile), gave a strong commitment to the “voluntary, safe and dignified repatriation of the Rohingyas” and zero tolerance to any discrimination against them. The vision is to build a state where “basic human rights can be valued and exercised” (p. 4). In the same month, Human Rights Watch reported that they had reliable evidence that the Bangladesh Armed Police Battalion (APBn), which had taken over camp security in 2020, was “committing extortion, arbitrary arrests, and harassment of Rohingya refugees” (Human Rights Watch, 2023a).

In December 2023, the Crisis Group (2023) reported that turf wars among armed groups and dwindling aid have worsened what were already dire conditions in the refugee camps. It noted that whilst both Bangladesh and Myanmar are pushing for repatriation, “large-scale returns are unrealistic given insecurity and the absence of citizenship and other protections”. To press for repatriation, Bangladesh has restricted the free movement of refugees and their ability to work in Bangladesh. The Government also places constraints on aid organizations in their delivery of

essential services. To survive, some refugees take drastic such as joining criminal gangs or attempting dangerous migration.

It is estimated that 4,500 Rohingya attempted to leave Bangladesh or Myanmar by crossing the Bay of Bengal or the Andaman Sea in 2023. Of these, at least 569 were reported to have died or were missing (Paul, 2024). On 16 January 2024, Human Rights Watch called on Indonesian authorities to:

immediately stop all pushbacks of boats carrying ethnic Rohingya refugees, and investigate and end all assaults on refugees . . . The authorities should allow them to disembark in the nearest safe port, provide protection and humanitarian assistance, and investigate online incitement of violence against them (Human Rights Watch, 2024).

In a separate January 2024 report, Human Rights Watch noted that:

Human Rights Watch has previously reported on allegations of extortion, arbitrary arrests, and the torture and harassment of refugees by camp police. Soon after, several units were transferred, and the refugees reported that the abuses had reduced. However, according to recent interviews, these abusive practices are again on the rise. Activists say Bangladeshi authorities seldom hold the police in the camps to account for human rights violations, which creates a climate of impunity for ongoing abuses, including sexual assault (Ganguly, 2024).

On 5 February 2024, at least two people, including one Rohingya worker, were killed in the Bangladeshi border village of Jalpaitoli from mortar shells fired from Myanmar in fighting between the Arakan Army, an ethnic armed group, and the Tatmadaw (Agence France Presse, 2024). In addition, at least 95 Myanmar border police had crossed into Bangladesh to avoid the conflict and had taken shelter in the border posts of the Border Guard Bangladesh.

Application of International Law to the Rohingya Crisis

The following legal analysis was inspired by Patrick Burgess (2021), an international human rights expert and co-founder of Asia Justice and Rights (AJAR). The analysis by the authors, in all cases, is based on the original documents as cited in the current article. The analysis is somewhat complex, but it is necessary to understand the issues facing the international community in resolving the Rohingya refugee crisis.

The questions that require resolution include:

- a. Under international law, can Bangladesh return refugees to Myanmar against their will?
- b. What role can the International Criminal Court play as Bangladesh is a party to the *Rome Statute of the International Criminal Court 1998*, but Myanmar is not?
- c. What role can the International Court of Justice play, as all United Nations members are subject to its jurisdiction?

Convention Relating to the Status of Refugees

The obligations under the *Convention Relating to the Status of Refugees*, 1951 include:

- a. “Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order” (art 2);
- b. “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin” (art 3);
- c. “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children” (art 4);
- d. “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order” (art 32(1));
- e. “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (art 33(1));
- f. “The benefit of the present provision [art 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country” (art 33(2)).

Neither Bangladesh nor Myanmar are parties to the *Convention*. Moyeenul Islam Chowdhury J (2016) of the Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction) found that:

Though Bangladesh has not formally ratified the Convention relating to the Status of Refugees, yet all the refugees and asylum-seekers from scores of countries of the world to other countries have been regulated by and under this Convention for more than 60 (sixty) years. This Convention, by now, has become a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not (pp. 9-10).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The (*Convention against Torture*, 1984 art 3), to which Bangladesh is a party, states that:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where

applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Rome Statute and the International Criminal Court

The *Rome Statute of the International Criminal Court* (1998) was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 and entered into force on 1 July 2002. The United Nations facilitated the establishment and adoption of the Statute. However, the International Criminal Court is not an organ of the United Nations and is managed by an Assembly of the States Parties to the Statute (art 112-118). The Court has an international legal personality (art 4(1)), and its jurisdiction is restricted to the following serious crimes (art 5):

- a. Genocide;
- b. Crimes against humanity;
- c. War crimes; and
- d. Crime of aggression (art 5).

Genocide is defined 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: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group (art 6).

Crime against humanity is defined as:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, . . . ; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (art 7).

War crimes are defined as:⁴

grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention (art 8^2(a));

...

⁴The acts that can be prosecuted are detailed in art 8^[2].

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law (art 8^2(b))

...

In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, . . . acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause 8^2(c)).

Crime of aggression is defined as:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (art 8bis ^[3](1)).

Most critically, “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5” (art 12(1)). The Court may also exercise its jurisdiction if the offence occurs in the territory of a State party, on board a vessel or aircraft registered by a State party, or if the accused person is a national of the State party (art 12(2)). It may also exercise jurisdiction if a non-State party accepts the jurisdiction of the Court “with respect to the crime in question” (art 12(3)). It can also exercise its jurisdiction “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” (art 13(b)).

Bangladesh is a State party to the Statute and can exercise jurisdiction if a crime occurs within its territory. The Security Council could also exercise jurisdiction, but it is generally accepted that China and Russia, who are supporting the military Government of Myanmar, would veto any such reference by the Security Council (Burgess, 2021, pp. 60-61). The authors of this article concur with that opinion.

The *Report of the Independent International Fact-Finding Mission on Myanmar* found that crimes against humanity have been committed in Rakhine State, principally by the Tatmadaw. The crimes include murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution, enslavement, elements of extermination and deportation, and possibly the crime of apartheid (United Nations Human Rights Council, 2019 para 88). It also considered that there was genocidal intent by senior officials of the Tatmadaw (para 87). War crimes were also likely committed (para 89).

The question then arose as to whether Bangladesh had any jurisdiction. On 4 July 2019, the Office of the Prosecutor requested authorisation to investigate the Rohingya persecution (“Request for Authorisation of an Investigation Pursuant to Article 15,” 2019). Specifically, the Prosecution sought “authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of the People’s Republic of Bangladesh” (para 1).

Chamber III concluded that there was a reasonable basis that the Tatmadaw, other security forces and some local civilians committed coercive acts that could constitute crimes against humanity of deportation and persecution on the grounds of

ethnicity and/or religion (“Authorisation of an Investigation,” 2019 para 110). The Chamber further noted that “the alleged crimes have partially been committed on the territory of Bangladesh since at least 9 October 2019. Consequently, the Court may assert jurisdiction *ratione temporis* over those crimes” (para 114).

International Court of Justice

The United Nations Charter established the International Court of Justice as its principal judicial organ (*UN Charter*, 1945 art 92). “All Members of the United Nations are *ipso facto* parties to the *Statute of the International Court of Justice*” (art 93(2)). Only states may be parties in a case before the Court (*ICJ Statute*, 1945 art 34). A state party refer to the Court any legal dispute concerning the interpretation of a treaty, question of international law, “the existence of any fact which, if established, would constitute a breach of an international obligation”, and the nature or extent of reparations to be paid for a breach (art 36(2)).

On 11 November 2019, the Republic of The Gambia (“The Gambia”) instituted proceedings against the Republic of the Union of Myanmar, alleging violations of the *Convention on the Prevention and Punishment of the Crime of Genocide* through “acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group” (*The Gambia v. Myanmar: Filing in Registry*, 2019). It argued that the genocidal acts committed from around October 2016:

were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar’s resumption of ‘clearance operations’ on a more massive and wider geographical scale (International Court of Justice, 2019, pp. 1, para 2).

In January 2020 the Court concluded that “*prima facie*, it has jurisdiction pursuant to Article IX of the *Genocide Convention* to deal with this case” (*The Gambia v. Myanmar: Order - Provisional Measures*, 2020 para 37). It also concluded that “The Gambia has *prima facie* standing to submit to it the dispute with Myanmar on the basis of alleged violations of obligations under the Genocide Convention”. The subsequent order required that the following provisional measures be implemented “in relation to the members of the Rohingya group in its territory”:

- a. “take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention” (para 86(1)),
- b. “ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts [of genocide] or of conspiracy to commit genocide, of direct and public incitement to commit genocide, or attempt to commit genocide, or of complicity in genocide” (para 86(2));
- c. “take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention” (para 86(3));

- d. regularly report to the Court “until a final decision on the case is rendered by the Court” (para 86(4)).

Importantly, the decision did not prejudice the question of the jurisdiction of the Court to deal with the merits of the case, the admissibility of the Application or the merits of the case itself. The governments of The Gambia and Myanmar retain their right to submit arguments and evidence with respect to the questions (para 85).

On 22 July 2022, the Court found that it had jurisdiction to “entertain the application filed” by The Gambia and that The Gambia’s Application “is admissible” (para 115(5)).

This remains the status of proceedings as of 31 May 2024.

Summing up

The legal analysis has shown that:

- a. Under international law, Bangladesh “shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture must not return refugees to Myanmar against their will under the *Convention relating to the Status of Refugees*, which the Bangladesh Supreme Court has ruled is now customary international law which applies to Bangladesh. The *Convention against Torture*, to which Bangladesh is a party, contains similar provisions.
- b. The International Criminal Court was found to have jurisdiction as, whilst the offences commenced in Myanmar, the alleged crimes have partially been since committed on the territory of Bangladesh.
- c. The International Court of Justice ruled that *prima facie*, it has jurisdiction to investigate the role of Myanmar in the persecution of the Rohingya.

As of 31 May 2024, the legal processes continue.

Discussion & Conclusion

To call the current situation of the Rohingya a catastrophe is, in reality, an understatement. They are the other. Bangladesh is “housing” them as refugees. In reality, there is nowhere else for them to go. Their land and culture are based in Rakhine State. Migration to a third country is unlikely, and it is certainly not in the numbers that make a difference. The ideal situation would be for them to return to their land in Rakhine state, which is no doubt occupied by others under the support of the Arakan Army and the Tatmadaw. Reconciliation between the various ethnic groups in the Rakhine would be a long-term project because of the deep hatred and ill-will that has taken place over the last 15 years or so.

The Tatmadaw learned to ignore international opinion during its economically destructive governance from 1962 until around 2010 and from 2021 until 2024. Russia and China strongly support it in terms of financial support, equipment, and armaments. It has been fighting local insurrections, especially in border areas since

independence in 1948. It sees its mission to unify the nation and promote Buddhism. The Ethnic Armed Organisations are, at times, its allies or at least neutral. At other times, they are deadly enemies. The Tatmadaw uses air strikes and artillery against its citizens as well. Human rights violations are a regular occurrence, particularly clearance operations, which often include razing of villages and ravaging the local villagers. Since the coup d'état of February 2021 most of the country appears to be its enemy. Total defeat would be unlikely due to its past behaviour and deep knowledge of the country and its population. Unfortunately, the Tatmadaw will probably be required to be part of the country's reconstruction process.

Ethnic Armed Organisations and their supporters would be more disposed to cooperation if two things occurred: each of the existing Regions were converted to individual States to overcome the view that they are a unified Bamar/Buddhist block. The next step would be to adopt a Federal Constitution. The citizen rights of the Rohingya must also be restored.

One possible solution, which has associated risks, would be to declare the north of Rakhine State a Self-Administered Area, which under Section 196 of the Constitution would give it power relating to matters in Schedule Three of the Constitution, namely: urban and rural projects; construction and maintenance of roads and bridges; public health; development affairs; prevention of fire hazard; maintenance of pasture; conservation and preservation of forests; preservation of the natural environment; water and electricity matters in towns and villages; and market matters of towns and villages. The obstacle is that the former land of the Rohingya has been reallocated to families from the Buddhist Rakhine ethnic group.

The Buddhist Sangha must establish rules that "outlaw" hate speech and encourage religious harmony. Monks that continue to violate these rules should be warned, and if they continue to offend, they should be subject to de-frocking. This might seem harsh, but violence against others cannot be tolerated. The Government should also introduce and enforce anti-discrimination legislation.

It is abundantly clear that the repatriation and re-integration of the Rohingya will be a long-term project. Preconditions are a stable civilian government and reconciliation of all parties caught up in the current civil war. In the meantime, they are caught between a rock and a hard place.

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