

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

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Abstract

Amidst a divided United Nations Security Council (UNSC) in New York, and a brittle equilibrium between the democratic forces and the Tatmadaw (Armed Forces) in Yangon, the international community is once again challenged to uphold and fulfil its moral, ethical and legal obligation to protect the Rohingyas in Rakhine, Myanmar - regarded as the most persecuted people in the world. But how can we hold the perpetrators of ‘atrocity crime’ accountable, and what instruments, mechanism, and institutions are available in this regard? To answer these questions, this paper first outlines the legal instruments that define and criminalize atrocity crime setting clear boundaries for individuals and states. Second, elucidating the agency-structure framework, it argues in favour of taking an agency centric approach – holding the individuals and not the state, criminally liable for committing atrocity crime. Third, the paper examines the international instruments ratified by Myanmar and its declarations upon ratification, revealing Myanmar’s potential obligations to address the allegations of atrocity crime. Fourth, exploring the mechanism and process of dealing with similar crimes in former Yugoslavia, Sierra Leone, Rwanda and Cambodia, the paper outlines two pathways for establishing an International Crime Tribunal for atrocity crimes committed in Rakhine, Myanmar (ICTM-R). The first pathway involves the UNSC to adopt resolution under relevant chapter of the UN Charter upholding its mandate of responsibility to protect (R2P); the second pathway requires involving the enlightened democratic forces of Myanmar leveraging the mandate of country’s National Reconciliation and Peace Centre (NRPC) to hold individuals criminally responsible for the atrocity crime as part of the reconciliation process. The paper contends that an active formal and informal diplomacy, engagement of different UN agencies, advocacy groups, human right and peace activists are essential for a credible and systematic gathering of evidences and documentation of atrocity crime to facilitate establishing the ICTM-R and uphold the moral, ethical legal obligation of the international community.

Key words: Rohingya, International Crime Tribunal, Atrocity Crimes, Myanmar

Introduction

From a moral and ethical perspective, the heart-wrenching testimonies and graphic video footages of the atrocity crimes committed against the Rohingyas in the Rakhine state leaves the ‘democratic’ leadership in Myanmar and the international community with one clear task: holding the perpetrators of these atrocity crimes accountable and ensuring a safe and expeditious return of the Rohingya refugees. Despite contestation,¹ the mass exodus of about half a million refugees to Bangladesh² in just two weeks, their ‘bone-chilling accounts’ of

¹ See Aung, Thu Thu., ‘Govt Information Committee Objects to UN Terminology on Rakhine’, *The Irrawaddy*, 27 September 2017, <https://www.irrawaddy.com/news/burma/govt-information-committee-objects-un-terminology-rakhine.html/>, accessed 07 November 2017.

² According to the United Nations High Commission for Refugees (UNHCR), since late August 2017 around 415,000 Rohingya refugees arrived in Bangladesh. These refugees are additional to the existing

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

facing ‘excessive violence and serious violations of human rights, including indiscriminate firing of weapons, the use of landmines’³ evidenced by some brave reporting containing live images amidst limited access,⁴ has irrefutably convinced the international community including the United Nations Secretary General (UNSG) that an act of genocide, ethnic cleansing and crime against humanity has happened in the northern Rakhine state of Myanmar.⁵ But how do we hold the perpetrators of these atrocity crimes accountable? What domestic and international legal instruments, institutions and mechanisms are available in this regard and how are those applicable in the case of Myanmar? What data, evidences and documentations are needed for a potential indictment and trial of individuals and attribute command responsibilities? This paper seeks to answer these vexing questions exploring the existing scholarship and experiences. **First**, the paper defines atrocity crimes – such as genocide, war crimes, crime against humanity and ethnic cleansing, as enshrined in different international instruments. It establishes that the international legal instruments criminalize atrocity crimes

ones and growing by hours. See UNHCR, ‘First group of Rohingya Refugees Moves to New Emergency Shelters’, <http://www.unhcr.org/uk/news/briefing/2017/9/59c0d9dc4/unhcr-first-group-rohingya-refugees-moves-new-emergency-shelters.html>, 19 September 2017, accessed 29 September 2017 and, ‘Rohingya Influx: 4, 80,000 and Counting’ *The Daily Star* 28 September 2017. Bangladesh’s Prime Minister in her speech at the UN General Assembly (UNGA) stated that Bangladesh, in total, is ‘sheltering over 800,000 forcibly displaced Rohingyas’. See United Nations, ‘Address by H. E. Sheikh Hasina, Hon’ble Prime Minister Government of the People’s Republic of Bangladesh at the 72nd Session of the UNGA’, 21 September 2017, https://gadebate.un.org/sites/default/files/gastatements/72/bd_en.pdf/, accessed 29 September 2017. Myanmar however disputes this claiming there is a lot of ‘fake news’ surrounding this issue. See Poppy McPherson, ‘“A lot of fake news”: Burmese back Aung San Suu Kyi on Rohingya crisis’, *The Guardian*, 20 September 2017.

³ See ‘Secretary-General’s Remarks at Open Debate of the Security Council on Myanmar’, 28 September 2017, <https://www.un.org/sg/en/content/sg/statement/2017-09-28/secretary-generals-remarks-open-debate-security-council-myanmar/>, accessed 29 September 2017.

⁴ A report by Jonathon Head of the British Broadcasting Corporation (BBC) on 7 September 2017 from the village Alel Than Kyew in Rakhine state was quite revealing. It contains images of the people who ‘almost certainly’ were engaged in burning the houses and reports their confession. See Jonathon Head, ‘Who is burning down the Burmese Villages?’ 11 September 2017, *BBC News*, <https://www.youtube.com/watch?v=9QIP5n15c9I/>, accessed 30 September 2017.

⁵ Most international media, scholars and leaders have described the persecution of Rohingyas in Myanmar as ‘ethnic cleansing’ and/or ‘genocide’. See Michael Shafi, ‘Myanmar treatment of Rohingya looks like ‘textbook ethnic cleansing’, says UN’ *The Guardian*, 11 September 2017. Euan McKirdy, Rebecca Wright and Z. Saeed, ‘“There is genocide going on there” Rohingya huddle on Bangladesh border’, *CNN*, 04 September 2017, <http://edition.cnn.com/2017/09/01/asia/rohingya-bangladesh-myanmar-crisis/index.html/>, Accessed 23 September 2017. Harriet Agerholm, ‘Burma soldiers ‘burning bodies of Rohingya Muslims’ to conceal evidence’, *The Independent*, September 4, 2017, <http://www.independent.co.uk/news/world/asia/burma-rohingya-muslims-genocide-soldiers-burn-bodies-massacre-evidence-crackdown-minority-a7927981.html#commentsDiv/>, accessed 30 September 2017. ‘Permanent Peoples’ Tribunal finds Myanmar guilty of Rohingya genocide’, *The Daily Star*, 22 September 2017, <http://www.thedailystar.net/world/rohingya-crisis/peoples-tribunal-finds-myanmar-guilty-rohingya-genocide-1466008/>, accessed 30 September 2017.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

setting clear boundaries for individual and collective social agent, such as state. **Second**, elucidating the agency-structure framework of social science, it shows why an agency centric approach – that is, holding the ‘state’ and/or the ‘human’ agent accountable, is more effective to serve justice for atrocity crimes. It reveals that, irrespective of the willingness/ unwillingness of the state, international community have traditionally taken an agency centric approach to indict and prosecute the perpetrators of atrocity crimes. This is evidenced by the mandate and functioning of four International Crime Tribunals (ICTs) in Rwanda, Cambodia, former Yugoslavia and Sierra Leone. **Third**, it examines the relevant international instruments ratified by Myanmar and the process of establishing ICTs in Rwanda, Cambodia, former Yugoslavia and Sierra Leone. The examination reveals that Myanmar’s minimalist ratification strategy, reservations upon ratification *does not restrict* the UNSC, and the contracting parties of 1948 Genocide Convention to engage International Court of Justice (ICJ) for the trial of the ‘agents’ who committed atrocity crimes in Rakhine state. **Finally**, by way of conclusion, the paper briefly highlights the process of collecting data, evidences and documentation for successful indictment and prosecution of various atrocity crimes including the attribution of command responsibility. The paper is not an historical account of the conflict but a practical way forward. It is aimed at exploring how the collective wisdom of the international community in dealing with atrocity crimes can be applied in this context to serve justice fulfilling the moral, ethical and legal responsibility and assisting all parties to remain in the right side of the history.

Atrocity crime defined

The collective wisdom of international community has identified three grave nature of crimes -- genocide, crimes against humanity and war crimes as the ‘atrocity crime’.⁶ The ambit of atrocity crime was extended to include ‘ethnic cleansing’ following the pledge by *all* UN member states on Responsibility to Protect (R2P) during the 2005 World Summit at UN General Assembly (UNGA).⁷ All these crimes are legally defined in different UN Conventions and Statute, in particular, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions and their 1977 Additional Protocols, and the 1998

⁶ David Scheffer suggests that genocide, crimes against humanity (including ethnic cleansing), and war crimes to be called as ‘atrocity crimes’ to facilitate public debate while reflecting its magnitude and character. See David Scheffer, ‘Genocide and Atrocity Crimes.’ *Genocide Studies and Prevention* 1, 3: 229-250, (December 2006), p.237. Current UN publications also uses the term. See UN, ‘Framework of Analysis for Atrocity Crimes: A Tool for Prevention’, <http://www.un.org/en/preventgenocide/adviser/pdf/framework/>, accessed 30 September 2017, pp.1-3

⁷ See A/RES/60/1 16 September 2005. p. 30.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Rome Statute of the International Criminal Court. The 1948 Convention defines *genocide* as any act committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Such act may include (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. It recognizes that, even though the victims of the crimes are individuals, they are targeted because of their membership, real or perceived, in one of the groups.⁸ The *crimes against humanity* encompass acts that are part of a widespread or systematic attack directed against any civilian population. The Rome Statute of the International Criminal Court (ICC) lists eleven such crimes. These includes murder, extermination, enslavement, deportation/forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape/sexual slavery/enforced prostitution/forced pregnancy/enforced sterilization/any other form of sexual violence of comparable gravity, political, racial, national, ethnic, cultural, religious persecution against any identifiable group, enforced disappearance, 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.⁹ However, for an act to be regarded as crime against humanity, the *ultimate target* of the attack must be the civilian population. Finally, *War crimes* are defined as crimes committed against combatants or non-combatants in international or non-international armed conflicts.¹⁰ In international armed conflicts, victims include those specifically protected by the four 1949 Geneva Conventions.¹¹ In the case of non-international armed conflicts, common Article 3 of the four Geneva Conventions affords protection to “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”. Additionally, it includes

⁸ See ‘Convention on the Prevention and Punishment of the Crime of Genocide,’ 9 December 1948, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf/>, accessed 30 September 2017, Article 2. Myanmar is a state party to this Convention since 1949 with reservations.

⁹ See ‘Rome Statute of the International Criminal Court,’ https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, 17 July 1998, accessed 30 September 2017, Article 7. Myanmar is *not* a state party to the Rome Statute.

¹⁰ For a details of war crimes see, *Ibid*, Article 8.

¹¹ Four Geneva Conventions accord protection to the (a) wounded and sick in armed forces in the field; (b) shipwrecked members of armed forces at sea; (c) prisoners of war; (c) civilian persons, including in occupied territory. See ‘The 1949 Geneva Conventions,’ <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>, accessed 30 September 2017. Myanmar is party to all four Conventions since 25 August 1992.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

protection for the medical and religious personnel, humanitarian workers and civil defence staffs in both international and non-international conflicts.¹²

Interestingly, the term ‘ethnic cleansing’ is *not* recognized as an independent crime under international law and does not have an agreed definition.¹³ A working definition of ethnic cleansing was first introduced by the UN Commission of Experts mandated to investigate violations of international humanitarian law committed in the territory of former Yugoslavia. They defined ethnic cleansing as ‘a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.’¹⁴ Later the R2P document have extended the realm of atrocity crime to include ethnic cleansing requiring all states, regional organizations and the UN system ‘to give a doctrinal, policy and institutional life’ to prevent and respond to such crime.¹⁵ The physical acts that are identified as ethnic cleansing are similar to acts listed as genocide and crime against humanity including confinement of civilian population in ghetto areas, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, use of civilians as human shields, destruction of property, robbery of personal property, attacks on hospitals, medical personnel, and locations with the Red Cross/Red Crescent emblem. Thus, there are specified legal boundaries set by the international legal instruments to define atrocity crimes.

Every mass killing evokes an emotive ‘political’ use of the terms like genocide, ethnic cleansing, war crimes. However, the well-established and legally binding international instruments to codify these crimes allows separating the ‘emotive-political’ part from the ‘empirical-legal’ account. Thus, the ‘political’ and the ‘legal’ depiction of atrocity crime is not necessarily conflicting and irreconcilable. Indeed, the former is often couched in a *preventive strategy* while the latter is based on gathering systemic data, facts and evidence leading to possible indictment, prosecution and trial of the perpetrators. A painstaking fact finding and

¹² See ‘The 1949 Geneva Conventions, <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>, accessed 30 September 2017.

¹³ See UN Office on Genocide Prevention and the Responsibility to Protect, ‘Ethnic Cleansing’, <http://www.un.org/en/genocideprevention/ethnic-cleansing.html/>, accessed 30 September 2017.

¹⁴ See S/1994/674, 27 May 1994, p.33.

¹⁵ Following the 2005 World Summit Outcome on R2P several UN documents suggests the implementations strategy of the R2P to protect the populations from atrocity crimes. See A/63/677, 12 January 2009, p.4.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

evidence gathering efforts along the legal definitions can bridge the gap between the ‘political’ and ‘legal’ account of atrocity crimes. Such an effort, though time consuming, emboldens the ‘political will’ to serve justice and setting the historical record straight fulfilling our moral, ethical and legal responsibility. UN assistance to establish different International Crime Tribunals (ICTs) – as discussed later in the paper, reflects such collective political will of the international community. The prosecuting record of these ICTs validates that the legal definitions of atrocity crime are sufficiently precise and implementable through a transparent trial process.¹⁶ Thus, If and when the allegation of atrocity crime is meticulously investigated, systematically recorded and documented, the difference between ‘political’ and ‘legal’ version collapses, helping to serve justice to the ‘agency’ committing the crime.

Why the ‘agency’ approach?

In social science, ‘agency’ refers to a social unit (individuals, groups, states) and its *capacity to act* independently and to make free choices. In contrast, ‘structure’ refers to the *factors of influence* (culture, social class, religion, norms, gender, ethnicity, ability, customs) that shapes the ‘free choice’ and ‘act’ of the agency.¹⁷ The agent-structure framework is also called as ‘actor-system’, ‘micro-macro’ and ‘parts-whole.’ At its core, this framework reflects two truisms of social life. First, it suggests that the ‘agency’ is a *purposeful actor*. A family, group, society, or state qualifies as an ‘agency’ insofar their *purpose* to act are distinguishable and unitary in nature. The actions by the agency produce and reproduce the ‘togetherness’ or ‘enmity’ in which they live and transform that relationship over time.¹⁸ Second, it reflects the truth that any social agency is made up of *social relationships* -- the ‘structure’ that guides the interactions of the ‘purposeful actor’. A structure could be local, regional, national or global. Its purpose it to define the social relationship as to how the ‘agency’ will work/act. For example, if we consider ‘slavery’ as a social structure, then the concept of ‘master’ and ‘slave’ becomes a creation of this structure. Masters alone cannot cause slaves because without slaves there cannot be masters in the first place. Thus the constituent social structure of slavery

¹⁶ Indeed, many individuals initially indicted by the ICTs were later acquitted by the same ICTs supports this argument.

¹⁷ Reconciling the structure-agency problem with the concept of ‘*emergence*’ (italic in original) Dave Elder-Vass argues that ‘an entity’ or ‘a whole’ can have properties and capabilities that are not possessed by its parts. See Dave Elder-Vass, *The Causal Power of Social Structures: Emergence, Structure and Agency* (New York: Cambridge University Press, 2010), p.4.

¹⁸ According to Wendt, ‘there are no structures without agents, and no agents...without structures.’ See Alexander Wendt, *Social Theory of International Politics*, (Cambridge: Cambridge University Press, 1999), p.186.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

contributes to the cause of slavery. This social structure of slavery is produced and re-produced through the actions and interactions of master and slaves until such time both the agencies decides and acts otherwise.¹⁹ These two ‘truisms’ of social life suggest that the human agency and its associated relational structure are theoretically interdependent but ‘mutually implicating entities.’²⁰ Within the confines of their respective structures, individuals, societies or states exercises their ‘freewill’/sovereign power to carry out the ‘purposeful acts’ that may or may not be beneficial for others -particularly when crossing the moral, ethical and legal boundaries.

Notwithstanding their symbiotic relationship, the ability of the *agency* to (re)produce the underlying ‘rules of the game’ of the social relationship (i.e. structure), accords them an ontologically primitive status. The primacy of agency is emphasized by the methodological individualists who maintain that the causal power of social acts fundamentally resides in the ‘agency’ and not ‘structures’.²¹ Denigrating the role of structure, the individualists’ highlight that agents are self-organizing entities, as such they can exist independent of each other. This allows the ‘agency’ to act in their own rights using their ‘free will’ or ‘sovereign power.’ Such primacy of the individual and state agents is the central logic of an ‘agency approach’ to address, not just atrocity crimes, but all types of criminal behaviour. It justifies the basis as to why ‘agency’ should be held accountable for committing such crime. Holding the ‘agency’ accountable is key to altering the ‘status quo’ and behaviour leading to changing the ‘structure’ that might have contributed in committing atrocity crime. But how can the international community hold the state or the individuals accountable for atrocity crimes?

Agency approach to atrocity crimes: holding the state agent accountable

International legal instruments constitute the international body of law governing states, analogous to the body of national law governing individuals.²² These international instruments become legally binding for the state agency upon ratification. Similarly, international norms and practices, such as the R2P, are *not* legally binding; but they also facilitate the

¹⁹ The example is borrowed from Wendt, *Ibid*, p.25.

²⁰ Despite differences between ‘individualists’ who believe that structure *can be* reduced to the properties and interactions of agents and the ‘holists’ who view that structure has ‘irreducible emergent properties’, most contemporary IR theorists take an middle ground recognizing both.

²¹ Max Weber and David Émile Durkheim are cited as the earliest proponents of the methodological individualism. However, prominent contemporary scholars such as Anthony Giddens and Pierre Bourdieu reject the idea that structure and agency represent a binary choice. See Elder-Vass, *The Causal Power of Social Structures: Emergence, Structure and Agency*, pp.2-5.

²² See David Haljan, *Separating Powers: International Law Before National Courts*, (The Hague: T.M.C. Asser Press, 2013), DOI 10.1007/978-90-6704-858-3, p. 73-86.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

implementation of the laws relating to atrocity crimes. Indeed, R2P provides a well-defined, internationally accepted, and coherent set of frameworks to guide effective international response to imminent or occurring atrocity crimes. There has been repeated reference to the R2P provisions in different UNSC Resolutions, reminding member states about their responsibility to prevent atrocity crimes (UNSCR).²³

The R2P provisions are embedded in two core principles. First, it upholds the sovereignty norm recognizing that the primary responsibility for preventing atrocity crime lies with the individual *state*. Second, if the state is unable/unwilling to stop such crime, the principle of non-intervention yields to the international community’s responsibility to protect.²⁴ State that has ‘manifested failed’ to protect its own population can face a ‘timely and decisively’ external intervention mandated by the UNSC. Defining the threshold, the R2P document suggest a ‘large scale ethnic cleansing, when carried out by killing, forced expulsion, acts of terror or rape’, would constitute a valid condition at which state’s sovereignty may yield to international community allowing such intervention. The nature of such intervention could be, diplomatic, humanitarian, coercive sanction or in extreme cases military action, often in the form of establishing ‘safe zones’ to save lives.²⁵ Viewed these way, the R2P provisions appears not an abrogation of state’s ‘sovereign power’, but a reflection of the collective responsibility of the international community to protect humanity and strengthening host nation’s capacity. The R2P provides the normative legitimacy of external interventions as it is aimed at preventing ‘irreparable harm’ and ‘large scale loss of life’.

However, the R2P provision is also viewed as an ‘interventionist’ political instrument.²⁶ Such a view originates from the practical and political challenges to implement R2P provisions.

²³ Between 2006 to 2016, there were several such reminders by UNSC. See Global Centre for Responsibility to Protect, <http://www.globalr2p.org/>, accessed 03 October 2017.

²⁴ See International Commission for Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001), pp.xii-xiv.

²⁵ The R2P document states that military intervention is an ‘exceptional and extraordinary measure’. For such interventions to happen, there must be ‘serious and irreparable harm’ such as large scale loss of life and /or large scale ‘ethnic cleansing’ occurring or imminently likely to occur. See *Ibid*, p.xii.

²⁶ The R2P document itself recognizes the historical failure of the UNSC as it notes, ‘...faced with conscience-shocking situations, [the Security Council] failed to respond as it should have with timely authorization and support’. See ICISS, *The Responsibility to Protect*, p. 70. Also see David Chandler, ‘The Responsibility to Protect? Imposing the ‘Liberal Peace’, *International Peacekeeping*, 11 (1): 59–81 (2004). Phillip Cuncliffe, ‘A dangerous Duty: Power Paternalism and the Global Duty of Care’, in *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice*, (New York: Routledge, 2011), pp. 51-70.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

From a practical standpoint, establishing that the state has ‘manifested failed’ to protect its population is almost always bitterly contested. Counter evidences are often presented by states and their patrons, refuting the allegations as based on ‘fake news’. This was aptly reflected in the UNSC public debate on Rohingya issue on 29 September 2017. Echoing Myanmar’s claim, the Russian envoy blamed the Arakan Rohingya Salvation Army (ARSA) for arson attacks ‘*on entire villages*’ to maximize the ‘scale of humanitarian catastrophe’.²⁷ Russian envoy’s statement did not have *any mention* of the acts by Myanmar security forces and their supporting militias as documented by the UN agencies, victims, media and satellite images, authenticating their ‘most certain’ involvement in the atrocity crimes.²⁸ Instead, the statement was selective in choosing evidences. Russian envoy also suggested to be ‘very precise’ in using terms like ‘genocide’ and ‘ethnic cleansing’. Such as position by a P-5 member reflects the ‘political’ and ‘practical’ challenges that erodes and weaken the normative legitimacy of the R2P. This has, in the past, led to ‘inconsistent and selective’ decision making by the UNSC resulting an uneven and rare enforcement of R2P.²⁹ Thus, holding the state agent accountable for atrocity crimes has been challenging because the R2P focusses on ‘political responsibility’ of states for violations against *individuals* requiring the UNSC to act, instead of the ‘criminal responsibility’ of individual perpetrators. However, some international instruments shift away from state and focuses on individual criminal responsibility to prosecute perpetrator of atrocity crime – which we discuss next.

Agency approach to atrocity crimes: holding the individual agent accountable

International instruments such as the genocide convention, humanitarian laws, crime against humanity focuses on the human agent rather than the state to prevent such crimes. the ‘referent object’ in these instruments are individuals and not states. For example, Article IV of the 1948 Genocide Convention focuses on persons irrespective of their status, as it states:

‘Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.’ (Italic added).

²⁷ See ‘Statement by Ambassador Vassily A. Nebenzia, Permanent Representative of the Russian Federation to the United Nations, during the UN Security Council meeting on the situation in Myanmar, <http://russiaun.ru/en/news/myan2809>’, accessed 02 October 2017.

²⁸ See, Jonathon Head, ‘*Who is burning down the Burmese Villages?*’

²⁹ The UNSC’s inconstancy on implanting R2P was most evident in Darfur and Syria. See Gareth Evans and Mohamed Sahnoun, ‘The Responsibility to Protect’, *Foreign Affairs*, November/December (2002). Also see Neville F. Dastoor, ‘The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect’, *Harvard Human Rights Journal* 25, (2009), p.31.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Article V of the same Convention underpins the *criminal liability of individuals*, requiring States ‘to enact necessary legislation’ to provide ‘effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.’³⁰ Indeed, as David Scheffer argues, one of the five ‘cumulative definitional characteristics’ of atrocity crimes is that, it must have provisions of holding individuals criminally liable for the commission of such crime, in addition to imposing state responsibility that would enable their prosecution of a court duly constituted for such purpose.³¹ The emphasis on *individuals* is also evidenced by the strictly defined mandates of the ICTs for the trial of atrocity crimes committed in former Yugoslavia, Rwanda, Sierra Leone and Cambodia. For example, International Criminal Tribunal for the Rwanda (ICTR), established in 1994 was aimed at ‘*prosecute individuals* for the crime committed in the territory of Rwanda and neighbouring States.’³² Similarly the focus of Special Court for Sierra Leone (SCSL) - a ‘hybrid’ ICT established in 2002, was to prosecute ‘*persons who bear greatest responsibilities*’ for the grave violation of international humanitarian law and SL law.³³ The mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the prosecution of crimes committed during the period of democratic Kampuchea was also for the trial of ‘*senior leaders and those most responsible*’ for atrocity crimes.³⁴ The focus on ‘individuals’ as opposed to the ‘state’ by these ICTs were instrumental in serving justice and establishing the rule of law. Table 1 provides a summary of the total number of individuals who were served justice through these four ICTs.³⁵ Mentionable that 33 individuals who were initially indicted, were acquitted by these ICTs while 18 were transferred to state jurisdiction and the indictment of 51 individuals were terminated due to illness/death. These facts together with the court proceedings tends to indicate the practice of due process and rule of law.

³⁰ The acts under Article III of the 1948 Genocide Convention includes: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

³¹ David Scheffer, *Genocide and Atrocity Crimes*, p. 239.

³² See ‘The ICTR in Brief’, <http://unictr.unmict.org/en/tribunal>, accessed September 23, 2017. The ICTR operation ended on 31 December 2015.

³³ SCSL is referred as a ‘hybrid court’ as it involves both national and the international (UN) elements. See ‘Impact and Legacy Survey for the SCSL’, <http://www.rscsl.org/>, accessed 04 October 2017.

³⁴ See ‘Key Events’, <https://www.eccc.gov.kh/en/about-eccc/introduction/>, accessed 04 October 2017.

³⁵ The figures are as of 15 October 2017. In 2010, UN established the Mechanism for International Criminal Tribunals (MICT), formally referred to as the International Residual Mechanism for Criminal Tribunals, with a mandate to perform a number of essential functions previously carried out by the ICTR and ICTY. According to the MICT website there are 85 cases involving 117 accused individuals who awaits trial and sentencing. See <http://www.unmict.org/en>, accessed 15 October 2017.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Table 1: Summary of Justice Served for Atrocity Crimes through ICTs (Figures indicates number)

	ICTY	ICTR	SCSL	ECCC	Total
Indicted/Charged	161	93	13	15	282
Proceedings concluded	154	85	10	3	252
On going	7	0	0	3	10
Acquitted	19	14	0	-	33
Transferred to State Jurisdiction	13	5	-	-	18
Fugitive/At large	0	8	1	-	9
Indictment Terminated/ Withdrawn/Died or illness	37	8	3	3	51
Suspects yet to be Charged	0	0	0	6	6

Source: Author’s compilation from ICTY, ICTR, SCSL, and ECCC official websites.

In sum, holding individual agents accountable for atrocity crimes through ICTs have been more successful in practice. It resulted in serving justice to 252 individuals. The ICT mechanism and process has matured allowing greater involvement of state’s criminal system where such atrocity has been committed. In Myanmar context, such a mechanism to establish ad-hoc/hybrid ICT with UN assistance could be relevant and begs detail examinations – as carried out later in the paper. However, crucial to establishing such ICTs for the trail of the atrocity crimes is the *political will* of the host nation and the international community. Assessing the political will starts with examining the domestic institutions for peace & reconciliation and the status of ratification of international instruments on atrocity crime – which we examine next.

Myanmar and the international community

The collective wisdom of international community has produced several well-established instruments to protect human rights in general and atrocity crime in particular (see annex A for a list of the international instruments relating to human rights and atrocity crime). However, not all states are party to these instruments, fearing that ratification may invite external scrutiny and undermine sovereign power. However, state’s failure to become party to egalitarian and universal instruments *to protect its own people* reflects, what many IR scholars have term, a ‘autistic foreign policy’.³⁶ In IR parlance, an autistic foreign policy is described as patterns of

³⁶ Based on Freud’s concept to ‘id’, ‘ego’ and ‘superego’ to explain narcissism and behavioural anomalies, IR scholars Karl W. Deutsch, Dieter Senghaas and Edward Luttwak have used the term ‘autism’ in the context of state’s foreign policy. More recently, Barry Buzan and Hanns Maull have also advanced this concept. See Hanns Maull, *Autism in Foreign Policy*, Working Paper, Project “Diplomacy in the 21st Century” No 05, February 2017, German Institute for International and Security Affairs, pp.1-2. And Barry Buzan and Richard Little, ‘The idea of International System: Theory meets history’, *International Political Science Review*, 15, (1994) pp. 231-255.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

state’s behaviour that are ‘clearly and persistently either too weak or too disruptive to realize the collective interests of that state and its people.’ An autistic foreign policy could be due to specific political dysfunctions, emotionally charged politics, excessive involvement of organized interests in decision-making.³⁷ When a state is unable to reconcile the conflicting pressure from within and outside, it may behave ‘autistic’ in its foreign policy. Such behaviours may include a failure to act with enlightened self-interests, interacting responsibly and empathically with its own people and other states. Myanmar’s ratification trend of international instruments and interactions with UN bodies reflects such as ‘autistic’ tendency.

Ratification trend

Myanmar has acceded to only five human rights and atrocity crimes related Conventions and two Protocols (see table 2).³⁸ The country is amongst those who are party to least number of Conventions. Myanmar’s chequered political history under military rule for over 51 years, its recent return to ‘disciplined democracy’ under a constitutional provision that allows appointing 25 percent parliamentary seats by the military, and a fragmented state-society cohesion provides ample evidence of internal political dysfunctions, organized interests and emotionally charged politics contributing to a very limited and restrictive external engagement.

Table 2: Relevant International Instruments Ratified/Accessed by Myanmar

International Instruments on Human Rights and Atrocity Crime Ratified/Accessed by Myanmar	Date Ratified/ Accessed	Declaration/ Reservation
1948 Convention on the Prevention and Punishment of the Crime of Genocide	Accession 14 Mar 1956	Article VI & VIII
1976 International Covenant on Economic, Social and Cultural Rights	Signed in 2015 but not ratified.	-
1981 Convention on the Elimination of All Forms of Discrimination against Women (CEADW)	Accession in 1997	Article 29
1990 Convention on the Rights of the Child	Accession in 1991	Withdrew declaration in 1993
2008 Convention on the Rights of Persons with Disabilities	Accession in 2011	-
2002 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Signed in 2015 but not ratified.	-
2002 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Accession: 2012	-

³⁷ Hanns Maull, *Ibid*, p.2.

³⁸ Includes instruments that have been signed and ratified and/or accessed by Myanmar excluding Geneva Convention. Mentionable state’s signature is not binding until ratification.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach
 Mohammad Zahidul Islam Khan

Trend in declaration/reservation upon ratification

The examination of Myanmar’s declarations upon ratification provide a more nuanced understanding of regime’s ‘mind’ with respect to atrocity crimes. Out of the five ratified Conventions, Myanmar made declaration on three out of which one was withdrawn in 1993 (see table 2). Myanmar’s declarations in these two Conventions are unique. For example, the declarations/reservations by the 148 signatory states of 1948 Genocide Conventions mostly relates to Article VI, VII, VIII, XI, and XII as shown in table 3. Myanmar’s declarations relate to Article VI, (which outlines provision for engaging International Penal Tribunal (IPT) for the trial of personnel committing atrocity crime) and also Article VIII (that relates to involve ‘competent organs of the UN’ to resolve disputes between two states).

Table 3: Declarations/Reservation by Signatory States on 1948 Genocide Convention

Article	What the Article says	Declarations /Reservation (Countries)
Article VI	‘Persons charged with genocide...shall be tried by a competent tribunal of the State..., or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’	Algeria, Morocco, Myanmar, Philippines, USA, Venezuela
Article VII	Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.	Malaysia, Philippines, Venezuela
Article VIII	Contracting party can call upon the ‘competent organs of the UN to take such action under the Charter of the UN as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.’	Myanmar
Article IX	Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the <i>International Court of Justice</i> at the request of any of the parties to the dispute.	Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Montenegro, Morocco, Serbia, Singapore, UAE, USA, Venezuela, Viet Nam, Yemen
Article XII	Any Contracting Party by notifying the UN can ‘extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.’ (applicable for countries with external territorial jurisdiction)	Albania, Algeria, Argentina, Belarus, Bulgaria, Hungary, Mongolia, Poland, Romania, Russian Federation, Ukraine, Viet Nam

Source: Author’s compilation from United Nations Treaty Collection database.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Myanmar is the only country that has declined to engage ‘competent UN organs’ ‘for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III’.

Regarding Article VI (engaging the IPT), Myanmar’s declaration is similar to Venezuela. Table 4 provides the extract of declarations on Article VI by five other countries. As evident, Morocco and Algeria accept the provision of engaging IPT under ‘exceptional’ circumstances; USA and Philippines also do not reject it, but, refers to the consent of Senate, bilateral treaty and review by domestic Courts as preconditions to accept the jurisdiction of IPT for atrocity crimes committed within their territory. In contrast, Myanmar and Venezuela are the only two countries who rejects any jurisdiction of IPT on matters related to atrocity crime.

Table 4: Declaration/Reservations by Countries on Article VI of 1948 Genocide Convention³⁹

Myanmar. Nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.

Algeria. International tribunals may, *as an exceptional measure*, be recognized as having jurisdiction, in cases in which the Algerian Government has given its express approval.

Morocco: May be *admitted exceptionally* in cases with respect to which the Moroccan Government has given its specific agreement.

Philippines. Nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory *save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles.*

USA. Reserves the right to effect its participation in any such [international] tribunal only by a treaty entered into specifically for that purpose with the *advice and consent of the Senate.*

Venezuela. Any proceedings to which Venezuela may be a party before an international penal tribunal would be invalid without Venezuela's prior express acceptance of the jurisdiction of such international tribunal.

Interestingly, contrary to the most states,⁴⁰ Myanmar did not make any declaration on Article IX of the 1948 genocide convention that allows involving ICJ to address disputes relating to

³⁹ See ‘Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations’, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en#33, accessed 17 October 2017.

⁴⁰ Highest number of states (total 16) made declaration/reservation on Article IX, followed by Article XII (12).

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

‘interpretation, application or fulfilment of the Convention, responsibility of a state for genocide, any of the other acts enumerated in article III.’ This arguably opens a window – particularly for the affected states, to involve ICJ for addressing the allegations of atrocity crime in Rakhine state. However, while ratifying the CEADW, Myanmar expressed reservation on Article 29 that allows states to refer dispute to the ICJ.⁴¹ Interestingly, Myanmar National Human Rights Commission (MNHRC) has called the Government of Myanmar (GoM) to withdraw this declaration ‘to have effective protection for women’s rights.’⁴² An optimistic interpretation of these evidences hints at the possibility of involving ICJ for addressing the atrocity crimes in Myanmar.

Interaction with the UN CEADW Committee

GoM’s interaction with the UN CEADW Committee (hereafter Committee) is also indicative of regime’s ‘mind’ and intentions. GoM has submitted five periodic reports to the Committee.⁴³ This can be seen as a positive engagement. However, the obstacles to implement CEADW in Myanmar is much more fundamental and systemic. The Committee’s final recommendation following GoM’s combined 4th & 5th report echoes such obstacles in areas such as parliament’s legislative power, legal and nationality status, gender based violence, access to justice, visibility, participation in political and public life, education and employment.⁴⁴ The Committee observed: ‘there is no comprehensive law guaranteeing protection against *forced displacement* or programmes...in particular those belonging to ethnic minority groups such as the Rohingya.’⁴⁵ Mentionable that the Committee’s final recommendations were made after a detailed deliberation with the state party and consultation of shadow reports by different Civil Society Organizations (CSOs). The CSOs that submitted reports to the CEDAW Committee includes Amnesty International,⁴⁶ CEDAW Action Myanmar (CAM),⁴⁷ Christian Solidarity

⁴¹ See ‘CEDAW’, <http://www.un.org/womenwatch/daw/cedaw/>, accessed 05 October 2017.

⁴² See MNHRC, ‘A Report to the UN Committee on the Elimination of Discrimination against Women’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_IFN_MM_R_24177_E.pdf/, accessed 05 October 2017, p. 5.

⁴³ Myanmar submitted its combined 4th and 5th Report to the UN CEDAW Committee in 2015. See CEDAW/C/MMR/4-5, 2 March 2015. Also see CEDAW/C/SR.1407, 12 July 2016.

⁴⁴ See CEDAW/C/MMR/CO/4-5, 25 July 2016, pp.4-8, 10, 14-15.

⁴⁵ See *Ibid*, p. 14.

⁴⁶ See Amnesty International, 64th Pre-sessional Working Group: The Republic of the Union of Myanmar - Information on ‘Race and Religion Protection’ Laws and Whrds’, 29 September 2015, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_21795_E.pdf/, accessed 05 October 2017.

⁴⁷ See CAM, ‘Shadow Report on Thematic Issues: Violence against Women to 64th Session of UN CEDAW Committee In relation to Myanmar Combined 4th & 5th Periodic Report’, 23rd February 2015,

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Worldwide (CSW)⁴⁸, Global Justice Centre (GJC) and Gender Equality Network (GEN),⁴⁹ Karen Human Rights Group (KHRG),⁵⁰ Landesa and Namati,⁵¹ The Arakan Project⁵², Women Peace Network – Arakan (WPN-A)⁵³, Women's League of Burma⁵⁴, and Myanmar National Human Rights Commission (MNHRC).⁵⁵ A brief summary of the recommendations related to the Rohingya populations from the CSO's shadow reports is given at annex B. The Anan Commission Report, submitted prior to the current spate of violence, also notes episodes of ‘serious human rights violations by the [Myanmar] security force’ and recommends that the ‘perpetrators of serious human rights violations are held accountable’.⁵⁶

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24427_E.pdf/, accessed 07 October 2017.

⁴⁸ See CSW, ‘CEDAW Committee 64th session – Stakeholder Submission’ June 2016. http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24254_E.pdf/, accessed 07 October 2017.

⁴⁹ GJC & GEN, ‘Shadow Report on Myanmar for the 64th Session of the CEDAW Committee July 2016’ http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24273_E.pdf/, accessed 07 October 2017. And Global Justice Centre, ‘Promises Not Progress: Burma’s National Plan for Women Falls Short of Gender Equality and CEDAW’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_21890_E.pdf/, accessed 07 October 2017.

⁵⁰ See KHRG, ‘Submission for the 64th session of the Committee on CEDAW, Myanmar, July 2016’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24239_E.pdf/, accessed 06 October 2017.

⁵¹ Namati and Landesa, ‘Recommendations for Implementation of Pro-Poor Land Policy and Land Law in Myanmar: National Data and Regional Practices October 2015’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_21937_E.pdf/, accessed 07 October 2017.

⁵² The Arakan Project, ‘Key Issues Concerning the Situation of Stateless Rohingya Women and Girls in Rakhine State, Myanmar, Submission to the Committee on CEDAW for the Examination of the combined 4th and 5th periodic State Party Reports Myanmar, 10 June 2016’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24280_E.pdf/, accessed 07 October 2017..

⁵³ See WPN-A, ‘Observations and Topics to be Included in the List of Issues’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_21938_E.pdf/, accessed 07 October 2017. And WPN– A, ‘Submission to the 64th Session CEDAW Committee for Consideration of Myanmar’s Combined Fourth and Fifth Periodic Reports’, June 2016, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24229_E.pdf/, accessed 07 October 2017.

⁵⁴ See WLB, ‘Shadow Report on Burma for the 64th Session of the Committee on CEDAW’ http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24233_E.pdf/, accessed 07 October 2017. And WLB, ‘Annex to the Shadow Report on Burma for the 64th Session of the Committee on the Elimination of Discrimination against Women’, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MM_R_24233_E.pdf/, accessed 08 October 2017.

⁵⁵ MNHCR, *A Report to the UN Committee on the Elimination of Discrimination against Women*.

⁵⁶ Kofi Anan, ‘Final Report of the Advisory Commission on Rakhine State’, August 2017, http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf, accessed 16 October 2017, p. 55.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

In reply to the Committee’s recommendations, the GoM stated that “the people of Myanmar do not recognize the term “Rohingya” which has never existed in Myanmar ethnic history.”⁵⁷ GoM also requested the Anan Commission for not using the term ‘Rohingya’ as a result, the Commission’s report do not uses the term ‘Bengali’ or ‘Rohingya’, and refer them as ‘Muslims’ or ‘the Muslim community in Rakhine’.⁵⁸ The denial of an ethnic group appears contrary to Myanmar’s constitutional provisions that guarantees ‘non-discrimination based on race, birth, religion, official position, status, culture, sex and wealth.’⁵⁹

In sum, Myanmar’s minimalist ratification and engagement strategy and the declarations made upon ratification of international Conventions provides a general protection to the regime and the perpetrators of atrocity crimes. However, a closer scrutiny of the provisions of holding individuals criminally liable as enshrined in these instruments and the provisions of Article IX of the 1948 Genocide Convention, offers a window of opportunity to engage the ICJ for holding individuals accountable for atrocity crimes. Having discussed the relevant instruments and their applicability, let us now turn to the process and mechanism of different ICTs to explore the feasibility of establishing the ICTM-R.

Pathways for establishing the ICTM-R

As alluded before, the UN has been instrumental in establishing four ICTs following varied pathways and mechanism. Fundamental to the creation of all ICTs was a clear political will of the UNSC and/or the state where the atrocity crimes were committed. For example, the formation of the SCSL was rooted in the steps taken by the GoSL in creating a national truth and reconciliation process, in line with Article XXVI of the Lomé Peace Agreement. Similarly, formation of the ECCC was preceded by the promulgation of ECCC Law by Cambodian government. These ICTs incorporated national criminal code in light of the ‘principle of complementarity’ enshrined in the Rome Statute of the ICC contributing to the promotion of the rule of law; they also incorporated procedures to attribute command responsibilities. A brief

⁵⁷ See ‘List of Issues and Questions in Relation to the Combined 4th and 5th Periodic Reports of Myanmar: Replies of Myanmar’, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=MMR&Lang=EN/, accessed 07 October 2017.p. 13.

⁵⁸ Kofi Anan, ‘*Final Report of the Advisory Commission on Rakhine State*’, p. 12

⁵⁹ See, *List of Issues and Questions in Relation to the Combined 4th and 5th Periodic Reports of Myanmar: Replies of Myanmar*, p.2.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

comparison of some key issues relating to the formation of the ICTY, ICTR, SCSL and ECCC as shown in table 4. It provides important insights for establishing the ICTM-R.

As evident from table 4, the host nation’s willingness/unwillingness is key to dictating the pathways for establishing the ICTM-R. Thus, we discuss the pathways considering two scenarios. First, in case of GoM’s unwillingness, the UNSC, acting under Chapter VII of the UN Charter, can provide the legal mandate to establish the ICTM-R. Following the ICTY or ICTR examples, the mandate for ICTM-R could be precise and restricted focusing on persons. The UNSC resolution could also specify the temporal and spatial jurisdiction of the Court. The Court composition could include Myanmar’s criminal justice system, appoint judges from host nation, engage host nation’s Supreme Court for appeal procedure. However, any UNSC mandate for ICTM-R will require and enlightened support from China and Russia. This calls for strong diplomatic efforts, presenting facts from the ground and a focused campaign by the local, regional and international bodies including human rights and peace advocacy groups. The momentum of such advocacy campaign and the possible loss of ‘soft power’ by China and Russia can only result in their change of heart over time. Between 1991-2014, there were 22 UNGA resolutions concerning the human rights situation in Myanmar. However, none of those worked as a deterrence for the current crisis. This indicate that the state agency has manifestly failed in their responsibility despite exhaustive efforts by the international community and strongly argues in favour of a timely and decisive UNSC resolution fulfilling its obligations.

‘Atrocity Crime’ against the Rohingyas in Myanmar – An ‘Agency’ Approach

Mohammad Zahidul Islam Khan

Table 3: Comparison of the salient issues relating to the establishment of ICTY, ICTR, SCLS and ECCC.

ICTY	ICTR	SCLS	ECCC
1. Mandate of the Court/Tribunal			
Prosecute <i>persons</i> responsible for specific crimes committed since January 1991 in the territory of the former Yugoslavia.	Prosecute <i>individuals</i> for the crime committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994	Prosecute <i>persons</i> who bear greatest responsibilities for the grave violation of international humanitarian law and Sierra Leone law during the civil war after 30 November 1996.	Crimes committed between 17 April 1975 to 6 January 1979 by the <i>senior leaders and those who are most responsible</i> in Democratic Kampuchea.
2. What UN instrument formally initiated the process of establishing the Court?			
UNSC Resolution 827 (1993) 25 May. SC acted under Chapter VII of the UN Charter.	UNSC Resolution S/RES/955 (1994), 8 November. SC acted under Chapter VII of the UN Charter. And S/RES/977 (1995) 22 February (for locating the Court in Arusha, Tanzania).	UNSC Resolution S/RES/1315 (2000), 14 August 2000. Adopted following the letter from the President of Sierra Leone on 9 August 2000.	Commission on Human Rights Resolution 1997/49, 11 Apr 1997; UNGA Resolution A/RES/ 52/135, 12 December 1997 and A/ RES/ 53/145, 8 March 1999
3. Involvement of the State agency, Court composition and selection of Judges			
All 14 Permanent Judges elected by UNGA from a list of 28 to 42 judges forwarded by UNSC. Three Trial Chambers each composed of 3x Judges and a maximum of 6 x ad-litem Judges. Ad-litem judges are appointed by the UNSG. One Appeal Chamber consists of 7xJudges (5 ICTY & 2 ICTR judge).	All judges elected for a 4-year term by UNGA from a list forwarded by UNSC. Initially the Chambers composed of 16 judges and no two could have been nationals of the same state. Two Trial Chambers and one Appeals Chamber.	Extensive involvement of the State in selection of judges and formation. Out of 16 Judges, ten are appointed by the UNSG and six by the GoSL. SCSL jurisdiction also included certain Sierra Leonean crimes committed on national territory.	Extensive State involvement. Pre-trial and trial Chamber composed of 3xCambodian, and 2x International Judges where any decisions requires at least four affirmative votes. The Supreme Court Chamber of the ECCC composed of 4x Cambodian and 3x International Judges.

'Atrocity Crime' against the Rohingyas in Myanmar – An 'Agency' Approach

Mohammad Zahidul Islam Khan

4. Did the State(s) party request for UN assistance, and if so when?			
No, UNSC acted under Chapter VII of the UN Charter.	No, UNSC acted under Chapter VII of the UN Charter.	Yes. GoSL letter to UN on 9 August 2000 initiated the formal process. The letter was in accordance of the Lomé Peace Agreement (Article XXVI) signed between the RUF and GoSL which included provisions for establishing a Truth & Reconciliation Committee to address the human rights violation. Consequently an agreement between the UN and GoSL was signed on 16 January 2002.	Yes. Royal Government of Cambodia (RGC) letter to UN on 21 June 1997 initiated the process. Consequently, in 2001, the Cambodian Parliament passed the ECCC Law. In 2003, UN and RGC signed agreement "Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea".
5. Prior to the formation of the Court, was the State(s) whose citizens were prosecuted, party to International Instruments on Atrocity Crimes like:			
a. 1948 Genocide Convention			
Croatia since in 12 Oct 1992. Serbia since 12 Mar 2001.	Party since 26 Apr 1975.(Withdrew reservations on Article IX in 2008).	No.	Yes, Party since 14 Oct 1950
b. 1949 Geneva Conventions and Protocols			
Croatia since 11 May 1992(including Protocol I &II). Serbia since 16 October 2001(including protocol I, II). Protocol III since 18 August 2010.	Yes. Since 05 May 1964. Protocol I & II since 19 Nov 1984	Yes. Since 10 June 1965 Protocol I & II since 21 Oct 1986	Yes. Party since 08 Dec 1958 Protocol I & II since 14 Jan 1998
c. 1968 Convention Statutory Limitations to War Crimes			
Croatia since 11May 1992. Serbia since 12 March 2001	Yes. Since 16.04.1975	No.	No.
d. 1998 Statute of the International Criminal Court			
Croatia: since 21 May 2001. Serbia: Since 6 Sep 2001.	No.	Party since 15 Sep 2000.	Party since 11 Apr 2002.

Source: Author's compilation from the official websites of ICTY, ICTR, SCSL, ECCC and UN Treaty Collection Database.

The second pathway is working with the democratic leadership of Myanmar, its peace and reconciliation institutions and advocacy groups within and outside Myanmar. If the leadership of Myanmar is sufficiently convinced that such a trial is essential for the national reconciliation and for democracy to take root in Myanmar, they may volunteer to engage the UN to establish the ICTM-R. Indeed, as revealed in table 4, the formation of the SCSL and the ECCC was initiated by the request from the respective governments. The political leadership of Sierra Leone and Cambodia were brave enough to deal with the atrocity crimes committed in their lands to achieve a lasting peace, reconciliation and establishing rule of law. Following these examples, the democratic leadership of Myanmar can also act on an enlightened self-interest. The democratic leadership of Myanmar transformed the Myanmar Peace Center (MPC) into National Reconciliation and Peace Center (NRPC) the In 2016 through the Presidential Order 50/2016 entrusting it with following functions and duties⁶⁰:

- to set policies and guidelines needed for national reconciliation process,
- to set policies and guidelines needed for internal peace process,
- to set policies for coordination with local and foreign donors, governments, international nongovernmental organizations and international institutions regarding assistance to national reconciliation and peace processes,
- to lead and lay down guidelines paving the way to participation of the government, Hluttaw (Assembly of the Union), Tatmadaw (Armed Force), ethnic organizations and ethnic armed groups, civil society organizations, international community and donors and local and foreign experts from various sectors in national reconciliation and peace processes,
- to seek ways and means for turning the Republic of the Union of Myanmar into a Democratic Federal Union, and
- to release procedures and directives needed for implementation of functions of the National Reconciliation and Peace Center-NRPC.

⁶⁰ The ten-member NRPC is led by Union Minister for the Office of State Counsellor U Kyaw Tint Swe as chairman together with Union Minister for Border Affairs Lt-Gen Ye Aung as vice chairman and Director-General U Maung Maung Tint of Planning Department of the Ministry of Planning and Finance as secretary. The NRPC is also empowered to ‘form and appoint technical board and support team in order to ensure successful implementation of national reconciliation and peace processes in accord with rules and regulations’. See for details, National Reconciliation and Peace Centre, ‘Summary’, <http://www.mmpeacemonitor.org/stakeholders/myanmar-peace-center/227-nrpc>, accessed 08 November 2017.

The ultimate objective of NRPC is to transform ‘the Republic of the Union of Myanmar into a Democratic Federal Union.’ In recent times, Myanmar has also engaged positively with the UN such as inviting Kofi Anan Commission. Thus, it looks plausible that the democratic forces within the Myanmar will be supportive to establish a system under the mandate of NRPC for weeding out the perpetrators of atrocity crime and holding individuals criminally responsible as part of the national reconciliation process. The NRPC stakeholders such as the CSOs, international community, donors and local and foreign experts from various sectors in national reconciliation and peace processes can play an important part emphasizing the need of establishing the ICTM-R in this regard. Positive encouragement and pressure from its neighbours, regional and international power could pave the way for such a transformation.

Concluding remarks: the way forward

Myanmar’s ratification status of international instruments and the potential pathways as discussed, suggest that it is possible to establish the ICTM-R to address the atrocity crime committed in Rakhine state. However, central to such possibility is a consistent, systematic and painstaking evidence gathering, documenting and advocacy efforts by all stakeholders.

First, a **systematic collection and documentation of data** and evidences of the atrocity crimes is essential. Mentionable that the UNGA Resolution 61/143 mandates such data collection, particularly on violence against women.⁶¹ The UN Office for Genocide Prevention and R2P is also mandated for, among others, (i) collection and assessment of information on situations worldwide, (ii) sending fact-finding missions, (iii) dissemination of monthly reports to UN partners (iv) preparation and dissemination to UN partners of analytical briefings on country situations. (v) promote systematic and cohesive information gathering and assessment by the UN on situations at risk of atrocity crimes.⁶² The division for Advancement of Women of the UN Department of Economic and Social Affairs is also authorized to document, disseminate and analyse data on gender based violence and update their searchable database/portal. The reporting from inside Myanmar, the testimony of the refugees in Bangladesh, and the imagery of burning villages, human remains, and clothes are all important primary information for setting up the initial database on atrocity crime. The initial data gathering should include basic facts such as when, where, what types of violence and by whom (if possible) has been

⁶¹ The mandate includes establishing a coordinated database, provided by the States national statistical offices and also where appropriate, ‘through relevant UN entities and other relevant regional intergovernmental organizations.’ See A /Res61/143, 19 December 2006.

⁶² See ‘UN Office on Genocide Prevention and the Responsibility to Protect’. *Ibid.*

committed. Subsequent scrutiny and verification of these data, as and when available/accessible, could be useful adding credibility to the database. However, the method of data collection and documentation needs to be transparent, involving universally respected and impartial sources. UN agencies like the office of High Commissioner for Human Rights and for Refugees, Genocide Prevention and the R2P, international and regional organizations, and on occasion credible media houses are often considered as acceptable sources. A verified and cross referred initial database on the atrocity crimes would be invaluable to establish that the case meets the threshold criteria of ‘just cause’ triggering UNSC action⁶³ and to indict and prosecute individuals when the ICTM-R is established.

Second, establishing the **command responsibility** is fundamental to deter atrocity crimes. However, it would require establishing the criminal-intent of individual commanders. In most cases the commanders in higher echelon deny having any knowledge about their subordinates and what the subordinates were doing at a particular period. Thus, it is necessary to gather both generic and specific information on what the *commander knew and what he/she did* with that information to prevent the atrocity crime to happen. The Commission of Experts for the ICTY suggested 12 indices to determine whether or not a commander must have known about the acts of his subordinates. These includes (i) The number of illegal acts; (ii) The type of illegal acts; (iii) The scope of illegal acts; (iv) The time during which the illegal acts occurred; (v) The number and type of troops involved; (vi) The logistics involved, if any; (vii) The geographical location of the acts; (viii) The widespread occurrence of the acts; (ix) The tactical tempo of operations; (x) The modus operandi of similar illegal acts; (xi) The officers and staff involved; (xii) The location of the commander at the time.”⁶⁴ Gathering information on these indices could be useful to establish the criminal-intent of the commander and attributing command responsibility during any future prosecution in ICTM-R.

Third, an active diplomacy through formal and informal channel is essential to keep the issue ‘alive’ culminating in its ‘logical conclusion’ as suggested by the Bangladeshi envoy in the UN in his report to the UNSC.⁶⁵ As an affected state, both Bangladesh and India may intimate Myanmar that they would like to raise the issue to the ICJ. Pursuant to the five-point recommendations by the Prime Minister at the UNGA, Bangladesh as an affected nation, can

⁶³ For details on threshold criteria for ‘just cause’, see CISS, *The Responsibility to Protect*, p. 32-35

⁶⁴ See S/1994/674, 27 May 1994, pp.16-17.

⁶⁵ See ‘Statement by H. E. Mr. Masud Bin Momen, Ambassador and Permanent Representative of Bangladesh to the UN in New York at the Security Council Meeting on the ‘Situation in Myanmar’ (under Rule 37), 28 September 2017’, <https://www.un.int/bangladesh/>, accessed 08 October 2017.

Atrocity Crimes against the Rohingyas in Myanmar – An ‘Agency’ Approach

also employ a special envoy on this issue to periodically brief and update other countries, especially the P-5 and the regional bodies presenting factual testimonies and data. The ‘soft power’ of the advocacy groups, including those working inside Myanmar (see annex B) can also facilitate in marshalling support and change of mind by the P-5 countries. Providing qualified access to these advocacy groups, peace activist, international media and UN agencies to gather data and testimonies from the Rohingya refugees can enhance their ability to project the truth amidst the prevalence of ‘fake news’. Through a combination of these efforts, it is likely that the P-5 state that are currently opposed to changing the status quo may eventually change their mind if only they find that the risks of losing their ‘soft power’ outweigh their ‘perceived’ interest. The solution lies in a self-enlightened realization and an agency centric actions against the perpetrators and not state.

Total Words:9570

Annex A: List of International Instruments on Human Rights and Atrocity Crime Including Myanmar’s Status of Ratification

Annex B: Brief Summary of CSOs Shadow Report to UN CEDAW Committee -2015-2016