

## The Rohingya crisis: post-ICJ provisional measures

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The plight of the Rohingyas getting greater attention in recent times cannot be denied, indeed, not only in Bangladesh but also around the world. But the question that merits attention is, what has changed in recent times? The hearing on the Rohingya genocide at the International Court of Justice (ICJ) in The Hague, Netherlands, on 10-12 December 2019, would certainly be one. This is a unique case. An African country, The Gambia, bringing charges against an Asian country, Myanmar, for committing genocide against the Rohingyas, a community of people residing in the Arakan, Myanmar. This is something that no one expected. Indeed, if it had surprised the world, it had surprised Myanmar the most.

The weather was mildly coldish when I arrived at The Hague as a member of the Bangladesh delegation to witness *The Gambia v. Myanmar* case, with the former requesting the Court to enact certain 'provisional measures' against Myanmar until the Court deliberates and decides on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide with reference to Myanmar's treatment of the Rohingyas in the Arakan. I visited The Hague several times but never for once thought that I would end up inside the premise of the Court listening to a case on genocide, although on several occasions some of my friends pressed me to visit the historic building, which incidentally was built in the beginning of the 20th century to take up arbitration cases between the nation-states. The same probably would be true for Aung San Suu Kyi, coming to the premise for the first time albeit to justify, almost shamelessly, the role of the Myanmar military and counter the allegation of genocide.

I was not at all impressed with Myanmar's submission against The Gambia's moral plea and the request for provisional measures at the ICJ. Myanmar, in fact, kept its arguments limited mainly to two issues, both were old and overly used with hardly anyone consenting to them outside Myanmar. Firstly, questioning the jurisdiction of The Gambia in bringing such a case to the ICJ against Myanmar. Since both Myanmar and The Gambia were members of ICJ, the Court had no problem in ruling in favor of The Gambia. Secondly, the Myanmar team at the ICJ claimed that the military only responded to the coordinated attacks of the Rohingya insurgents under the leadership of ARSA (Arakan Rohingya Salvation Army), which killed 12 members of Myanmar's security forces in the Arakan on 25 August 2017. Even if one takes this to be the case, although it is yet to be verified internationally, how can Myanmar justify the mass expulsion of over 700,000 Rohingyas to Bangladesh? Moreover, the so-called ARSA attack took place barely 48 hours after the submission of the Kofi Annan Commission Report, which was favorable towards reviewing Myanmar's citizenship law and granting the Rohingyas human rights. This further puts into question Myanmar's claim.

Noteworthy, however, is the fact that Suu Kyi throughout her presentation at the ICJ never for once referred to the Rohingyas as 'Bengalis' or 'illegal migrants.' But then, as it was

pointed out by The Gambian team member, Philippe Sands, she uttered the word 'Rohingya' only once, and that again, when spelling out the acronym, ARSA. Otherwise, Suu Kyi referred to them as 'Arakanese Muslims.' Sands could not help telling the Court that this only gave credence to the allegation that Myanmar is trying to destroy the Rohingyas as a community of people with 'genocidal intent,' one which has been meticulously carried out by its military and now arrogantly expressed in Suu Kyi's presentation.

The Court too was not impressed with the contention of Suu Kyi and her team members. In less than two months of the hearing on 23 January 2020, the Court granted the provisional measures requested by The Gambia. This included:

(1) Unanimously,

The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to the 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; and
- (d) imposing measures intended to prevent births within the group;

(2) Unanimously,

The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, 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 described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide;

(3) Unanimously,

The Republic of the Union of Myanmar shall 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 on the Prevention and Punishment of the Crime of Genocide;

(4) Unanimously,

The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court.

Two things from the provisional measures stand out clearly, both of which must have shocked Myanmar. Firstly, the Order of the Court was *unanimous*. This Myanmar never expected. In all probability, Myanmar was looking for a split decision at the ICJ, which then

would have allowed her to rally at home that not all members agreed to the provisional measures and therefore the Order could be ignored. Fortunately for the Rohingyas and those supporting their just cause, this did not happen. It may be noted here that the pro-regime Buddhist monks arranged a special day of prayers for Suu Kyi before she left for The Hague to attend the ICJ hearing. This is an old practice of using religion to beef up political support, particularly when the support is required to win elections, which in Myanmar's case is expected towards the end of 2020!

Secondly, the Court identified the group at the centre of the case as 'Rohingyas'. The following statement of the Court is worth noting:

The Court's references in this Order to the "Rohingya" should be understood as references to the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar.

This was a major victory for the Rohingyas, indeed, with implications far beyond the provisional measures. In many ways, it was a direct slap on the face of Myanmar for keeping a taboo on the word 'Rohingya'. What word will Myanmar now use when responding to the Court's Order? This will be something to look out for.

There is no denying the fact that the recognition of the 'Rohingya identity' remains critical. If anything, it is the greatest stumbling block and conversely a way out in resolving the crisis. The disruptive policy of Myanmar, which has gradually disenfranchised and dehumanized the Rohingyas, comes from an 'unspoken racial feeling' of the military and civilian elite of the country. This unfortunately found a 'legal' expression in the 2008 National Constitution of Myanmar. As Thant Myint-U, the grandson of U-Thant, the former Secretary-General of the United Nations, points out in a book published in 2020:

The constitution...included an arcane formula tied to race. Any *taing-yintha* (or multi-National races) "whose population constitutes at least 0.1% of the national populace" (around 50,000 people in 2010) was entitled to representation in local legislative assemblies and ministerial portfolios in local administrations. If a *taing-yintha* constituted more than half of two contiguous townships, it was entitled to an "autonomous zone." So, in addition to ethnically-based states for the Shan, Kachin, and five others, there would now be "self-administered zones" for the Nagas, Danus, and a few smaller ethnic groups.

I've heard many Burmese warn that giving Muslims in northern Arakan *taing-yintha* status, as "Rohingya," would lead automatically to their being entitled to a zone of their own. "A part of Burma would fall under sharia law," a university lecturer whispered. To consider the Muslims of northern Arakan as one of the "National Races" fused anxieties around both race and religion. The ethnonym "Rohingya" was particularly toxic for this reason, as it means literally "of Arakan" and therefore implied that those to whom it referred were indigenous. On the other hand, if they were called "Bengalis," they could be seen...as immigrants and not natives deserving special protection and special rights.

Good sense prevailed during the hearing at the ICJ where Suu Kyi and her team, as indicated earlier, refrained from using the word 'Bengalis' or 'illegal migrants' for the Rohingyas. Given the proliferation of research on the Rohingyas in recent times, Myanmar is well aware that labeling the Rohingyas as 'Bengalis' or 'illegal migrants' would take them nowhere. Instead, this would make them closer to being accused of committing genocide

against the Rohingyas. Myanmar is also aware that the International Criminal Court (ICC) has opened an investigation into crimes committed against the Rohingyas in the Arakan. Also there is a separate lawsuit filed against Suu Kyi in an Argentine court, which, if convicted, could damage her reputation, and even restrict her from traveling abroad.

In a situation like this, Suu Kyi could only work for the best possible outcome, and that is to stop the possibility of Myanmar being labeled as a genocidal state. Indeed, a unanimous verdict on the issue of genocide at the ICJ could compel many countries to reimpose sanctions on Myanmar. Such a verdict could also push Myanmar to pay compensation to the victims, including payment to the countries now hosting the victims. That is why Myanmar is so attentive to the case at the ICJ, prompting Suu Kyi to represent her country at The Hague. No such attention is found when it comes to the ICC or the Argentine court, mainly because Myanmar is not a party to either of them, and therefore could ignore the judgments arising from them.

Predictably, Suu Kyi when talking to the members of the international community, particularly Westerners, returns to her familiar narrative of taming the military and establishing democracy in Myanmar. This is the narrative which had previously mesmerized the West, making them lift the sanctions even when nearly one-third of the members of both the houses of Myanmar's Assembly of the Union or parliament consisted of incumbent military officials nominated by the Commander-in-Chief of the Defence Services. Suu Kyi is now 'privately' welcoming the ICJ decision, as I was told by an international bureaucrat assigned to liaison with Myanmar, because it puts pressure on the Myanmar military and creates an opportunity for her to deepen democracy in Myanmar. I was, of course, hardly surprised to hear Suu Kyi's narrative. Rather, what surprised me the most almost beyond belief, is the confidence that the international bureaucrat had on Suu Kyi and her narrative, interestingly disclosed to her during a 'private' one-to-one conversation!

Let me flag three things here. Firstly, nothing could be more naive than to think that a conversation between Suu Kyi and an international bureaucrat in Naypyidaw or Yangon would remain 'private,' with the Myanmar military having no knowledge of it. Rather, the conversation, if it had taken place, had all the blessings of the military, as it would be the best way to hoodwink the West once again. After all, the international bureaucrat would be preaching to the West and the world what Suu Kyi had confided to her 'privately'! Secondly, no democracy could be established by one person or one party, and this is more so the case when the country under discussion has no experience of democracy in the entire history of its existence. The 'democracy narrative' is only a ploy for Suu Kyi to keep Myanmar engaged globally, indeed, not only for attracting investments but also for reproducing the power of the state. Thirdly, even if we were to take Suu Kyi's 'democracy narrative' seriously, the question that merits attention is, where will the Myanmar military go with the deepening of democracy? Would it just vanish into thin air? Will the military cease to exist? Anyone familiar with the discourse on the "military withdrawal from politics," particularly in post-colonial or developing societies, would know that such 'withdrawal' takes place not by weakening or limiting the power of the military but rather by having its tentacles consolidated in the state and society. The diplomatic effort in spreading the 'democracy narrative' is otherwise geared towards the West so that the latter refrains from reimposing the sanctions on Myanmar. Moreover, if the West remains hesitant and slow in taking a stand on the Rohingya genocide, it could benefit Myanmar. In fact, it could even lead to the squashing of The Gambian case or split the ICJ judges in taking a unanimous decision. Myanmar is likely to be more active in such backdoor diplomacy.

But then Myanmar is unlikely to limit itself only to backdoor diplomacy, particularly when it comes to offsetting the efforts of The Gambia at the ICJ. This is where Bangladesh needs to remain extra vigilant, particularly in the refugee camps in Cox's Bazar district where agents working for Myanmar will certainly try to penetrate and create chaos of all kinds, including inciting hatred and violence between refugees and the host community. Even the use of weapons and drugs by the agent provocateurs cannot be ruled out. A constant vigilance and mapping of violence inside and outside Rohingya camps is therefore required. The recent spike in the number of 'gunfights' and killings in the refugee camps can only make one suspicious about some of the dubious forces trying to wreak havoc in the lives and livings of more than 1.1 million traumatized Rohingya refugees. Security forces alone cannot contain such chaos. Active participation of all the stakeholders, including media, non-governmental organizations, educational institutions, cultural bodies, and even *masjid* committees, would be required.

Let me finally come to the issue of what is to be done if the Rohingya refugee crisis becomes protracted with no solution and, more critically for Bangladesh, no repatriation. Integration of the Rohingya refugees inside Bangladesh is out of the question, and this is something that needs to be flagged clearly. Anyone advocating their integration inside Bangladesh in post-2017 would make the person complicit in the 'genocidal intent' of the Myanmar military. Integration within Bangladesh would also mean the loss of the Rohingya identity in the Arakan while allowing the Myanmar military to go scot-free after committing mass atrocities and genocide. It may be pointed out that having the Rohingyas integrated within Bangladesh is precisely the policy of the Myanmar military!

Third-country settlement can also be ruled out. Those advocating such a policy are either not familiar with the plight of the Rohingyas or advocating it just for the sake of advocacy, without probably having knowledge on the previous efforts of settling the Rohingyas in the third-country. It is worth pointing out here that more than 300,000 Rohingya refugees have been residing in Bangladesh since the 1990s, but till date only 300 or so got residency status in a third-country, mainly Canada. Put differently, third-country settlement for 1.1 million Rohingya refugees is only wishful thinking! But then, more critically, it is no different from those who call for integration of the Rohingyas within Bangladesh. This is because any third-country settlement, apart from contributing to the destruction of the Rohingya identity, will only help in fulfilling the genocidal policy of the Myanmar military.

The current state of the Rohingya refugee crisis, indeed, with no repatriation, no integration, no third-country settlement, and no justice, at least not yet, has prompted the alarmists to raise the spectre of a conflict between refugees and the host community. This spectre needs to be debunked and the conflict de-mythicized. The Rohingyas, as many as 300,000, as indicated earlier, have been residing in Bangladesh in the Cox's Bazar district since 1990s as 'undocumented refugees,' but not a single riot took place between the two communities. It is true that since 2017, the total number of Rohingya refugees has increased to 1.1 million, but we are yet to witness any serious conflict between the two communities.

Apart from the issue of religion, which no doubt is a bonding factor, Bangladesh has remained sensitive to human sufferings even in the past, almost as part of its civilizational quest. Many people probably have forgotten that two students were killed in police firing for the first time in post-independent Bangladesh for protesting against the Vietnam War in front

of the American Cultural Centre in Dhaka on 1 January 1973. The government of the day, however, sought to make amends and accepted the demands of the students to recognize the Provisional Revolutionary Government of Vietnam (PRGV), making Bangladesh the first South Asian and second Asian country to recognize PRGV on 11 February 1973. Vietnam ought to be reminded of the sacrifice of the Bangladeshi students whenever issues of solidarity arises.

One could also refer to some Bangladeshis supporting the ULFA and other militant groups in Northeast India in their struggle for greater autonomy, despite such groups having an anti-Bengali cum anti-Bangladeshi position during their birth. Opening the Bangladesh-Myanmar border and providing food and shelter to the traumatized Rohingyas, therefore, is hardly an exception. In fact, the fear lies not in the possibility of having conflicts between the refugees and host community but rather in having a part of the host community joining the Rohingyas and supporting them with arms and ammunitions in what would be regarded as helping the Rohingyas in the 'just cause' against the Myanmar military.

This is not to discount the increased level of violence in the refugee areas, although this is not surprising given the concentration of the population, living in cramped makeshift camps with bare necessities and no extra-curricular activities. One report indicates that the homicide rate from 'gunfights' in Teknaf (an Upazilla of Cox's Bazar district with a local population of 152,000 and Rohingya refugee population of 158,000) is 32.1 per 100,000 population, and the report then follows it up with the remark that Teknaf is "the most violent place in Bangladesh," and then with the equally alarming and provocative statement that "Risk of getting killed is twice as high for Rohingyas"! The report, however, is presented without explaining 'gunfight' (the main cause of homicide), and whether it means 'gunfight' with law-enforcement agencies or between gangs/individuals? Or, whether the 'gunfight' and the killing resulted from an increase in the intervention of law-enforcement agencies in curbing crimes, like countering narco-trafficking and gang violence? Moreover, if one compares Teknaf with Baltimore in Maryland (USA), for instance, which has a population of 602,495, without half of them being traumatized refugees, but a homicide death rate of 50.52 per 100,000 of the population, then one would be more alarmed with Baltimore than Teknaf! This is precisely the reason why quantification, while curiously 'assisting' in flagging an alarmist view, remains limited in understanding the relative calmness and the resilience of a refugee population.

Indeed, if anyone is serious about the plight of the Rohingyas and is looking for sustainable solutions to the crisis, then the person ought to put her gaze not on Bangladesh but on Myanmar. Sustainable solutions can come about only by putting pressure on Myanmar, and that again, from all sides - political, economic, social, cultural, and intellectual. Let me break this down a little.

Now that the ICJ has given credence to the 'Rohingya identity', there has to be a serious international effort to pressurize Myanmar to either amend or bring in new laws, and accept the 'Rohingya identity.' In this context, an international conference can be convened either inside or outside the UN with all the stakeholders, including the Rohingyas from across the world, with the avowed task of preparing a roadmap for Myanmar's recognition of the 'Rohingya identity' and the resolution of the crisis. Both political and civil societies, particularly of countries which are closer to Myanmar, like China, India, Japan and Vietnam, ought to be more engaged in this effort.

Economic pressure on Myanmar, particularly in the form of sanctions, too is required. On this, even Thant Myint-U thinks that sanctions "may be returning." Although it is true that sanctions often harm the disempowered economically more than the empowered, yet the West has utilized the power of sanctions not always from the standpoint of economic merit but on moral grounds, which certainly brings pressure on the sanctioned regime to reform and rectify *within*. In fact, many would argue that the Myanmar military created a semblance of democracy and allowed Suu Kyi to come to power precisely because sanctions made it difficult for them to govern the population and cleverly assessed that the West would fall for the bait and withdraw the sanctions if space were provided to Suu Kyi, even if it was in their own terms! A beginning on this could be made by exposing and shaming the companies who have invested or are in the process of investing in Myanmar, in fact, by telling them that "You are trying to profit from a country which has forcibly displaced 1.1 million of its population and is now under investigation for committing genocide and crimes against humanity. If you continue with your activities, you too will be held responsible for the crime!"

Social intervention is also required in Myanmar, particularly in the areas of race and religion. According to Myint-U, the popularity of Suu Kyi at home had little to do with her being "a fighter for liberal democracy and human rights," as recognized in the West. Rather, it had a 'local context,' which shockingly was related to racial politics. As Myint-U noted:

In the 1980s, before her first foray into politics, [Suu Kyi] wrote several academic papers about the nationalist movement and "the progressive attempts of the Burmese people to reassert their racial and cultural identity." She argued that, in the early 20th century, the threat of Burmese "racial survival came not so much from the British as from the Indians and Chinese who were the more immediate targets of twentieth-century nationalism. Not only did these immigrants acquire a stranglehold on the Burmese economy, they also set up homes with Burmese women, striking at the very roots of Burmese manhood and racial purity.

If this is the mindset of Suu Kyi then one can easily see that it is very much ingrained in Myanmar society, creating fear amongst the Burmese majority. But then, from fear comes hatred and from hatred comes violence, as Ibn Rushd, the 12th century Andalusian scholar, would say. The violent attack on the '*kala* race' or those 'arriving from the west,' which would include the Rohingyas as well, is an outcome of racist discourse prevalent in Myanmar and now reproduced by Suu Kyi.

Similar also is Myanmar's practice of Theravada Buddhism, advocating a confluence between state and religion, which incidentally is not so different from Salafism or Hindutva. In fact, such confluence between state and religion, while reproducing a religio-centric majoritarian state, end up alienating the minorities. This is true as much in Saudi Arabia as it is in India under Narendra Modi. The statist discourse of race and religion in Myanmar ought to be dismantled not only for Myanmar's sake but also for the sake of peace and stability in the region.

There is hope in the domain of culture however, mainly because the latter is yet to be politicized and tainted with the statist practices of race and religion. Poets, musicians, painters, photographers, novelists, short-story writers, all have so much to contribute to break the 'silences' of the people craving for justice and peace in Myanmar. The creative minds within Myanmar could be organized to interact with the Rohingya diaspora, using modern technology so that they could share their utopias and put them into practice. Television

channels across the world too could work on this and creatively display the cultural and civilizational heritage of the Rohingyas, including the good things in their life and living, so that negative images get erased from the minds of the Myanmar people. It is true that Myanmar is a hard nut to crack, but as the saying goes, a hard nut is easy to crack provided we know where to put the pressure!

Finally, intellectual intervention is required to contain the prejudices against the Rohingyas as well as against the people residing beyond the borders of Myanmar. More specifically, there ought to be creative structures where Myanmarese and Bangladeshis, for instance, can work together in fields ranging from harnessing oceanic resources to conducting joint courses in universities in Dhaka and Yangon. Academic and research collaboration would certainly provide opportunities for the Myanmarese to know Bangladeshis and vice versa. The Rohingyas are bound to benefit from such confidence-building measures between the people of these two countries.

A comprehensive, multilayered approach is required to put pressure on Myanmar so that its people can rise to the occasion and compel the regime, not only to cease attacking and displacing the Rohingyas, but also to provide the latter with the 'rights to have rights' so that they can live a life with dignity in Myanmar. The earlier this is done, the quicker the Rohingya crisis would be resolved, with Myanmar benefiting the most as it would provide the country with an opportunity to regain its moral authority, both within and beyond its borders.