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Rohingya Muslims and IHL: Expanding the Basis For Responsibility to Protect in a NIAC with a Proactive Mechanism

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ABSTRACT

Rohingya Muslims have suffered persecution and genocide in the Republic of Myanmar (formerly Burma) and have been expelled from the country by the military junta who are in power. The evidence is incontrovertible of grave human rights abuses and that the refugees have lived in diaspora with no prospect of returning home. The UN human rights investigators have compiled reports that testify to the inhumanities that they have suffered prior to their expulsion. Despite this, there has been no efforts towards redressing this problem which falls within the remit of international human rights and humanitarian law. The actions of the Myanmar authorities in using force can be considered as Non-International Armed Conflict (NIAC) and the UN intervention under the Responsibility to Protect (R2P) measure, could be activated. This can serve as a basis for arresting the responsible officials in Myanmar and prosecuting them under an international tribunal. This has not been possible because of the lack of consensus in the international community and the exercise of the veto power by some members of the Security Council. This article argues that there should be intervention in this conflict under the existing precedent by broadening the scope of intervention and then by prosecution in a specially constituted tribunal. The R2P mechanism can be activated by prescribing the genocide of the Rohingyas within the framework of an NIAC and by constituting a tribunal under the Tadic principle[1] to try the members of the Myanmar's regime for their breaches of IHL.

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1 . Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

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Introduction

The victimization of ethnic minorities within nation states can lead to genocide when force is used to oppress and brutalize them, and when there are no constitutional safeguards or rule of law in place. In asymmetric conflicts, persecution often escalates to genocide, as seen in the case of the Rohingya Muslims who have been the victims of a military crackdown and forced exile from their home country of Myanmar. The persecution of the Rohingya people is extensively documented and attested by UN human rights agencies. The prime question is whether they can be protected under the principle of Responsibility to Protect (R2P) and whether the conflict can be regarded as a Non-International Armed Conflict (NIAC), thereby activating the norms of the international human rights law. This requires an examination of the mechanisms of International Humanitarian Law (IHL) to determine legal remedies and bring the perpetrators before an international tribunal to dispense justice. The R2P is an evolving concept in international law that has emanated from a consensus of the UN member states as an imperative for preventing international human rights abuse.[1]

However, in light of the diplomatic considerations within the UN Security Council, this concept has not been allowed to develop into a proactive and impactful principle of internationo al law. This has resulted in tragedies such as the ethnic cleansing and expulsion of Rohingya Muslims from Myanmar to refugee camps in Bangladesh. The necessary step is to create a basis for intervention under the R2P and consider this as a test case for the exercise of this measure. This can be done after the grounds are established for the arraignment of the Myanmar's offih cials for infringing the IHL in a NIAC.[2] The definition of an NIAC applies to all armed conflicts not of an international character based on *the intensity of the fighting* and *the organization of*

1 . The World Summit Outcome Document (A/RES/60/1) produced by the General Assembly compels the Heads of State and Government to affirm their responsibility to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and accepted a collective responsibility to encourage and help each other uphold this commitment. They also declared their preparedness to take timely and decisive action, in accordance with the United Nations Charter and in cooperation with relevant regional organizations, when national authorities manifestly fail to protect their populations. Available at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml., accessed on March 30, 2024.

2 . The General Assembly Resolution A 63/677 is pretext for the a RP2 measure "If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations ".

the non-State group.[1] Firstly, the hostilities between the parties "must reach a certain level of intensity, which may be indicated by, among other factors, the seriousness and frequency of attacks and military engagements, the extent of destruction, or the deployment of governmental armed forces".[2] Secondly, the non-State group "must have a minimum level of organization, indicators of which may include the presence of a command or leadership structure, the ability to determine a unified military strategy, the adherence to military discipline, and the capability to comply with IHL."[3]

The Genocide Convention can be invoked in the conflict in Myanmar between the government, both 'civilian' and military, and their attacks on the Rohingya Muslim population which have resulted in death and exile.[4] The arrival of Muslims can be traced to pre-British times in South East Asia, when Muslim settled in the Arakan State in the 1430s which is now part of Myanmar. This small independent kingdom was conquered by the Burmese Empire in 1784 the majority of whom practiced the Buddhist faith.[5] The origins of the conflict can be traced to the period when the British, under colonial authority, entered Burma in 1824 and imposed the colonial administration until 1948 as part of British India. In this period, other Muslims from Bengal entered Burma as migrant workers, tripling the country's Muslim population over a 40-year period.[6] The Muslims were never granted devolution in the form of an autonomous state, or a referendum to create a separate province. Furthermore, the Burmese authorities have refused to grant citizenship to the Rohingyas which could officially recognize them under the Citizenship Act of 1982. The Act states that citizens must belong to one of 135 'national races' whose ancestors settled in the country before 1823, as recognized in the Constitution.[7]

The reference to the R2P measure has to be placed on a coherent and substantive principle of jurisprudential rationale. This is because of the colossal mistake made in the Libyan intervention, where military action led to partitioning of country, civil war and national chaos. The UN Security Council Resolution 1973, which enforced the No-Fly Zone stated in its Paragraph 6, that it served "to protect civilians" in Libya rather than explicitly state that there was a responsibility to protect". This self-serving approach by NATO powers plunged the country into a civil war after the overthrow of the legitimate government in Libya.[8]

This paper has the following chapters: Section 1 considers the *jus cogens* principle of in-

1 . See also Prosecutor v Tadić (Trial Judgment) IT-94-1-T (7 May 1997) (noting that the two criteria distinguish "an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law"). [562]

2 . Prosecutor v Boškoski and Tarčulovski (Trial Judgment) IT-04-82-T (10 July 2008) [177].

3 . Prosecutor v Limaj, Bala and Musliu (Trial Judgment) IT-03-66-T (30 November 2005) [129]; Prosecutor v Boškoski and Tarčulovski (Trial Judgment) IT-04-82-T (10 July 2008) [199]–[203].

4 . Article II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (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

5 . E Blackmore, National Geographic, 'The Rohingya people', Accessed: 4 April, 2019, https://www.nationalgeographic.co.uk/2019/02/the-rohingya-people.

6 . Ana Pantea, 'The role of state in the construction of otherness in Myanmar, The Case of Rohingya Muslims. Studia Europea' (2019) Vol. 64 Issue 1 Studia Universitatis Babes-Bolyai - Studia Europea 219-236. DOI:10.24193/subeuropea. Accessed 13 March 2019.

7 . Allard K. Lowenstein International Human Rights Clinic – Yale Law School. (2015, October). Persecution of the Rohingya Muslims: Is Genocide occurring in Myanmar's Rakhine State? A legal analysis. Retrieved from Allard K. Lowenstein International Human Rights Clinic – Yale Law School at http://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf.

8 . S/RES/1973 (2011) https://www.un.org/securitycouncil/s/res/1973-%282011%29

ternational customary law and the establishment of the R2P mechanism for its implementation. Section 2 examines the application of the Geneva Conventions that regulate the conduct of the Parties involved in the NIAC. Section 3 examines the basis for enforcing the R2P measures in the conflict in Myanmar to protect the Rohingya Muslims. Section 4 considers the precedents established in the IHL for prosecuting the responsible officials in a special tribunal constituted under the International Residual Mechanism for Criminal Tribunals. This could then dispense justice against the Myanmar officials who are responsible for perpetrating genocide in this conflict.

1. Jus Cogens in Customary International Law

The application of international law in conflicts can be considered in the context of the rules that bind states to civilized normative conduct. This preserve the *jus cogens* norms, which are peremptory norms whose breach is universally recognized as a crime.[1] They apply to all states and are recognized in the treaty framework of the UN, which will void any treaty that infringes their implementation.[2] The concept of *jus cogens* expresses the idea of the existence of an international *lex superior* and stipulated in UN documents.[3] The *jus cogens* norms possess an authority that exceeds the ordinary standards of international law, and are applicable without any limits as to either subject or circumstances., for example, a *jus cogens* status is conferred on the prohibition of torture as defined in the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

This prohibition applies to all subjects of international law, including States, international organisations, insurrectional or national liberation movements, corporations or individuals.[5] The concept of *jus cogens* has also been invoked in proceedings before international judicial tribunals including the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[6] the Special Tribunal for Lebanon,[7] the Special Court for Sierra Leone,[8] the Inter-American and European Courts for Human Rights,[9] the Court of Justice of the European Union,[10] and

1 . Marry Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms. THE ROLE OF ETHICS IN INTERNATIONAL LAW', Donald Earl Childress, III, ed., (2012) Notre Dame Legal Studies Paper No. 11-19, Cambridge University Press, Available at SSRN: https://ssrn.com/abstract=1815155.

2 . Article 53 of the Vienna Convention on the Law of Treaties (VCLT)1969 states that, 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Article 64 of the VCLT 1969 further enhances its importance by giving it retrospective effect by voiding a provision of an existing treaty which if in conflict becomes terminated.

3 . Draft Conclusion 2 of the ILC Special Rapporteur, Mr Dire Tladi: "Norms of jus cogens … are hierarchically superior to other norms of international law" (UN Doc A/71/10, p 299). See, similarly, Weil, p 423 ff; CarilloSalcedo, p 595; Mitchell, p 228; Wouters& Verhoeven, p 403; Sarkin, p 541; Ruiz Fabri, p 1050; Macdonald, 1987, 129 ff.

4 . Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. Compare the approach of the ICTY Trial Chamber in Prosecutor v Delalić and others, Judgment of 16 November 1998, para 457 ff.

5 . A. Cassese, International Law (2005) Oxford University Press, 205.

6 . For the jurisprudence of the ICTY, see e.g. Prosecutor v Kupreškić, Judgment of 14 January 2000, paras 519–20; Prosecutor v Kunarac and others, Judgment of 22 February 2001, para 466; Prosecutor v Furundžija, Judgment of 10 December 1998, paras 153–54. For the jurisprudence of the ICTR, see e.g. Prosecutor v Kayishema and Ruzindana, Judgment of 21 May 1999, para 88.

7 . See e.g. Prosecutor v El Sayed, Order of 15 April 2009, para 29; Prosecutor v Ayyash, Decision of the Defence Appeals, 20 October 2012, para 68.

8 . See e.g. Prosecutor v Gbao, Appeals Chamber, Decision on Preliminary Motion, 25 May 2004, paras 9, 10; Prosecutor v Morris Kallon and BrimmaBazzy Kamara, Decision on Challenge to Jurisdiction, 13 March 2004, paras 60, 66–71.

9 . For the jurisprudence of the European Court, see e.g. Al-Adsani v UK, Judgment of 21 November 2001, paras 60–7; Othman (Abu Qatada) v UK, Judgment of 17 January 2012, para 266; Jones and Others v UK, Judgment of 14 January 2014, para 198; Naït-Liman v Switzerland, Judgment of 15 March 2018, para 129.

10 . See e.g. Kadi and Al-Barakaat International Foundation v Council and Commission of the European Union, Judgment of 3 September 2008, paras 280, 287.

numerous arbitration tribunals.[1] It has even permeated the rulings of the International Court of Justice, which had not previously incorporated this concept in its jurisprudence, but has now adopted its reasoning with arguments of *jus cogens*, and acknowledged its relevance.[2]

The consensus of the UN Member States that led to the adoption of the R2P principle stems from the need to prevent infringement of *jus cogence* norms. This consensus is based on the fact that "since the late 1990s and the beginning of the twenty-first century, there has been a remarkable increase in the use of *jus cogens* arguments in international legal discourse".[3] R2P has served as a mechanism for intervention when populations are at risk of genocide and crimes against humanity.

This concept of R2P postulates three pillars of responsibility as follows:

> *Pillar One: every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing; Pillar Two: the wider international community has the responsibility to encourage and assist individual states in meeting that responsibility; and Pillar Three: if a state is manifestly failing to protect its population, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.*[4]

The R2P measures have a mandatory effect on how they are interpreted and enforced within the context of international human rights and IHL. The two most important provisions are framed in the document (A/63/677) that the UN General Assembly released as follows:

> *138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*
>
> *139. The international community, through the United Nations, also has the re-*

1 . See e.g. Delimitation of Maritime Boundary between Guinea-Bissau and Senegal, Award of 31 July 1989, UNRIAA, Vol 20, para 44; Methanex v United States, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ILM, Vol 44, Part IV, Ch C, para 24; EDF v Argentina, Award of 11 June 2012, available at: https://arbitrationlaw.com/sites/default/files/free_pdfs/edf_international_v._argentina_award_jun_11_2012.pdf para 909.

2 . See e.g. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Merits, Judgment of 3 February 2015, paras 87–8; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, para 99; Jurisdictional Immunities of the State (Germany v Italy; Greece intervening), Judgment of 3 February 2012, paras 92–7; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, para 81; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment of 26 February 2007, para 161; Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda), Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

3 . Ulf Linderfolk, Understanding Jus Cogens in International law and International Legal Discourse, (Edward Elgar publishing 2020) 1-39, Available at: https://www.e-elgar.com/shop/gbp/understanding-jus-cogens-in-international-law-and-international-legal-discourse-9781786439505.html.

4 . These principles originated in a 2001 report of the International Commission on Intervention and State Sovereignty and were endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document paragraphs 138, 139 and 140.

> *sponsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.*

The Office of Genocide Prevention and Responsibility at the UN has declared Sections 138 and 139 as an important step in the "political commitment by Member States". The Office has also asserted that the R2P, as defined in these instruments, has reinforced the "international legal obligations for States" that are progressing "through State practice and the case-law of international courts and tribunals".[1] The R2P has been invoked in over 80 UN Security Council Resolutions and over 50 Human Rights Council Resolutions. This statement has provided an impetus for the R2P to be recognised in the procedural framework of international law at the UN.[2] There is conjecture over whether this arises from consensus and 'meaningful support' for its implementation.[3]

Surprisingly, the response that triggers the R2P does not have to be military intervention and many other instruments exist which can provide a means for enforcement, including "using tools designed for the upstream prevention of atrocity crimes". Paragraph 138 of the 2005 World Summit Outcome document states that 'this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means' including 'establishing early warning capability'.[4] The measures can be invoked as anticipatory responsibility to prevent the crimes and the States at the UN General Assembly agreed that when endorsing R2P that 'their commitment to the responsibility to protect is first and foremost a commitment to prevent and mitigate the risk of commission of atrocity crimes'.[5]

The concern for minorities who suffer from the acts of their national government provides a basis for intervention when genocide has taken place. This is an appropriate analogy given the human rights violations in Myanmar against the Rohingya Muslims in the hinterland of Southeast Asia.[6] The Muslim minority has historically been persecuted by the ultra-nationalist Buddhist monks who have targeted them to forcibly convert to restore "the ethno-religious balance."[7]

1 . 'Office of Genocide Prevention and Responsibility of Duty to Protect', https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.
2 . Jess Gifkins, 'R2P in The UN Security Council: Darfur, Libya and Beyond' (2016) Vol. 51 No.2 Cooperation and Conflict 148-165.
3 Aidan Hehir, Hollow Norms and the Responsibility to Protect (Palgrave Macmillan 2018) 8.
4 . UN General Assembly, 2005 World Summit Outcome A/60/L.1, p. 30.
5 . UN General Assembly, 2020, Report of the UN Secretary-General: Prioritizing Prevention and Strengthening Response: Women and the Responsibility to Protect, A/74/964, 23 July, para 9.
6 . Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Myanmar since 1 February 2021 (A/HRC/49/72, March 2022)
7 . Francis Wade, Myanmar's Enemy Within: Buddhist Violence and the Making of a Muslim Other (Zed books 2017) 8.

The consequences of this state policy have largely been ignored by the international community.[1] The case for protection of the Rohingya communities in Myanmar falls under the R2P Pillar III that provides for international assistance after establishing grounds to intervene under this mechanism and promote collaboration between concerned States and the international community. This concept of a diminished State Sovereignty cannot preclude foreign interference if the government has committed crimes against humanity against its people, as enshrined in Article 1 of the Genocide Convention 1989 and defined as a crime in international law.[2] The implementation of measure under Pillar III requires a referral to the Security Council, followed by a resolution that authorizes the intervention to terminate the genocide. The most referred example is the Libyan civil war in 2011, which under UNSC Resolution 1973 prohibited the state's forces from attacking the 'rebel' base in Benghazi.[3] This was affected by means of enforcing a no-fly zone and by restricting the scope of Libyan government's military operations in the western sector of the country. Resolution1973 is framed as a "Demand*" in Article 3 that states "the Libyan authorities comply with their obligations under international law, including international humanitarian, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance*."

However, Western nations placed conditions that meant an active withdrawal of the Libyan government's forces, which then led to an escalation and triggered a military intervention in which the regime change became part of the NATO agenda. It is argued that this was against the presumed attention of Article 1, that did not provide a basis for military intervention by the Western powers acting under the auspices of the Security Council and facilitating the rebel National Transitional Council to seize power.[4]

The definition of Pillar III needs special attention and it should be noted that any UNSC Resolution for an intervention under RP2 is not blocked by member states who have the right to exercise veto.[5] The five veto wielding powers at the UN have their separate interests, and while principles identified by the UN General Assembly in A/63/677 are valid, these states have their own regional influence which leads to them offering protection from any measures that are initiated under the RP2 mechanism.

2. R2P and Mechanism for Intervention

The forced removal from Myanmar of the Rohingya community began with the arrival of military rule in 1962, when the authorities launched the first of their operations that led to genocide of the people. This was with the intention of pacification of the Muslim minority and was conducted

1 . T Karman, 'The Rohingyan tragedy shows human solidarity is a lie', Al Jazeera, Available at: https://www.aljazeera.com/opinions/2017/12/1/the-rohingya-tragedy-shows-human-solidarity-is-a-lie. Accessed 1 Dec 2023.

2 . International Convention Against Genocide, Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

3 . 'Libya and the Future of the Responsibility to Protect – African and European Perspectives Matthias Dembinski/Theresa Reinold P', PRIF Report no 107, Available at: https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif107.pdf. Accessed 1 Dec 2023.

4 . Article 1 Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.

5 . Zifcak Spencer, 'The Responsibility to Protect after Libya and Syria, Melbourne Journal of International Law' (2012) Vol. 13 No. 1 Melbourne Journal of International Law 7-14; See also The Ethics of Humanitarian Intervention in Libya', Ethics and International Affairs, 25, no 3 (2011) 273-74.

by mass arrests and incarcerations.[1] The 'ethnic cleansing' operation in 1978 led to Rohingya refugees fleeing to nearby Bangladesh in large numbers,[2] followed by the "Operation Clean and Beautiful Nation, that led to the exodus of another 200,000 people from the country".[3]

The exclusionary policy of the Myanmar government is based on the denial of citizenship to the Rohingya and the process has been aggravated by preventing their ability to register as temporary residents with identification cards. These are known as 'white cards', which the military began issuing to Muslims, both Rohingya and non-Rohingya, in the 1990s. The white cards conferred limited rights but were not recognized as proof of citizenship.[4] In 2014 the civilian authority held a UN-backed national census where the Muslim minority was initially permitted to identify as Rohingya.

However, after Buddhist ultra-nationalists threatened to boycott the census, the government decided the Rohingya could only register if they identified as ethnically Bengali instead. The pressure from the ultra-nationalist led to the Rohingya people's right to vote in a 2015 constitutional referendum to be annulled and the temporary identity cards that were issued in February 2015 were withdrawn. This effectively revoked their newly gained right to vote (white card holders were allowed to vote in Myanmar's 2008 constitutional referendum and 2010 general elections.) The Parliamentary elections held in 2015 did not lead to any member of the Muslim community to be elected in the national assembly.[5]

The UN Human Rights Council (HRC) has been investigating the persecution of the Rohingya and its various bodies have issued reports condemning their treatment.[6] The HRC appointed an Independent Fact-Finding Mission (IIFFMM) that found evidence of genocide, crimes against humanity, and war crimes, and accordingly requested that the international community employ R2P to protect the Rohingya people. Their comprehensive 440-page account of their findings after its 15-month examination of the situation in Myanmar states:

> *"During their operations the Tatmadaw has systematically targeted civilians, including women and children, committed sexual violence, voiced and promoted exclusionary and discriminatory rhetoric against minorities, and established a climate of impunity for its soldiers".*[7]

1 . Transcript of the Current Affairs magazine discussions with Prime Minister's Private Secretary-2 U KhinNyunt, "Special Issue on Mayu," Current Affairs (or Khit Yay), Ministry of Defence, the Union of Burma, 12, 6 (July 18, 1961) 16-20.

2 . Personal Testimony delivered by U Ba Sein, a former Rohingya civil servant – now a refugee in London, UK - who lived through this King Dragon Operation in N. Rakhine, Permanent People's Tribunal on Myanmar, Queen Mary University of London. March 6-7, 2017, accessed April 3, 2019.

3 . M Myint, 'Ninety Percent of Rohingya Population Ejected from Rakhine', The Irrawaddy, 23 February 2018. https://www.irrawaddy.com/specials/ninety-percent-rohingya-population-ejected-rakhine.html. Accessed 9 April 2021.

4 E Albert, L Maizland, 'The Rohingya Crises, Council on Foreign Relations', Accessed 23 March 2024, https://www.cfr.org/backgrounder/rohingya-crisis.

5 . Ibid.

6 . The UN High Commissioner for Human Rights acknowledged a clearance operation that occurred on 25 August 2017 at the hands of the Myanmar military regime was a "textbook example of ethnic cleansing". OHCHR, October 2017; The UNHRC also document "widespread, unlawful killings by the security forces and vigilantes, including several massacres; rape and other forms of sexual violence against women and children; the widespread, systematic, pre-planned burning of tens of thousands of Rohingya homes and other structures by the military, BGP and vigilantes across northern Rakhine State from 25 August until at least October 2017; and severe, ongoing restrictions on humanitarian assistance for remaining Rohingya villagers". "Burma: New Satellite Images Confirm Mass Destruction", Human Rights Watch, 17 October 2017; "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017".

7 . Myanmar: UN Fact –Finding Mission releases its full account of mass violations by military in Rakhine, Kachin, and

The report also recommends that the "*top generals should be investigated and prosecuted for genocide in Rakhine by crimes as horrendous and on such a scale as these*".[1] After the expiry of its mandate, the IIFFMM transferred its evidence to the Independent Investigative Mechanism for Myanmar (IIMM), that is instructed by the HRC and has been operational since 30 August 2019. The IIMM has the power "*to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011. It is further mandated to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes*".[2]

However, the IIMM exclusively depends on civil society organizations' (CSO) documentation to assert their jurisdiction". This factor created the need for the IIMM to act as a "*legal bridge between documentation and States' investigatory and prosecutorial duties: the concerns about the reliability of CSOs' documentation and the impediments in its direct admissibility in criminal trials.*"[3]

It can be argued that despite these reports, the international community has taken no effective measures to protect the Rohingya, and that there are possible strategic reasons for why the R2P measures have not been instituted to protect them. This lack of intervention can be ascribed to the "*ASEAN's non-interference strategy, the OIC's dependency on diplomacy, the EU's priority for the hybrid democratic transition of Myanmar, the UN's political dialogue strategy, and the UN Security Council's structural weaknesses are obstacles to the international community preventing genocide in Myanmar.*"[4]

3. Precedence and Avoidance of 'False Flag' Operations

There needs to be an examination of the previous interventions under the R2P umbrella in conflict zones in order to evaluate if these interventions can serve as a precedent for the intervention in Myanmar. In formative period of the R2P the government of Canada had initiated the debate in 2002 on the Responsibility to Protect under the auspices of the International Commission on Intervention and State Sovereignty (ICISS), which drafted the principles of' humanitarian intervention. This was the first indication of an international consensus to intervene when there was no scope for "redrawing the boundaries of the state or to support the self-determination claims of any particular belligerent party."[5] The document stated that the only reason for intervention is "the protection of civilians, therefore any military campaign must be strictly confined to this goal, and should not be used as a pretext for pursuing regime change."[6] The ICISS report

Stan States, 18/9/18. UNHR https://www.ohchr.org/en/press-releases/2018/09/myanmar-un-fact-finding-mission-releases-its-full-account-massive-violations?LangID=E&NewsID=23575.

1 . Ibid.

2 'What is the Independent Investigative Mechanism for Myanmar?', https://iimm.un.org/what-is-the-independent-investigative-mechanism-for-myanmar/. Accessed 19 Feb 2024.

3 . Konstantna Stavrou, 'Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya' (2021) 36(1) Utrecht Journal of International and European Law 95–113.

4 . Uddin Md Zahed, 'Responsibility to Protect, The International Community's Failure to Protect the Rohingya' (2021) Vol. 52, Issue. 4, Asian Affairs 947.

5 . International Commission on Intervention and State Sovereignty (ICISS) 2001: The Responsibility to Protect, Ottawa: IDRC.

6 . Ibid., 35

acknowledged that the protection of civilians "will often require disabling the target regime's capacity for hurting its own people, and what is necessary to achieve that disabling will vary from case to case."[1]

This concept was further developed by the International Coalition for the Responsibility to Protect (ICRP) and it was prefaced on the notion of a dual social contract between the sovereign government and its citizens, and between nation-states and the international community. Its stated purpose was: "*The sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and international order. Such a normative code is anchored in the assumption that in order to be legitimate, sovereignty must demonstrate responsibility.*"[2] Hence, sovereignty should not merely be regarded as the right to be left alone, but as the responsibility to discharge governmental duties. "Normatively, to claim otherwise would be to lose sight of its purpose in the original context of the social contract, taking the means for the end."[3] It conveyed the burden of responsibility to the state and argued that "state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself."[4]

However, R2P has been deemed to be applied selectively in conflict zones and this is a reflection of strategic goals of members states of the UNSC, such as regime change, rather than the moral authority to protect international law. The intervention by NATO countries in Libya to overthrow the regime of Colonel Gaddafi on the pretext of the UN Security Council Resolutions 1970 also threatened International Criminal Court (ICC) prosecution for crimes against humanity.[5] The Libyan government was viewed as having failed to comply with UN demands, and in view of the rebellion in Benghazi, the Security Council passed Resolution 1973 on March 17, 2011. Neither Resolution 1970 nor Resolution 1973 specifically mention the term "responsibility to protect" although the term "in order to protect civilians" is used in paragraph 6.[6]

The resolution was a pretext for western intervention rather than a serviceable guideline for the UN sponsored action, because the NATO forces had one overriding aim which was regime change above all other considerations. Resolution 1973 authorized member States acting "nationally or through regional organizations or arrangements" to create a no-fly zone. This was a reference to the UN's self-identified Chapter VIII which was moved by the Organization of African States (OAS), later the African Union, which could have intervened on the grounds of the Resolution. The western powers acting through NATO rejected the overtures by Col Gaddafi to establish a ceasefire including a "willingness to accept international monitors, and to abdicate and exit the country."[7]

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1 . Ibid.
2 . International Coalition for the Responsibility to Protect, www.responsibilityto protect.org (9.11.2011) i.
3 . Ibid., xviii.
4 . Ibid., xi.
5 . C Doebbler, "The Use of Force against Libya: Another Illegal Use of Force" (Jurist 20 March 2011) accessed 26 March 2021.
6 . Ibid.
7 . A. Abbas, Assessing NATO's involvement in Libya. Accessed on February 26, 2018; GeirUlfstein and Hege Fosund Christiansen, "The Legality of the NATO Bombing in Libya" (2013) Vol 62 Issue 1 British Institute of International and Comparative Law 159; Stark et al. The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention. New York: e-International Relations. (2011). at 28 http://responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3747-e-international-relations-the-responsibility-to-protect-challenges-a-opportunities-in-light-of-the-libyan-intervention.

It emerges from the NATO intervention which served to devastate Libya was a 'false flag' operation in which the main object was 'regime change'. The outcome effectively ended the sovereignty of the country, partitioned it into two divisions and led to refugee crises.[1] The preservation of international law would have been effective if there was a more objective application of the R2P that was not aligned with western states military goals which were defined by NATO. This form of subjective enforcement is against the implementation of a concept that optimizes the 'citizen-centered' right to be protected as exists under the R2P.[2]

Teimouri and Subedi argue that the "*principle of R2P was violated in the case of Libya, because the violence had not been carried out from the government side, but was also systematic from the rebels' side*".[3] They cite the International Commission of Inquiry on Libya, which states that "*the violence carried out by different rebel militias, the so-called thuwar (revolutionaries), that was widespread and grave.*"[4] They quote this report which provides evidence that the "*conduct of both the government and the rebels in graphic detail, indicating the commission of war crimes (if occurring during the armed conflict) and crimes against humanity (if occurring in a widespread and systematic manner).*"[5]

The foreign intervention presents obstacles because of "*complexity that lies in the international community authorizing encroachment on a state's sovereignty when the nature of the conflict remains inherently domestic*" and the consequence of this is encouraging self-determination and seemingly being "biased in favor of non-state actors". This in practice would mean that instead of applying the RP2 mechanism the "*international community might be prone to shielding armed groups from charges with respect to their behavior in the course of armed conflict, which is tantamount to legalizing armed action against the state authorities and, in principle, to granting those unhappy with the state the right to take up arms.*"[6]

It can be argued that the conflict in Myanmar is different from Libya because the military government that expelled the Rohingya have not recognized them as citizens or as part of the ethnic composition of the country. Therefore, the argument cannot be sustained that there should be no military intervention because it may violate the principle of sovereignty, because in this instance there is not an international conflict but an 'ethnic' genocide which has been carried out by the authorities in Myanmar.

The R2P process is at an early stage of development and the mechanism to refer cases that arise from atrocities have not been sufficiently developed. There have been efforts to establish the instruments for enforcement and in 2014, the United Nations launched its *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, as a guide for assessing the risk of genocide, crimes against humanity and war crimes. This was to anticipate "crises, promote action

1 . E. A. Posner. Outside the Law: From Flawed Beginning to Bloody End, the NATO Intervention in Libya Made a Mockery of International Law. (2011), https://foreignpolicy.com/2011/10/25/outside-the-law.
2 . Timothy McNamara, 'International Law, NATO's Campaign to Kill Gaddafi and the Need for a New Jus Cogens' (2019) Vol. 9 Beijing Law Review 519.
3 . Heidar Ali Teimouri and Suria Subedi, 'Right to Protect and International Military Intervention in Libya. What went wrong and what lessons could be learnt from it?' (2018) Vol.23 Issue 1 Journal of Conflict and Security Law 11.
4 . UNHRC, 'Report of the International Commission of Inquiry on Libya' (8 March 2012) UN Doc A/HRC/19/68, 6-7.
5 . Ibid., 8-9, 12-13 ,15
6 . H Teimouri and SP Subedi, Right to Protect and International Military Intervention in Libya.

and improve monitoring, early warning and preventive action."[1] There were "*14 risk factors identified and 143 indicators, a process that was in accordance with the UN's commitment to placing the protection of populations and the prevention of atrocity crimes as a matter of priority of [UN] wor*k."[2] The toolkit emphasis that "each situation demands its own 'contextual analysis and tailored response" and the UN recommendations were that in order to be effective, "*assessments require the systematic collection of accurate and reliable information based on the risk factors and indicators that the framework identifies."*[3]

The interactive process of enforcement of RP2 will be formulated if there is a "*predominant role played by consent in international law, as well as by the non-reciprocal nature of human rights obligations. Second, definitional ambiguity and a lack of well-defined normative implications hamper the protection of those human rights that have gained special status, such as jus cogens and erga omnes. Third., the political nature of the Human Rights Council and the Security Council impacts the effectiveness of these bodies and their efforts to promote human rights.*"[4]

The mechanism to activate the R2P measure should be voted by the General Assembly and can be activated without the need for the Security Council resolution. The permanent members can frustrate collective action by their veto, but "classic texts of international relations remind us that the veto 'registered power; it did not confer it'."[5] The rationale for the transfer from the Security Council to the General Assembly to authorise the action under the R2P is the originating fact of the measure that was endorsed by the majority of states at the General Assembly at its inception. It will carry more weight in terms of granting the moral authority to trigger the intervention under the R2P. The Secretary General of the UN would be able to circumvent the approval of the Security Council and nullify their veto and order intervention under the extraordinary powers available under R2P.

This will provide the basis for intervention to stop human rights abuses on a such a scale as in Myanmar, and this is only possible when the juridical rule of international law based on human rights and IHL is recognized and preserved in asymmetric conflicts. The imperative is for the international law to be based on the formal equality of states, with a UN acting in a diffuse manner in order to arrest, detain and to prosecute the officials who have carried out genocide in the Non-International Armed Conflict (NIAC).

4. Characterization of the Conflict and Criminal Trials

The conflict between the Myanmar government and the Rohingya Muslims is a national dispute and its definition comes under the Non-International Armed Conflict (NIAC). This is because

1 . The Global Network of "R2P Focal Points" was launched in September 2010 in collaboration with the Global Centre for the Responsibility to Protect. The motivating idea behind the Focal Point position was that it would 'integrate atrocity prevention within both domestic and foreign policy'. To do this, it was anticipated that 'the R2P Focal Point should have sufficient influence and access across their national system to be able to promote R2P broadly and to meaningfully engage with relevant operation mechanisms for preventing and halting mass atrocities'. GCR2P, Third Meeting of the Global Network of R2P Focal Points. Preventing Atrocities: Capacity Building, Networks and Regional Organization, June 2013 at http://www. globalr2p. org/media/files/third-meetingof-the-global-network-of-r2p-focalpoints.pdf.

2 . United Nations, Framework of Analysis, iii.

3 . United Nations, Framework of Analysis, 7.

4 . Iryna Bogdanova, Unilateral Sanctions in International law and the Enforcement of human rights. In the International Enforcement of Human Rights, Volume: 9 World Trade Institute Advanced Studies, (Brill 2022) 180 -182.

5 . Inis Claude, 'Swords into Plowshares. The Problems and Progress of International Organization' (1972) Random House 72.

there were two competing parties in this conflict however asymmetrical they were in terms of numbers and resources. The Arakan Rohingya Salvation Army (ARSA) or Harakah al-Yaqin (faith movement) first came into prominence in October 2016 after launching small scale attacks on border posts in northern Rakhene region leading to "a disproportionate response from the Myanmar authorities."[1] The first recorded incident of armed resistance was on 25 August 2017, when it attacked 30 members of the security force outposts in the northern Rakhane state and these "attacks were planned and coordinated just hours after a final report of the Advisory Commission on Rakhine State, led by former UN Security General Kofi Annan. formed after the in 2017."[2]

The laws of war are governed by treaties and customary international law and the "rules of IHL are set out in a series of conventions and protocols". The Four Geneva Conventions which were signed in 1949 together with the laws of the Hague Convention 1907 form the basis of contemporary IHL which come into effect during an armed conflict. The aims to regulate the conduct of belligerents; all combatants and to those no longer taking part in hostilities, including POWS. The application of IHL is based on the framework of the Geneva Conventions for the protection of civilian persons in times of war. The International Committee of the Red Cross (ICRC) is the main international agency that oversees its implementation whose "basic principle underlying that law, humanity, impartiality, and neutrality are as valid as ever and of utmost relevance" in its work.[3]

The state parties under Common Article 1 which is generic to all 4 Geneva Conventions 1949 places a duty «*on the part of all States to use all available means to ensure respect for all provisions of the Conventions by all other States during all armed conflicts, even those to which the State in question is not a party.*"[4] The Common Article 3 states *"(1) Persons taking no active part in the hostilities, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria;" and '(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".*

The Common Article 3 is also applicable in the case of armed conflicts 'not of an international character'(NIAC.) which are armed conflicts where at least one Party is not a State.[5] There are also the Additional Protocols that applies to NIACs which were formulated in 12 August 1949, and relates to the Protection of Victims of NIACs (Protocol II) of 8 June 1977.The only provision applicable to NIAC before the adoption of the Protocol II was the Common Article 3 but this

1 . International Crises Group Statement 'Myanmar tips into New Crises after Rakhine State Attacks', 27 August 2017 https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-tips-new-crisis-after-rakhine-state-attacks; International Crises Group, 'Myanmar's Rohingya crises enters a dangerous new phase, Report no 292/Asia, 7 December 2017.https://www.crisisgroup.org/asia/south-east-asia/myanmar/292-myanmars-rohingya-crisis-enters-dangerous-new-phase.

2 . See International Crises Group, Myanmar: A new Muslim Insurgency in Rakhine State, Report No 283/Asia, 15/12/16https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state; International Crises Group, Myanmar's Rohingya crises enters a dangerous new phase; Amnesty International, "We are at Breaking Point"; Rohingya persecuted in Myanmar, Neglected in Bangladesh (Index: ASA 16/5362/2016) 19 December 2016. https://www.amnesty.org/en/documents/asa16/5362/2016/en/.

3 . Yves Sandoz, The International Committee of the Red Cross as guardians of International Humanitarian Law, 31-12-98. icc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm. Accessed 12 March 2024.

4 . Laurence Boisson de Chazournes & Luigi Condorelli, Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests, 82 International Review of the Red Cross 67 (2000).

5 . Commentary of 2016. Article 3: Conflicts of Non-International Character. ISRC. iht-database.icrc.org/ihl/full/GLI-Commentary/aRT3.

instrument proved to be inadequate because approximately 80% of the victims of armed conflicts since 1945 have been victims of NIACs and these are often fought with more cruelty than international conflicts.[1]

This instrument has application to NIAC which is the definition for the persecution of the Rohingya Muslims and its non-compliance of Myanmar with the human rights and principles of IHL. Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."[2] The breach of IHL is a structural problem because the Myanmar government has not signed the two additional protocols that been added to the Geneva Conventions in 1977 which cover armed conflict. These are the Additional Protocol (AP) I and II and while the former defines armed movements involving the "right to self –determination of colonized peoples in international armed conflicts, bringing, in some respects, guerrilla warfare and state responses to it within the protection ambit of IHL."[3]The latter was "specifically adopted to cover situations of NIAC, thereby bringing a situation of armed conflict occurring on the territory of a country within the framework of IHL."[4]

Part IV (Article 13) of the Additional Protocol II on Civilian populations and General Protections of the Civilian Population states:

> *(1): The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.*
>
> *(2) . The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*
>
> *(3). The civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."*[5]

The breach of the Geneva Conventions' Common Article 3 and the AP II which is crucial to the protection of civilians in a NIAC is evidenced in the non-compliance of Myanmar's authorities and the armed forces absolute immunity in breaching the norms of the IHL. In executing a proactive, offensive and retributive doctrine the Myanmar armed forces have breached the rules not to cause "indiscriminate and disproportionate attacks"[6] and failed to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects."[7]

This exposes Myanmar's officials to the allegation of war crimes and also for committing crimes against humanity. The collective punishments imposed on the people is a breach of IHL and the

1 . Allex Bellamy, Just Wars: From Cicero to Iraq (Cambridge University Press, 2006) 110.
2 . Jean Marry Henckaerts, Luise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, (Cambridge University Press 2005), 3-76.
3 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
4 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), 8 June 1977
5 . Protocol Additional II to the Geneva Conventions of 12 August 1949, 94. Available at: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0467.pdf
6 . Ibid, Rules 11-24.
7 . Ibid Rules 15-24

principles of culpability were defined in *Prosecutor v. Tadic*,[1] where an international tribunal was constituted to determine the crimes committed by former Yugoslavian military personnel. The decision states:

> *"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [...the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: ...in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".*[2]

The Myanmar government is not acting in self-defence against an armed attack and have used force to expel a minority and genocide has been documented by the UN human rights agencies. The principle of proportionality will apply in the context of rights that it has infringed which are considered to be *jus cogens* and, therefore, protected as human rights. The proportionality test as it is currently understood in the laws of armed conflict is one of the "*cornerstones of IHL, together with the other basic principles of distinction between civilians and combatants, the prohibition on the infliction of unnecessary suffering, the notion of military necessity, and the principle of humanity.*"[3]

Under this distinction it is only the armed personnel and military targets which may be targeted during armed conflicts. The attacking party "*must ascertain whether a given target is military or civilian, and refrain from attacking the latter. This prohibits even when targeting a military objective, when the attack that is* "*expected to cause incidental harm to civilians which would be excessive in relation to the concrete and direct military advantage anticipated.*"[4]

It has been referred to as a cardinal principle of IHL and has been commented on by jurists who consider it preeminent in regulating armed conflict.[5] This prohibits the collateral damage to civilians by placing a sanction on assaulting a building or a site which may retain the military objectives. The attack whether deliberate or reckless is proscribed that would be excessive relative to the military advantage gained. For example, in the conflict between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) the agreement between the two parties commits them to "avoid[ing] acts that would cause collateral damage to civilians."[6]

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1 . Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

2 . At 111, 127 (citing U.N. General Assembly Resolution 2675).

3 . Amichai Cohen, David Zlotogorski, 'Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures' (Oxford University Press 2021) 4.

4 . Ibid.

5 . Thomas Franck has explained, that it defines the "imagination of the epistemic community in which it is used as the prism for viewing, arguing, and ultimately resolving disputes". Thomas M Franck, On Proportionality of Countermeasures in International law, 102 AJIL, (2008)715,728. 102; Also see Marco Sassòli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law' (2010) Vol. 1 Journal of International Humanitarian Legal Studies 32.

6 . Agreement on the Civilian Protection Component of the International Monitoring Team', 27 October 2009, Art. 1(a). Volume 93 Number 882 (June 2011) 9https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_091027_Agreement%20on%20Civilian%20Protection%20Component.pdf.

In customary international law the principle of proportionality is defined by the parameters of not causing harm to civilians to the exclusion of non-military personnel. The presence of civilians within or near military objectives does not render such objectives immune from attack. However, this exemption only applies to "civilians working in a munitions factory. This practice indicates that such persons share the risk of attacks on that military objective."[1] It would also mean that civilians not involved in any military support role are excluded from the military objective of attack or forced expulsion.

There needs to be an international tribunal to try the Myanmar officials including the military leaders who headed the chain of command and gave the order for the ethnic cleansing of the Rohingya. The International Residual Mechanism for Criminal Tribunals (UNMICT) established by Security Council in 2010, by resolution 1966, should be invoked to prosecute these officials who are culpable[2] This was established under Chapter VII Article 39: Action with Respect to threats to the Peace, Breaches of the Peace, and Acts of Aggression. There is one branch that is located in the Hague and the other branch is in Arusha, United Republic of Tanzania.

The Security Council have established two ad hoc criminal tribunals, the Criminal Tribunal for the Former Yugoslavia (ICTY) promulgated by Security Council Resolution 827 of 25 May 1993[3] and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of IHL Committed in the Territory of Rwanda and Rwandan Citizens and Other Such Violations Committed in the Territory of Neighbouring States (ICTR) on 31 December 1994 by Resolution 955.[4] It is possible to try the accused of Myanmar in ad hoc tribunals established to bring justice to victims of international crimes. This is an acceptable framework for a machinery of justice in IHL, because the mandate of the UNMICT has been extended for future referrals after the conclusion of the ICTY and ICTR proceedings.

The process of trying the accused of Myanmar is by establishing a separate criminal tribunal that would enable the indictment on the basis of "Joint Criminal Enterprise" or JCE. This concept was invoked by the two previous tribunals and the term considers each member of an organized group individually responsible for crimes committed by that group within the 'common plan or purpose'. The act is inculpatory by a "criminal agreement through which parties' intent becomes perceptible" and the principle has "developed through international case law."[5] This process enabled the guilt to be established by association of violent groups and the court entered convictions in all the cases it tried in the ad hoc tribunals.

This Criminal Tribunal for Myanmar for Serious Violations of IHL Committed against the Rohingya citizens will have to be created by the Security Council resolution and its terms of reference will be included in the statutory instrument and the various Articles that govern its

1 . See J.-M. Henckaerts, L. Doswald-Beck, Customary International Humanitarian Law, Vol 1: Rules. International Committee of the Red Cross, (Cambridge University Press 2009) 31.

2 . Security Council Resolution/1996 (2010) ww.icty.org/en/press/security-council-adopts-resolution-international-residual-mechanism-criminal-tribunals-irmct.

3 . International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. https://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.

4 . Available at www.irmct.org.files.documents.101222_sc_res1966_statute_en, accessed on April 23, 2023.

5 . Elinor Fry, Elies van Sliedregt, 'Conspiracy/ Joint Criminal Enterprise', Oxford Bibliography. 13/6/17https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0096.xml.

functions and the Rules of Procedure and Evidence. The Secretary General can under Article 99 bring to the "attention of the Security Council any matter that threatens the maintenance of peace and security". This will lead to the establishment of the tribunal and it will have the provision to be able to serve public indictments, to issue judicial decisions and produce the Annual Reports to General Assembly and Security Council on an annual basis.

The state of Myanmar has also abused human rights law as documented by the OHCHR reports along with the breach of IHL, and the infringements of international human rights law (IHRL) makes its officials liable for the crimes committed against the Rohingya for forcing their expulsion from the country of their birthright. The operations carried out by its armed forces, and their auxiliaries has caused the infliction of deaths, grievous harm and ethnic cleansing. The IHRL is based on the treaty framework that emanated from the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948. This was drafted as "*as a common standard of achievement for all peoples and nations", and it enables the "civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect."*[1]

The IHRL establishes the tenets that the states are bound to respect and which are drafted in the form of "obligations and duties under international law to respect, to protect and to fulfil human rights". These are framed in the negative context such as not restricting or annulling the standard terms ingrained in human rights. They apply to both the "individuals and groups" and states much respect against abuse of these enshrined rights.[2]

The Myanmar state has to abide by the basic human rights treaties such as the Convention of the Elimination of Racial discrimination (CERD); International Convention on the Economic, Social, and Cultural Rights (ICESCR); International Convention for Civil and Political Rights (ICCPR); Convention against Torture and Other Cruel, Inhumane and Degrading Treatment; Convention on Rights of Person with Disabilities, Convention on Enforced Disappearances; and the Convention on the Rights of the Child. The authorities in Myanmar have only ratified the ICESCR and the Optional Protocol to the Convention on the Rights of the Child which precludes the involvement of children in armed conflict.[3]

The actions of the armed forces of Myanmar will be judged for breaches of human rights that prevail generally under international treaties and customary laws that are inherent in these instruments and which are supplemented by the declarations, guidelines and principles adopted by the international bodies for the implementation of human rights. The breach of human rights law co-exists with humanitarian law and present a very persuasive argument for the prosecution of Myanmar's officials in an international criminal tribunal and to be tried for violating laws that establish conduct of states in NIAC conflicts.

1 . 'International Human Rights Law, UNHR Commissioner, Office of the High Commissioner' Available at: https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law. Accessed 20 Feb 2024.
2 . Ibid.
3 . UN-HR Treaty Bodies, Ratification Status for Mynamar. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN. Accessed 20 Feb 2024.

Conclusion

The mechanism for protection in international law for minorities is a process under the R2P which is a framework under Pillar I that defines 'atrocities' such as *genocide, war crimes, crimes against humanity and ethnic cleansing.* Pillar III establishes the grounds for intervention by which the international community may undertake resolute and collective action in furtherance of the UN Charter. The legal basis exists for intervention by consensus and the initiative is for the General Assembly to vote for activation of the mechanism in order to bring to justice the officials of the Myanmar government.

In this conflict the persecution, violation and the displacement of the Rohingya Muslims deserves the international community's attention and in particularly those in the General Assembly which voted for the measure to be enacted. It must be the body with powers to convene an international criminal tribunal that will prosecute the military officers and their commanders for genocide. The precedence was established in the *Tadic v Prosecutor* case and the jurisdictions is provided by the International Residual Mechanism for Criminal Tribunals which should be activated for the Myanmar officials to be indicted, tried and sentenced.

The ethnic minorities in remote parts of the world are often in conflicts where the majoritarian states which view them as alien despite their birthright in the country. In this instance the Rohingya who are original inhabitants of the country have been expelled from their homeland because of their creed and ethnic background. The conflict that has been imposed on them is a form of warfare that is defined as a NIAC and the rules that are applicable in their case stem from the international human rights and IHL principles. These need to be enforced vigorously and there should be no reluctance or reticence in forging the R2P procedures keeping in perspective the false flag operations of the past.

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