

International Criminal Court and its Tryst with Justice: The case of Myanmar

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Abstract: *The UN independent fact finding mission in 2018, distinctly corroborated by the UNHCR and Amnesty International, have evidently found the Myanmar Military forces of committing grave human rights violations cumulating to crimes against humanity and genocide. Myanmar's continuous denial of such crimes and its unwillingness to prosecute the perpetrators has brought the ICC in contention. Though Myanmar is not a state party to the Rome Statute, on a request by the chief prosecutor, the Pre Trial Chamber of the ICC has decided it has jurisdiction over Myanmar for the forcible deportation of Rohingyas to Bangladesh which amounts to crime against humanity. This article devolves the reasons for the accountability of the perpetrators at the ICC and the challenges ICC may face in holding the perpetrators liable. Finally the author would recommend ways by which the ICC may overcome such hindrances and result in accountability of the perpetrators.*

Keywords: *ICC, Jurisdiction, Obstacles, Myanmar, Bangladesh, Security Council.*

I. Introduction

Rohingyas are the child of long decades of persecution on ethnic grounds by the successive governments of Myanmar. Historically, if we view the case of Rohingya and particularly after the military coup of 1962, it appears to be a policy pursued by the Myanmar governments to destroy and completely annihilate the Rohingyas from Myanmar [1]. Such has been the atrocities of the Myanmar state forces including the local bamars that there has been displacement of 912,114 Rohingyas over the decades and 742,354 Rohingyas alone after the attacks of August 25, 2017 as per the records of United Nations High Commissioner for Refugees (UNHCR) [2]. However the plight of exact number of displacement may be far worse rising approximately to over 1.2 million [3] Rohingyas and this can be roughly attributable to the undocumented Rohingyas living in the host communities who were displaced over the time to Bangladesh [4]. The oppression, violence and discrimination on the Rohingyas has been calculative, systematic and planned, with the sole objective of the Myanmar government to exclude them from the history of Myanmar. The hostilities and discrimination on the Rohingyas extends from denial of citizenship to arbitrary arrest and detention, sexual violence, no access to freedom of movement, education,

Healthcare, voting rights, marital registration rights, forceful displacement, and destruction of villages, rapes and mass killings [5]. Zeid Ra'ad Al Hussein, the then U.N. High Commissioner for Human Rights appropriately termed the atrocities as "a textbook example of ethnic cleansing" [6]. Maung Zarni and Alice Cowley described the hostilities on the Rohingyas as a "slow burning genocide" [7]. The reports of UN and Amnesty International are no different and are of the view that the crimes committed on the Rohingyas by the Myanmar state forces amounts to genocide and crimes against humanity [8]. According to the Rome Statute, the International Criminal Court may have jurisdiction over such cases only if the state having jurisdiction is either unwilling or unable in reality to carry out the investigation or prosecution [9]. After a close perusal of the role of the Myanmar government to hold the perpetrators liable appears to be in total shambles as till date there has been no significant steps taken to hold the perpetrators accountable. The UN independent fact finding mission coherently concluded in its report of 2018 that Myanmar authorities unwillingness to prosecute and investigate has been vindicated by the fact that till date no progression has led to either prosecution for gross human rights violations or redress for victims [10]. These above facts bring the ICC in contention to prosecute and trial such cases. However another hindrance to the jurisdiction of ICC to try and prosecute the perpetrators is Myanmar not being a state party to the Rome Statute and the absence of referral of the case to the ICC by the Security Council. But in a turn of events, on a request [11] by the the Chief Prosecutor Fatou Bensouda on April 9, 2018 the Pre Trial Chamber of ICC concluded in the affirmative that it has jurisdiction over Myanmar to try the deportation of the Rohingyas to Bangladesh as it amounts to crime against humanity [12]. Accordingly, the chief prosecutor commenced preliminary investigation on September 8, 2018. Though the ICC has determined it has jurisdiction for the crime of deportation of Rohingyas to Bangladesh, it may face stern hindrances in

effectively holding the perpetrators responsible. The author puts forwards the areas which will result in obstacles for the ICC in bringing the alleged offenders to justice. The article will also enlighten the reasons as to why the ICC is the right forum for the accountability of the heinous crime of genocide and crimes against humanity. Finally the author recommends ways by which the ICC may be able to effectively investigate, prosecute and punish the personnel's responsible for atrocities on the Rohingyas.

II. History leading to the Present Crisis of the Rohingyas

Myanmar earlier known as Burma is principally a Buddhist country situated in Southeast Asia. Approximately, the total population of Myanmar is 58 million out of which 15% of the population practices the religion Islam [13]. Myanmar has its border with India and Bangladesh, Laos, China and Thailand to the west, east, northeast and southeast respectively. The southern part of the country meets the Bay of Bengal and the Andaman Sea [14]. In 2006, the city Naypyidaw has officially replaced Yangon as the capital of Myanmar.

In addition to regions or provinces, Myanmar also has 7 states which are basically named after the name of the ethnic communities. The names of the states are as follows i.e Mon, Chin, Kayah, Kachin, Rakhine, Karen and Shan. The Rohingyas are the followers of Sunni Muslim and in majority live in the Rakhine state. The major ethnic community in Rakhine is the Buddhist followed by the Rohingyas of approximately 1.2 million which is around 40% of the total state population [15].

The origin of the Rohingyas in Myanmar is vehemently debated by some scholars. However the most supported view is that the origin of the Rohingyas can be dated back to the 8th century when the Muslim traders from Arab settled in Arakan (now known as Rakhine) [16]. The numbers of this Muslim community (Rohingya) was further boosted by the colonization of Burma and India under the rule of the British. It is at this period when further migration of people took place to the state of Rakhine from the then muslim state of Bengal in search of work to rice cultivation projects undertaken by the British [17]. There are also theories that after the British left there may have been further migration of people to Burma from the Myanmar-Bangladesh border areas [18]. Thereby we can define the Rohingyas as a mix of those Muslims who settled at the 8th century and those who migrated to Myanmar during the colonization of the British during the 15th to 18th century.

International State Crime Initiative observes and traces the primary reason of the ethnic conflict between the Buddhist in Myanmar and Rohingya to the “massacres of both groups in 1942-43 in the context of World War Two, when the Rohingya fought with the British and the Rakhine with the Japanese” [19]. This animosity has thereby continued and one of the reasons for the propagandas used by the Myanmar people and establishment as Rohingyas being illegal immigrants from Bangladesh and not one of their own.

After the independence of Burma in 1948, the Rohingyas were given equal status as to the citizens of Burma and lived in harmony and peace. They had citizenship, were appointed as civil servants, could vote in election and were also appointed as Member of Parliament (MP's). However with the military coup of 1962 things started deteriorating for the Rohingyas [20]. During this period the Rohingyas were stripped off their social, political, economic and educational rights. Further oppression and persecutions on the Rohingyas continued like the one of ‘Operation Naga Min or Dragon king’ of 1978 which was marked by killings, rape, torture and displacement of 2,00,000 Rohingyas to Bangladesh [21]. Then in the year 1982 the new Citizenship Act was passed. It achieved its main object by depriving the Rohingyas of their citizenship and also did not recognize them within the approved 135 ethnic races of Myanmar. The policy of persecution of the Myanmar authorities did not stop there as the Rohingyas were restricted in accessing their fundamental rights to freedom, healthcare, voting etc [22]. The hostilities continued on the Rohingyas throughout and were also frequently displaced primarily to Bangladesh to about 2,50,000 amongst other countries in the 1990's. Thereby it appears by the 1990's, Rohingyas were stateless, forcefully displaced, deprived of basic rights, persecuted on ethnic grounds and were the victims of grave offences. The year of 2012 is significant in the Rohingya crisis as the communal tension between the Rakhine Buddhist and Rohingya reached new escalations of violence due to the alleged rape of a Buddhist woman by three Rohingya men [23]. As a result approximately 200 Rohingyas were killed people and about 1lakh were internally displaced [24]. These attacks were found to be planned and targeted against the Rohingyas where the security forces played an active role in the above stated violence [25]. Further violence erupted in October 2016 due to the attacks by the Arakan Salvation Army (ARSA) targeting the security forces and killing 9 police officers. The military retaliated with widespread and disproportional attacks. Amnesty International recounts these violence by the Myanmar military as “widespread and systematic human rights violations, including unlawful killings, rape and other forms of torture, enforced disappearances, and arbitrary detentions which may have amounted to crimes against humanity” [26]. The October 2016 violence resulted in the forceful displacement of around 87,000 Rohingya to Bangladesh [27]. On 25 August 2017, the ARSA launched a second and wider attack than the one in 2016 on 30 security installments in the northern

Rakhine State. This time the Myanmar state forces lead by the military lead brutal “clear operations” appearing to be with the objective to clear out the Rohingyas from Myanmar. Such “clearance operations” was characterized by rape, unlawful killings, and other crimes of sexual violence, premeditated of burning of Rohingya villages etc [28]. Such has been the atrocities which has left over 1.2 million Rohingya displaced to Bangladesh and over 1, 20,000 [29] Rohingyas displaced internally in Myanmar and overall made the Rohingyas statelessness.

III. ICC and its tryst of Justice: Jurisdiction and its Applicability in the case of Myanmar

The International Criminal Court (ICC) came into existence with the adoption of the Rome Statute in 1998. However it began to function in 2002 after the required ratification by the 60 states were fulfilled. The said court was set up with the sole object to investigate, prosecute and try perpetrators of the most heinous crimes i.e. genocide, crimes against humanity and war crimes. However, the court is given concurrent or complementary jurisdiction to that of the courts of the national jurisdiction [30]. By this we understand that the drafters of the Rome Statute gave primacy to the significance of national sovereignty by giving the countries the first and exclusive rights to try and prosecute the offenders of the crimes that took place within their territory. The ICC would only get the jurisdiction to try such cases if the national courts are unwilling or unable in reality to prosecute and try those perpetrators [31].

Daniel Nsereko commented on this complementary jurisdiction of the ICC as:

... characterized as a back-up or a reserve arrangement that may be resorted to only when national mechanisms are dysfunctional, inactive, or ineffective. The Court merely fills a gap or adds to, but does not replace, national courts in the prosecution and punishment of the crimes within the Court’s jurisdiction [32].

3.1. Jurisdiction of the ICC

The ICC has a limitation in regard to its universal territorial application as it can only try those crimes which have taken place in the territory of a State party to the Rome Statute [33]. But in cases of crimes that have taken place in a “Non-State party”, the ICC will only get jurisdiction over such crimes if the United Nations Security Council (UNSC) refers [34] the matter to the Court or if the “Non-State party” accepts the jurisdiction of the Court by lodging an application with the Registrar of the Court of acceding to its jurisdiction [35]. In addition the ICC has jurisdiction only to the gravest crimes of worry to the international society as follows:

- (a) The crime of genocide [36]
- (b) Crimes against humanity [37]
- (c) War crimes [38]
- (d) The crime of aggression [39].

The jurisdiction of the ICC is dormant which means that such jurisdiction needs to be triggered before it can be exercised. The Rome Statute lays down three mechanisms by which initiations of investigations can be triggered in a particular situation as follows a) referral by a state party [40], b) referral by the United Nations Security Council [41] and c) Prosecutor proprio motu or on his own starts the investigations [42].

3.2 Jurisdiction of ICC over the Crimes committed in Myanmar

ICC suffers from want of jurisdiction over the crimes committed in Myanmar over the Rohingyas in the absence of referral of the matter either by the UNSC or the State Party Bangladesh in addition to the fact that Myanmar is not a State Party to the Rome Statute.

However recently on April 9, 2018, Fatou Bensouda the Prosecutor of the ICC requested the Court to determine whether it has any jurisdiction over crimes pertaining to the mass movement of the Rohingyas from Myanmar (Non-State Party) to the territory of Bangladesh a signatory (State Party) to the Rome Statute [43]. Article 19 (3) of the Rome Statute entitles the Prosecutor to call for a ruling from the ICC to determine matters pertaining to admissibility of cases and jurisdiction of the Court. Thus thereby we infer the Court is entitled

under the Statute to make initial ruling as to whether the cases before it are either admissible or it has the jurisdiction over the said cases. The Prosecutor in support put forward two arguments claiming the Court has jurisdiction over the crime. Firstly, since the Rohingyas were forcefully displaced from Myanmar it amounted to crime against humanity [44] under the Statute. Secondly, the Prosecutor argued though Myanmar is not a State Party to the Rome Statute, the Court has territorial jurisdiction over Myanmar as the crossing of an international border resulted in the part of crime, forceful displacement, being committed on the territory of Bangladesh, which is a State Party to the Rome Statute. In this regard Pre-Trial Chamber of the ICC was formed after 2 days. On 7 May 2018, the Pre-Trial Chamber issued a decision under Rule 103(1), inviting Bangladesh to submit its observations to the Prosecutor's request by 11 June 2018.

Finally, the Pre Trial Chamber composed of 3 judges decided on September 06, 2018, by a majority ruling that it has the jurisdiction to investigate the authorities of the Myanmar establishment for carrying out forcible displacement of the Rohingya minority [45]. The ruling also emphasized that not only the acts of forcible displacement but also any other crime that was pursued in commission of the forcible displacement or took place in the territory of a State Party, would apply within the Court's jurisdiction [46].

The Pre Trial Chamber of the ICC summarized its ruling in the above matter herein below:

The crossing of an international border is a fundamental constitutive element for the crime of deportation. This position is supported by customary international law, international human rights law and is reflected in the domestic laws of Bangladesh; and The Court has territorial jurisdiction over the crime of deportation. This position is supported by international principles of territoriality, which are also reflected in the domestic laws of Bangladesh [47].

3.3 Why ICC in the case of Myanmar is the appropriate forum

The main object the ICC was established can be found in the Preamble of the Rome Statute as follows:

"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," No criminal should go unpunished Rome Statute" [48].

Though the Rome Statute gives primacy to the national courts to investigate and prosecute the perpetrators, it is impossible as the perpetrators (Heads of the Military including Commander-in Chief) occupy significant powers under the Constitution of Myanmar and the political administration [49]. Further till date no investigation of the perpetrators has lead to prosecutions for the serious crimes indicted even after passage of almost 2 years from the commission of such crimes. Thereby, accountability of the perpetrators is not possible in the Courts of Myanmar and hence ICC is the appropriate forum to mete out justice to the Rohingyas.

IV. Challenges and Issues for the ICC to hold the perpetrators accountable

Recently the Pre Trial Chamber of the ICC has determined on a request of the Prosecutor that it has jurisdiction over Myanmar for the crime of deportation of the Rohingyas to Bangladesh even though Myanmar is not State Party to the Rome Statute. This ruling provides challenges to the ICC in further prosecution and penalizing the perpetrators, as in the absence UN Security Council Resolution and the rejection of jurisdiction of such ruling by the Myanmar.

4.1 Myanmar, a Non State Party to the Rome Statute

ICC has jurisdiction [50] only on those countries which are a State Party to the Rome Statute unless there is an UNSC referral [51] on any Non State Party. The Statute only gives a positive duty on all the State Parties to fully cooperate with the Court in its duty to investigate and prosecute the perpetrators of the crimes within the jurisdiction of the Court [52]. However in the above case, Myanmar is not a State Party to the Rome Statute and thereby the Court suffers from lack of general jurisdiction on the crimes committed in Myanmar. Though the Pre Trial Chamber has decided that it has jurisdiction over the crime of deportation of Rohingyas to Bangladesh and the crimes that were pursued in connection to such deportation, Myanmar views it as a "result of faulty procedure and is of dubious legal merit" [53]. The Myanmar government in a press briefing has in totality rejected the ruling of the ICC claiming the Court has no jurisdiction over the alleged crimes as it is not a

State Party to the Statute [54]. In such a regard when the Rome Statute does not impose any positive duty or consequence for non cooperation by a Non State Party, the effectiveness of such ruling in holding the perpetrators is questionable. Thus the rejection of jurisdiction by the Myanmar government and unwillingness to cooperate makes us ponder as to how far such ruling of the ICC will be productive in further prosecution and trial of the perpetrators of the alleged crimes.

4.2 Enforcement of the Rulings of the ICC

The ICC under the Rome Statute does not have any independent mechanism to enforce its rulings but relies on the State Parties to enforce its rulings of indictment handed over to such States [55]. In the above case Myanmar is neither a State Party nor willing to cooperate. It makes you question then who is going to enforce such ruling. The one possibility of enforcement may be through the resolution adopted under Chapter VII of the UN Charter by the Security Council, which at present is not possible due to the veto powers of China and Russia. Hence, lack of independent enforcement mechanism is one of the biggest lacking of the Rome Statute as it can easily futile the cause of justice and accountability of the perpetrators of the most serious crimes. One vivid reference of a failure of the mechanism is the case of Darfur.

Darfur is situated in the western part of Sudan. It is residence to over 4 million people belonging from 30 ethnic tribes. The then President of Sudan Omar Al Bashir came to power by a military coup in 1989. The conflict in Darfur is primarily between Arab ethnic tribes and Non Arab ethnic tribes (Fur, Massalit and Zaghawa) since 2003 and it still continues. In pretext that the government policies favor the Arab tribes only, led to the creation of Sudan Liberation Movement/Army and the Justice and Equality Movement to revolt against the government in February 2003. In retort the Sudanese State forces carried out atrocities amounting to war crimes, crimes against humanity and genocides against the Non Arab ethnic tribes as they were perceived to be close to the armed groups fighting the government for atrocities and discriminatory policies. According to Amnesty International, an estimated 2.6 million people have fled as a result of the violence, 300,000 people have died, and an unknown number of women and girls have been raped [56]. Omar Al Bashir is alleged to organize and orchestrate the carrying out of such attacks. Thereby, ICC issued 2 arrest warrants for Omar al-Bashir in 2009 and 2010 respectively as there were reasonable grounds inferring that he committed war crimes, crimes against humanity and genocide against the Non-Arab ethnic groups [57]. Omar Al-Bashir was charged with five instances of war crimes, two instances of crimes against humanity, and three instances of genocide in Darfur [58]. However, Omar Al Bashir still continues to escape arrest and is at large beyond the clutches of the ICC.

4.3 Absence of an UNSC referral

The jurisdiction of the Court under the Rome Statute may be invoked either a) by a state party referring a matter of another state party including itself, or, b) by the Prosecutor's own initiative, or c) by the UN Security Council resolution adopted under Chapter VII of the UN Charter. The referrals by the State Party and the initiation of investigation by the Prosecutor is not much of a complication as these can be triggered in cases where the countries are either a State Party to the Statute or when a Non State Party has accepted the jurisdiction of the Court. The real concern comes when the crimes are committed in a country which is neither a State Party nor accepted the jurisdiction of the Court. In such a scenario the jurisdiction of the Court in crimes committed in a State Party and a Non State Party can be comprehensively referred only by the resolution of the Security Council adopted under Chapter VII of the UN Charter. In such a referral the Myanmar government cannot set up the defense of it not being a State Party or applicability of national laws to oust the Court's jurisdiction as such resolutions "over rides or takes precedence over all other existing mechanisms, including national mechanisms envisaged under the complementarity principle" [59]. Further the UN Charter obligates each and every member of the UN to agree and effectively carry out the resolutions of the Security Council [60]. Thus we can conclude that in case the Security Council refers a situation to the ICC, irrespective it being a State Party or a Non State Party, they have to accept the decision of the Security Council and assist the Court to investigate and prosecute the crimes. Unfortunately this is not to happen as Myanmar is backed by China and Russia, who are permanent members to the Security Council. No resolution can be adopted if any of the permanent members are not involved in the decision making or uses the power of veto. China and Russia blocked a meeting where the Security Council was supposed to meet and resolute on the Rohingya Crisis [61]. China's unconditional support [62] to Myanmar and its veto power in the Security Council has made it impossible for any actions to be taken or refer the crimes to the ICC, thereby frustrating the very object of the Security Council under the UN Charter. The future of a comprehensive accountability of all the atrocities committed by a Non State Party (Myanmar) at the ICC seems unlikely, due to veto of any referrals by China and Russia.

4.4 Limitations of the Prosecutors Investigations

The role of the Prosecutor in its duty to the ICC is unique. Such has been its importance that it has the power to trigger the jurisdiction of the court or start investigating a matter on its own. It has been vested with the power to choose cases among the several situations taking place globally and is within the Court's jurisdiction [63]. The independency [64] of the ICC sets it apart from the other traditional judges under the national mainstream. It gives them the complete freedom to completely carry out their duties without being influenced in any way by external factors. However, the Prosecutor can investigate only on those matters which are within the Court's jurisdiction. Though, the Pre Trial Chamber has ruled, it has jurisdiction over deportation of the Rohingyas to Myanmar and allied crimes pursued in such deportation [65], it may exclude the others accounts of crimes of humanity, genocide etc committed only in the territory of the Myanmar. Since such other crimes did not include in any way a State Parties territory or was completed only in the territory of a Non State Party, thus is outside the jurisdiction of the Court and consequently outside the jurisdiction of the Prosecutor's jurisdiction. However, in the absence of any other mechanism to bring accountability, it is a positive start as Michail Vagias observes "it is testament to the Court's willingness to address the criminal dimension of forced population movements, arguably one of the most troublesome issues of our time. It also shows the Prosecutor's determination to proceed with cases of commission in part on state party territory, regardless of the nationality of the perpetrators" [66]. Even though it is right progress but may fall in fulfilling the objectives of the Rome Statute of accounting the perpetrators of all the crimes committed as the request of the Prosecutor is only in regard to deportation and the crimes pursued in context to it [67].

4.5 Challenges to the Rulings of the Pre Trial Chamber

Myanmar has already rejected the jurisdiction and it appears they will continue doing so on the pretext that the ruling by the Pre Trial Chamber has been erroneous as Myanmar is not a State Party to the Rome Statute and thereby ICC has no jurisdiction over it. The ruling of the Pre Trial Chamber is not final and not binding [68] on the other Chambers of the ICC. Further the Myanmar government can challenge [69] the decisions of the Pre Trial Chamber or move for appeal and revision of any decision of the Court [70]. Though the Pre Trial Chamber has approved the Prosecutor's request we may have to wait later decision on the initial ruling if challenged before the Appellate Chamber. It is aspired that such future ruling of the Court will not give way to the pressure of China, Russia and Myanmar and reverse the initial ruling that the Court has jurisdiction over the crime of deportation of Rohingyas to Myanmar [71].

5. Findings

The Findings are herein laid below herein laid below:

- 1) The ICC only has jurisdiction over the crimes committed under Article 5 of the Rome Statute in the territory of a State Party unless a crime of a Non State Party is referred by the Security Council. In this regard, Myanmar is not a State Party to the Rome Statute.
- 2) There have been no State referrals (Bangladesh) or UN Security Council referral of the crimes committed in the territory of Myanmar.
- 3) However, recently on a request by the Prosecutor the Pre Trial Chamber of the ICC has decided it has jurisdiction over Myanmar for the crimes of deportation of the Rohingyas to Bangladesh which amount to crimes against humanity under the Rome Statute and other crimes pursued for the deportation of the Rohingyas.
- 4) Myanmar has rejected such ruling claiming it as erroneous on the ground that since it is not a State Party to the Rome Statute the Court cannot have jurisdiction over it.
- 5) The ICC has impediments in bringing the perpetrators to justice comprehensively in the absence UN Security Council Resolution, Myanmar's unwillingness to cooperate, absence of its own enforcement mechanism etc. The case of Darfur is an exemplary example in this regard.
- 6) The Prosecutor has limitations over prosecution of the crimes of deportation only. Though the Prosecutor has opened preliminary examination in the crime of deportation it would come into nullity if

the decision of the Pre Trial Chamber is reversed on being challenged by the Appeal Chamber of the ICC.

- 7) The prosecution and punishment of the senior official of the military is not possible in Myanmar as they hold superior power in the administration of the State under the Constitution of Myanmar.
- 8) Myanmar State forces lead by the military and the local bamars have committed among other atrocities the gravest crime of genocide and crimes against humanity.
- 9) The Rohingyas have been persecuted throughout the decades by the successive governments of Myanmar and significantly after 1962 where they were systematically deprived of citizenship, economic social and political rights, freedom of movement etc.
- 10) The Rohingyas at present are statelessness.
- 11) China backed by Russia is a strong ally of Myanmar and has stopped at present any actions by the Security Council over Myanmar. Further, future actions by the Security Council are unlikely due to veto powers of China and Russia.
- 12) The Security Council has failed in fulfilling its very objectives of maintaining international peace and security and in turn has frustrated the very purpose of the UN Charter primarily because of the voting structure and veto power of the permanent members of the Security Council.

V. Recommendations

The recommendations are laid herein below for the ICC to do justice for the most serious crimes of the international community:

- 1) The Preamble to the Rome Statute gives the main purpose of ICC is to ensure the fact that no perpetrator of the most serious crimes goes unpunished. This purpose can be simply frustrated by a State not ratifying the Rome Statute or not being a member to the Rome Statute in the absence of a referral by the UN Security Council. Thereby, the Rome Statute needs to be amended by the Assembly of States and by drawing power from the UN Charter; the ICC should be given 'Universal Jurisdiction' over all States. Thus by this irrespective of the fact whether a State Party is a member or not, if the most serious crimes are committed in a State and such State is unable or unwilling to prosecute the perpetrator, then ICC will get jurisdiction over it.
- 2) In the matter of Myanmar at present only a UN Security Council resolution can effectively vest the jurisdiction to the ICC to try all the crimes committed in the territory of Myanmar and as well effectively implement the rulings on the Myanmar government. However, the present voting mechanism of the Security Council has frustrated any action over Myanmar due to the veto power of China and Russia. It's time that the Security Council stands on its very promise of maintaining international peace and security, for which it was established. The international community must pressurize the Security from their standings to adopt resolutions to bring accountability of justice. However, even after such inhumane grounds of atrocities, the Security Council fails, there must be reorganization and reformation of the voting structure of the Security Council which will be consistent to its very purpose.
- 3) The ICC must be armored with an independent enforcement mechanism of its own so that situations like Darfur can be avoided.
- 4) At present the preliminary examination of the Prosecutor must be assisted by all the State Parties and ensure the prosecution and punishment of the perpetrators of the crimes of deportation and other crime pursued to such deportation. The Appeal Chamber must stand by the rulings of the Pre Trial Chamber and vindicate itself to committing justice by rejecting any challenges and by giving the Prosecutor comprehensive power in further investigation and prosecution of such crimes.

- 5) If the UN Security Council fails in implementing the rulings of the ICC or bringing an halt to the decades of persecution of the Rohingyas then other States or Unions can intervene on Humanitarian ground to bring the perpetrators to justice, just as in the case of Kosovo in 1999 by the North Atlantic Treaty Organization (NATO).
- 6) The Bangladesh government (State Party) should come out of its decades long failed policy of 'Repatriation' to the Rohingya crisis and assist the ICC in bringing the perpetrators to justice as this is the most durable solution to the Rohingya crisis.
- 7) All the State Parties must change their policy to a repressive one towards Myanmar so that they succumb to the pressure and submit their jurisdiction to the ICC. Further all State Parties must cooperate the ICC in committing arrest and handing over the offenders to the ICC if they within their territory.

VI. Conclusion

No defense should be a hindrance to the prosecution and punishment of the perpetrators of the most serious crimes of concern to the international community by the ICC if the national mechanism fails. Any solution to the Rohingya crisis without holding the perpetrators accountable in significance will never be sustainable rather set an encouragement for further crimes. If the United Nations together really think of justice, impunity for violation of international law, peace, security, value of mankind and respect to humanity then this is the time to set a deterrent example for the whole world by punishing the perpetrators of the gravest crime i.e crimes against humanity and genocide. The ICC should be enabled so that it can do justice to the very objectives of its creation and fulfill the noble cause that no perpetrators of most serious crimes should go unpunished thereby upholding humanity.

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