

# **Rohingya Persecutions in Myanmar: Ethnic Cleansing or Genocide?**

*A Theoretical and Empirical Assessment*

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**Md. Pizuar Hossain**

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## **DISCLAIMER**

First of all, the names, and former and current addresses of the respondents are placed omitted in this research paper to protect their identities. However, the meaning of the statements given by the respondents has not been changed. Thus, the factual assertions of the statements were not checked and may contain factual inaccuracies, exaggerations or gaps. This research project is about finding specific details of respondents' experience of persecutions. Thereby, the respondents were entitled to share their own opinions and make generalized statements that do not necessarily represent the research team's own opinions. Finally, since Myanmar was previously known as Burma and Rakhine State was known as Arakan State, these names have been used interchangeably in this paper.

## ABSTRACT

On 25 August 2017, the Myanmar security forces launched widespread and systematic attacks against the Rohingya people with brutalities unbound. As a matter of fact, such persecution is termed either “ethnic cleansing or “crimes against humanity, or “genocide” by diverse personnel, scholars, organisations, and even representatives of many countries. Each term has its own significance and recognition in the contemporary international law. The term “ethnic cleansing” is an oblique expression that is generally used to avoid the liability of “genocide” or any other mass violations of human rights. In contrast, the 1948 Genocide Convention defines “genocide” denoting it as a punishable offence. These different scenarios generate an ambiguity in the relationships as well as differences between “ethnic cleansing” and “genocidal intent” because the International Court of Justice (ICJ) indicated in the Croatia v. Serbia [2015] case that even a mere campaign of ethnic cleansing may amount to a genocidal act considering its aftermath. This proposition fortified the author to find answer to a universal epidemic question as to whether the persecutions committed against the Rohingyas can be termed merely “ethnic cleansing” or “genocide”. This issue gives birth to certain interconnected questions such as, what is intimately the criminal nature of Rohingya persecution, and what is the consequence of defining the perpetrator’s criminality. This study has focused on the ample answers to these questions. On the basis of the core findings, it has also highlighted the legal inferences of the atrocities to prosecute the individual perpetrators of Myanmar, and to make Myanmar accountable as a State. In order to determine the criminal nature of the persecution, the author primarily relied on qualitative research approaches including focus group discussions. As per relevance, various reports, international instruments, and precedents are also consulted in this study. Key Words: Computer ergonomics, Academic staff, MSDs, Training, Bangladesh

## LIST OF ABBREVIATIONS

Burma Socialist Program Party	BSPP
Citizenship Scrutiny Card	CSC
Center for the Study of Genocide and Justice	CSGJ
East West University Center for Research and Training	EWUCRT
Focus Group Discussion	FGD
Identity Cards of National Verification	ICNV
International Court of Justice	ICJ
International Crimes Tribunal for the Former Yugoslavia	ICTY
International Criminal Court	ICC
International Criminal Tribunal for Rwanda	ICTR
International Military Tribunal	IMT
International State Crime Initiative	ISCI
Liberation War Museum	LWM
National League for Democracy	NID
Responsibility to Protect	R2P
State Law and Order Restoration Council	SLORC
State Peace and Development Council	SPDC
Temporary Resident Card	TRC
UN Human Rights Council	UNHRC
UN Security Council	UNSC
World War II	WW II

# CHAPTER I

## INTRODUCTION

### 1. Preliminary Notes

**1.1** The “stateless”<sup>1</sup> Rohingya people have been persecuted by the military and other security forces in the name of ensuring national security in Myanmar for several years. The United Nations (UN) initially termed this situation a textbook example of ethnic cleansing” instead of “genocide.”<sup>2</sup> Again, a few nation States including the United States and international civil society organizations viewed the Rohingya persecutions as “ethnic cleansing.”<sup>3</sup> On the other hand, the International State Crime Initiative (ISCI) at Queen Mary University of London affirmed that ‘the Myanmar Rohingyas are now suffering the final stages of genocide.’<sup>4</sup> Similarly, the Allard K. Lowenstein International Human Rights Clinic at Yale Law School conducted a legal analysis on the situation of Myanmar and claimed to discover numerous evidences of genocidal acts committed against the Rohingya population.<sup>5</sup>

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<sup>1</sup> Although the members of Rohingya community are living in Myanmar for generations, this community was not officially recognized as an ethnic group and they were deprived of their full citizenship under the 1982 Citizenship Law; See, Nour Mohammad, ‘International Refugee Law Standards: Rohingya Refugee Problems in Bangladesh’, [2011] 1 ISIL Year Book of International Humanitarian & Refugee Law 401, 402.

<sup>2</sup> The UN Office of the High Commissioner for Human Rights, ‘Myanmar: UN Rights Expert Launches New Official Visit to Assess Recent Developments in the Country’, 6 January 2017, available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21069&LangID=E>> accessed on 25 December 2018; See also, Jay Milbrandt, ‘Tracking Genocide: Persecution of the Karen in Burma’, [2012-3] 48 Texas International Law Journal 63, 74.

<sup>3</sup> See also, ‘Rohingya crisis: US calls Myanmar action ‘ethnic cleansing’’, BBC News, 22 November 2017, available at: <<http://www.bbc.com/news/world-asia-42084895>> accessed on 21 January 2019; Elliot Friedland, ‘Anti-Muslim Persecution in Myanmar is Ethnic Cleansing’, The Clarion Project, 23 November 2017, available at: <<https://clarionproject.org/us-anti-muslim-persecution-myanmar-ethnic-cleansing/>> accessed on 21 January 2019.

<sup>4</sup> Queen Mary University of London, ‘Violence against Rohingya in Myanmar has Become Genocide According to Report’, 18 April 2018, available at: <<https://www.qmul.ac.uk/media/news/2018/hss/violence-against-rohingya-in-myanmar-has-become-genocide-according-to-report.html>> accessed on 25 April 2019.

<sup>5</sup> Yale Law School, ‘Clinic Study Finds Evidence of Genocide in Myanmar’, 29 October 2015, available at: <<https://law.yale.edu/yls-today/news/clinic-study-finds-evidence-genocide-myanmar>> accessed on 15 April 2019; See also, Yale Law School, ‘Treatment of Rohingya could Constitute Genocide’, 3 November 2015, available at: <<https://www.bnionline.net/en/news/karen-state/item/1059-yale-law-school-treatment-of-rohingya-could-constitute-genocide.html>> accessed on 15 April 2019.

**1.2** Furthermore, it has been stated in the report of the Independent International Fact-Finding Mission on Myanmar, established by the UN Human Rights Council (UNHRC), that:

Myanmar’s top military generals, including Commander-in-Chief Senior-General Min Aung Hlaing, must be investigated and prosecuted for genocide in the north of Rakhine State, as well as for crimes against humanity and war crimes in Rakhine, Kachin and Shan States.<sup>6</sup>

In recent times, the UN International Court of Justice (ICJ) ordered Myanmar to “take all measures within its power” to safeguard the Rohingyas from genocide.<sup>7</sup> Moreover, the pre-trial chamber of the International Criminal Court (ICC) is now considering initiating a legal process against the Myanmar authorities on the ground of “deportation” of the Rohingyas which constitutes “crimes against humanity”.<sup>8</sup>

**1.3** The above-mentioned propositions encompass three distinct terms that refer to the Rohingya persecution as “ethnic cleansing”, “genocide”, and “crimes against humanity”. Nonetheless, there is a mutually reinforcing relationship between the concepts of “ethnic cleansing” and “genocide”. The phrase “ethnic cleansing” appeared in the context of the conflict in the former Yugoslavia during 1990s from a literal translation of the Serbo-Croatian expression “*etničko čišćenje*”.<sup>9</sup> The judgment of the Permanent Peoples Tribunal on the *State Crimes Allegedly Committed in Myanmar against the Rohingyas, Kachins and Other Groups* stated that the expression “ethnic cleansing” is yet to be formally recognized as an independent crime under the international law.<sup>10</sup> The Tribunal further added that the term “ethnic cleansing” has been invoked by the perpetrators of the crime of genocide for many years.<sup>11</sup> Besides, it has been exemplified in the said judgment that President *Milosevic* used this phrase to rationalize and justify the acts of genocide in the former Yugoslavia to avoid potential sanctions.<sup>12</sup>

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<sup>6</sup> The UN Office of the High Commissioner for Human Rights, ‘Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes’, available at: <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475&LangID=E>> accessed on 22 January 2019.

<sup>7</sup> Human Rights Watch, ‘International Court of Justice Orders Burmese Authorities to Protect Rohingya Muslims from Genocide’, 27 January 2020, available at: <<https://www.hrw.org/news/2020/01/27/international-court-justice-orders-burmese-authorities-protect-rohingya-muslims>> accessed on 26 March 2020.

<sup>8</sup> Please visit the ICC website for details, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>> accessed on 15 February 2019.

<sup>9</sup> Details of “ethnic cleansing” have been given in the website of the UN Office on Genocide Prevention and Responsibility to Protect, available at: <<https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>> accessed on 15 February 2019.

<sup>10</sup> Judgment of the Permanent Peoples’ Tribunal on the ‘State Crimes Allegedly Committed in Myanmar against the Rohingyas, Kachins and Other Groups’, 18-22 September 2017, University of Malaya, Faculty of Law, Kuala Lumpur, Malaysia, 1, 41, available at: <<http://permanentpeopletribunal.org/wp-content/uploads/2017/11/PPT-on-Myanmar-Judgment-FINAL.pdf>> accessed on 5 March 2019.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.



**1.4** On the other hand, the word “genocide” was coined by Polish lawyer Raphael Lemkin for the first time in 1944 in his book titled, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*.<sup>13</sup> It involves a Greek prefix “*genos*” which means “race” or “tribe”, and a Latin suffix “*cide*” that signifies “killing”.<sup>14</sup> After a campaign, led by Lemkin, to codify genocide as an international crime, it was first introduced in the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>15</sup> (hereinafter referred to as the *Genocide Convention*) (see Appendix VI) in 1948.<sup>16</sup> The crime of genocide denotes destructive actions committed by the perpetrators with the “special intent” to destroy a national, ethnical, racial or religious group wholly or partly.<sup>17</sup>

**1.5** Recently, the ICJ endorsed in the *Croatia v Serbia* case that the “special intent” of genocide can be inferred by the “existence of *dolus specialis* from a pattern of conduct” and thus, no direct proof is required.<sup>18</sup> Nevertheless, it left an ambiguity between the notions of “ethnic cleansing” and “genocide” in this case by stating that the actions undertaken by the Serb forces compelled the Croat people to leave their living place and thus, such actions do not constitute a systematic process of destruction of that population in whole or in part.<sup>19</sup> This approach is problematic because it gives the idea that the actions of ethnic cleansing may be justified by the absence of any genocidal intent.

**1.6** Such awareness brings up the foremost question of this research as to whether the persecutions committed against the Rohingya people can be termed merely “ethnic cleansing” or “genocide”. In this study, the data gathered by Focus Group Discussions (FGDs), a qualitative research method and data collection tool, have been analyzed using Dr. Gregory H. Stanton’s 10-stage model of genocide. On the basis of the patterns of crime that appeared from the persecutions committed against the Rohingyas, an endeavour has been made to find the elements of “genocide” spelled out in the *Genocide Convention* with additional references to the relevant judicial precedents, reports, and scientific discussions of the jurists. At the end, this study also discusses the jurisdictional aspects of the ICC and ICJ in relation to the Rohingya persecutions referring to their latest instances and developments.

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<sup>13</sup> ‘Genocide, United Nations Office of Genocide Prevention and the Responsibility to Protect’, available at: <<https://www.un.org/en/genocideprevention/genocide.shtml>> accessed on 5 March 2019. See also, Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2009) p. 139; Barbara Harff, ‘No lessons learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955’, [2003] 97(1) *American Political Science Review* 57, 73.

<sup>14</sup> *Ibid.*

<sup>15</sup> This convention was adopted by the UN General Assembly on 9 December 1948 as General Assembly Resolution 260.

<sup>16</sup> Raphael Lemkin, ‘Genocide’, [1946] 15(2) *American Scholar* 227, 230; Raphael Lemkin, ‘Genocide: A Modern Crime’, [1945] 4 *Free World* 39, 43.

<sup>17</sup> Please see Article II of the Genocide Convention.

<sup>18</sup> *Croatia v. Serbia*, ICJ’s Judgment of 3 February 2015, para. 139, available at: <<https://www.icj-cij.org/files/case-related/118/118-20150203-JUD-01-00-EN.pdf>> accessed on 18 November 2019.

<sup>19</sup> *Ibid.*, para. 435.

## **1.7 Research Question and Objectives**

**1.7.1** The earlier discussion shows that the persecutions committed against the Rohingyas in Myanmar are designated as either “area clearance operations” or “crimes against humanity”, or “ethnic cleansing”, or “genocide” by the diverse national and international personnel, scholars, organizations, or nation States. However, to make a concrete conclusion concerning proper label of the atrocities committed against the Rohingya people, an extensive study is a must that involves analyzing the patterns of conduct of the military and other security forces of Myanmar. Therefore, the cardinal question of this study is “whether the persecutions committed against the Rohingya people in Myanmar constitute mere ethnic cleansing or genocide. In other words, this research attempts to explore a comprehensive explanation of the question as to “should we term the Rohingya persecutions committed by the Myanmar military and other security forces as simply “ethnic cleansing” which is yet to be criminalized in the international law as an independent crime, or “genocide” which is regarded as the crime of crimes in the international law arena. Hence, it should be mentioned that this study bears the significance of exploring a very contemporary and dynamic international issue.

**1.7.2** We know that although the Rohingya crisis is an international concern per se, maximum number of the victims is living as refugees in Bangladesh. Considering the importance of this study, its aims and objectives are outlined in the following: -

- (a) Collecting testimonies of the Rohingya people for exploring the patterns of crimes committed against them;
- (b) Consulting the documentary searches, media searches, and academic literatures and surveys etc. on Rohingya persecutions;
- (c) Gathering opinions of the national and international experts, activists, journalists, researchers, and academicians on this pertinent issue;
- (d) Determining the criminality of the perpetrators of Rohingya persecutions; and
- (e) Recommending pathways towards justice for the Rohingya people.

## **1.8 Research Methodology and Sampling Method**

**1.8.1** This study aims to understand perspectives of the victims and produce knowledge that can serve them. The principle research methodology of the study is qualitative, using “Focus Group Discussions” (FGDs) method with the Rohingya refugees, and face-to-face method to conduct interviews with the key informants. For the purpose of conducting the FGDs, a total of 96 Rohingya refugees who are now living in Kutupalong refugee camp of Cox’s Bazar region, Bangladesh were divided into 12 groups and each group consisted of 7-9 respondents. In addition, the key informant interviews were conducted with 11 participants who are national and international experts, activists, journalists, researchers, and academicians of different countries.

**1.8.2** This study chose the respondents of the Kutupalong refugee camp only because it is the largest camp of the Rohingya refugees in Bangladesh where both the former-registered and newly-registered refugees are living together. According to the

*UNHCR - UN Refugee Agency Report*<sup>20</sup>, an estimated 0.15 million Rohingya households were situated in the Kutupalong refugee camp, Ukhia, Cox's Bazar, Bangladesh as of 31st October 2018. Hence, considering the standard normal deviation set at 95% confidence level ( $Z = 1.96$ ), percentage picking a choice or response ( $P = 0.5$ ); and the confidence interval ( $e = 0.05$ ), sample size of this study derived 383 Rohingya households.

**1.8.3** This study applied “simple random sampling” as a sampling method. First of all, a total of 383 households were identified from the list of around 0.15 million Rohingya households of *Kutupalong* refugee camp by using the “random number table method. Subsequently, each of the 383 households was assigned an individual number (e.g. 001, 002 ... 382, 383). Then, two separate lists of more than 18-year-old male and female family members of such 383 households were prepared. The lists included the given number of each household, and names, ages and years of registration of the household members. After that, 12 focus groups were formed by identifying members from the lists using the “random number table” method.

**1.8.4** During formation of the focus groups, three factors were considered namely, (a) gender of the members, (b) age range of the members, and (c) year of the members' registration as refugees in Bangladesh. The members of the focus groups were categorized by age into young adults (18 - 35 years old), middle-aged adults (36 - 55 years old), and older adults (more than 55 years old).<sup>21</sup> At the time of conducting the FGDs, the research team followed a checklist which included “open and non-committal questions” (see Appendix I), that led the respondents to discuss their experiences without being biased by the wording or presentation of the research topic. Each FGD continued for 90 to 120 minutes or even more depending on the circumstances. It should be noted that the female moderator, note takers, interpreters, and a psychiatrist conducted the FGDs of the female respondents. Similarly, the male moderator, note takers, and interpreters conducted the FGDs of the male respondents.

**1.8.5** The key informants were identified from the journalists, academics, activists, and researchers of different countries who have either worked or gathered direct knowledge on the Rohingya issue. During face-to-face interviews with all the participants, they gave insights on certain events involving Rohingya persecution and patterns of atrocities committed against the Rohingyas. We also followed a checklist which included “open and non-committal questions” to conduct interviews of the key informants (see Appendix II).

**1.8.6** After collecting data following the above-mentioned methodology and methods, the relevant contents were analyzed by classifying, summarizing and tabulating the verbal data. Moreover, the narratives of the respondents were analyzed that refers to the reformulation of the respondents' stories. Besides, the framework analysis was done in this study for ensuring proper interpretation as well as identification of a thematic framework or pattern of atrocities committed against the Rohingyas.

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<sup>20</sup>Please visit the website of the ‘UNHCR-UN Refugee Agency Report’ for details, available at: <[https://data2.unhcr.org/en/situations/myanmar\\_refugees#\\_ga=2.119237193.1523502024.1571918496-1594004571.1537847220](https://data2.unhcr.org/en/situations/myanmar_refugees#_ga=2.119237193.1523502024.1571918496-1594004571.1537847220)> accessed on 20 November 2019.

<sup>21</sup> Nathan Kogan, ‘A Study of Age Categorization’, [1979] 34(3) *Journal of Gerontology* 358, 359.

## **1.9 Ethics and Confidentiality**

**1.9.1** In collecting oral testimonies from the respondents, we applied some of our own learning from the previous research experiences. When we met the respondents, it was vital that we respected their choices about the manner of conversations and the final outcome of the research. However, the flow of conversations, when to take rest, record, and not to record, were all up to the discretion of the respondents and varied during each session of the FGDs. All steps of the study were also made transparent to the respondents, including its aims and objectives.

**1.9.2** Both the respondents and key informants were informed about the research objectives before interviewing them. The research team also asked for their consent using a “consent form” (see Appendix III). Due to the respondents’ scanty access to education, many of them are still illiterate and hence, the interpreters read out the consent form and have their thumb impression inscribed in it. The paramount concern was to ensure safety, confidentiality, anonymity and emotional wellbeing of the respondents. This study does not reveal identity of any respondent but the key informants’ identities have been disclosed with their prior consent.

**1.9.3** All the people involved in this study as a part of the research team to collect data through FGDs declared through a “non-disclosure agreement form” (see Appendix IV) to conform that the information and observations of this research will be kept confidential. As per this form, any non-compliance might result in being excluded from the research team of this project.

## **1.10 Research Limitations**

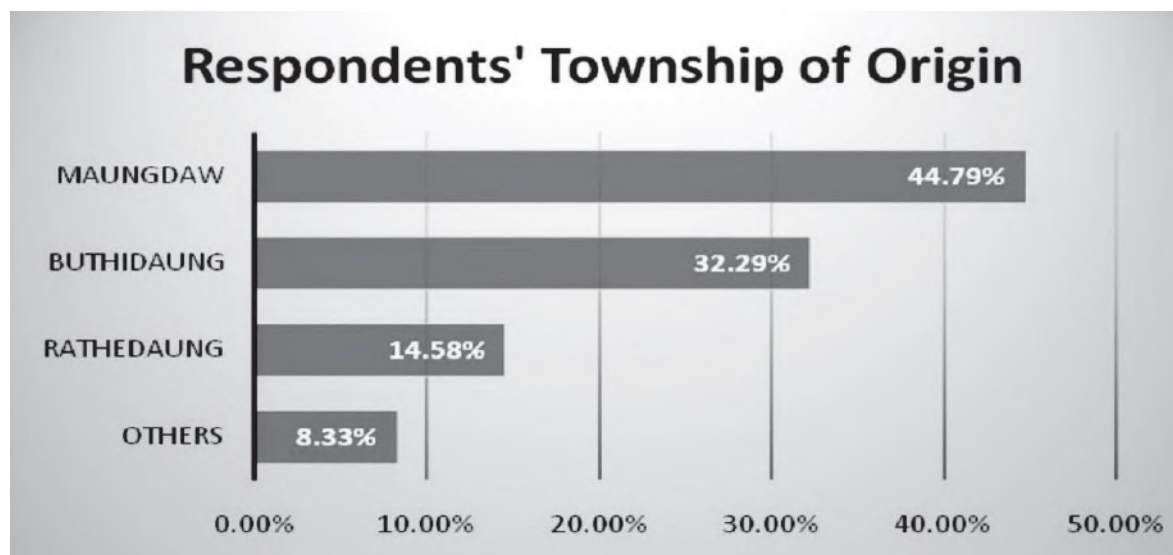
**1.10.1** First of all, the number of respondents of this study is very limited compared to the whole Rohingya population who are living in different camps at Cox’s Bazar, Bangladesh. Thus, the occurrences that we collected are likely to understate the brutality of the actual events, occurred before/on/after 25<sup>th</sup> August 2017 in the northern Rakhine State of Myanmar. In addition, we recorded the testimonies as per the wishes of the respondents and a few of them hesitated to disclose their traumatic experiences. The respondents who are victims of rape or sexual abuses were likely to cover their experiences during their interviews due to lack of privacy in the temporary shelters of the *Kutupalong* refugee camp. Again, some of the respondents could not recall the exact dates of the occurrences that they experienced and thus, imprecision of dates may happen in the data. Lastly, the Myanmar officials have not been interviewed in this study rather their statements which are referred to in various organizational reports, newspaper articles, and journal articles are used as per relevance.

## **1.11 Demographics of the Respondents**

**1.11.1** All the respondents of this study belong to Rohingya community who fled from northern Rakhine State of Myanmar to Bangladesh at different times. Of the 96 respondents, 81 respondents arrived in Bangladesh after the incidents of 25<sup>th</sup> August 2017 while remaining 15 respondents came to Bangladesh earlier than the said events. The following discussion specifies townships of origin, age range, gender, and identification documents of the respondents:-

## 1.12 Respondents' Townships of Origin

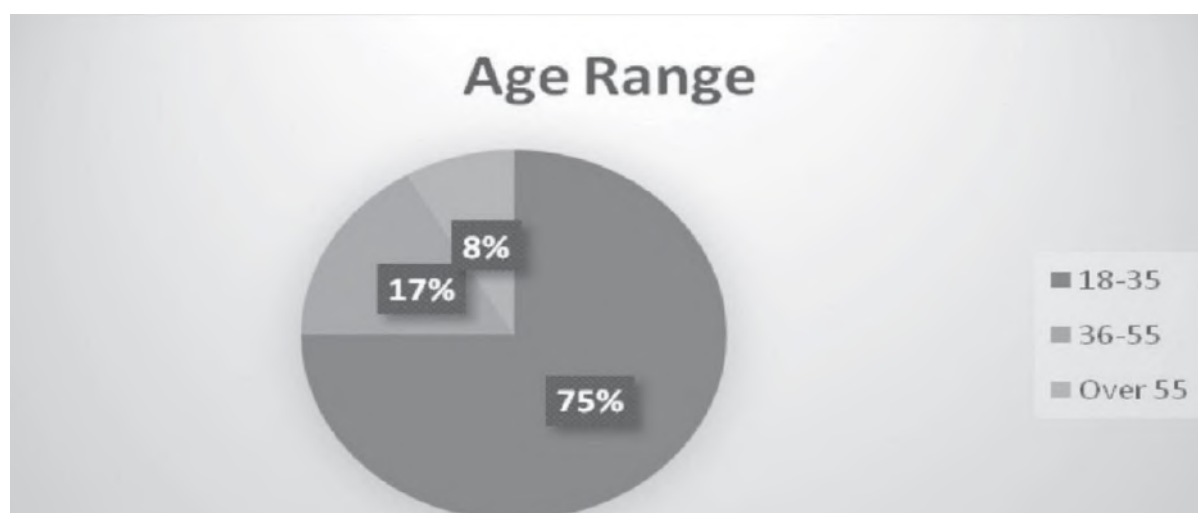
**1.12.1** All the respondents came to Bangladesh from different towns of northern Rakhine State of Myanmar. A total of 43 respondents (44.79 percent) were from *Maungdaw*, 31 respondents (32.29 percent) came from *Buthidaung*, 14 respondents (14.58 percent) lived in the town named *Rathedaung*, and 8 respondents (8.33 percent) originated from other towns including *Ponnangyun*, *Kyauktaw*, *Mrauk-U*, and *Minbya*. The respondents' percentages based on their township of origin are given below:-



*Figure 1: Townships of origin of the Rohingya respondents*

## 1.13 Respondents' Age Range

**1.13.1** The sample ranged in ages from 18 to 71 years old. The respondents were divided into three categories by age, e.g. young adults (18 - 35 years old), middle-aged adults (36 - 55 years old), and older adults (more than 55 years old). Accordingly, a total of 72 respondents were between 18 to 35 years old which shows that majority (75%) of the respondents were young adults. It should be noted that 16 respondents (17%) were between 36 to 55 years old and last 8 respondents (8%) were more than 55 years old. The respondents' percentages of different ages are given below:-



*Figure 2: Age range of the Rohingya respondents*

## 1.14 Respondents' Gender

1.14.1 Of the total 96 respondents, 59 were male (61.45 percent) and 37 were female (38.54 percent) as given in the following table: -

*Table 1: Gender of the Rohingya respondents*

Respondents' Gender	Total Number	Percentage
Male	59	61.45%
Female	37	38.54%

## 1.15 Respondents' Identification Documents

1.15.1 During the FGDs, we asked the respondents as to whether they possess any forms of identification document. Among all the 81 respondents who have come to Bangladesh on or after the incidents of 25th August 2017, each one of a total of 64 respondents (66.67%) reported that he/she has received an identification document which was given by the Bangladesh authorities a few days before their interviews. The rest 17 respondents (17.71%) informed that they were yet to get any identification document from the Bangladesh authorities.

1.15.2 All the 15 respondents (15.62%) who have entered Bangladesh before a couple of years of the incidents of 25th August 2017 informed us that they have identification documents provided by the Bangladesh authorities. Besides, of the 96 respondents, 12 respondents (12.5%) showed us "white cards", Temporary Identity Certificates, issued by the Myanmar authorities at different times. The cards were deemed invalid by the Myanmar authorities in 2015.<sup>22</sup>

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<sup>22</sup> Please see below chapter IV and accompanying texts; *See also*, Penny Green, Thomas MacManus and Alicia de la Cour Venning, 'Countdown to Annihilation: Genocide in Myanmar', [2015] *International State Crime Initiative* 1, 8.



## CHAPTER II

### HISTORICAL BACKGROUND OF ROHINGYA PERSECUTION<sup>23</sup>

**2.1** Myanmar, also known as Burma, gained independence from British rule on 4<sup>th</sup> January 1948. However, the ethnic groups, including the Rohingya community, remained in fears of losing their identities due to the enactments of the *Constitution of the Union of Burma* 1947, the *Union Citizenship Act* 1948 as well as the *Union Citizenship (Election) Act* 1948.<sup>24</sup> Therefore, tensions between the government and the Muslim Rohingya communities grew to a greater extent since independence of Myanmar. At the beginning of 1950, the “*Mujahideen*” groups led some armed groups of the Rohingya community to fight against the soldiers of the Burmese government with a view to annexing northern Arakan, Burma with East Pakistan (now Bangladesh).<sup>25</sup> During that period, after the Pakistani government warned the Burmese government regarding treatment of Arakanese Muslims, *U Nu*, the first Prime Minister of Burma, assigned a Muslim ambassador, *U Pe Kin*, to make an understanding with the Pakistani authorities.<sup>26</sup> After that, Pakistan stopped supplying weapons to the *Mujahideen* groups.<sup>27</sup> Moreover, *Cassim*, the leader of the *Mujahids*, was arrested by the Pakistani law enforcement agencies and detained in a Chittagong jail.<sup>28</sup> Following this, the Burmese army launched some operations in the Rakhine State, also known as Arakan State, and became successful to end the revolt by November 1954.<sup>29</sup>

**2.2** Democracy was actually practiced in Myanmar from 1948 to 1962.<sup>30</sup> Later on, the Military coupled by General Ne Win overthrew the democratic government in 1962.<sup>31</sup> The federal structure was demolished and the political as well as ethnic minorities’ leaders were arrested by the military.<sup>32</sup> and their ideology was marked as “Burmese Way to Socialism”.<sup>33</sup> Moreover, General Ne Win

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<sup>23</sup> Since the present day crimes committed against the Rohingyas have a little reference to the past atrocities of Myanmar, this chapter focuses on merely the pertinent historical background of Rohingya persecution. However, the detailed historical background of Myanmar and the Rohingya community has been discussed in APPENDIX - V.

<sup>24</sup> Archana Parashar and Jobair Alam, ‘The National Laws of Myanmar: Making of Statelessness for the Rohingya’, [2018] 57(1) International Migration 94, 98.

<sup>25</sup> Tim Mclaughlin, ‘Origin of ‘Most Persecuted Minority’ Statement Unclear’, Myanmar Times, 8 July 2013, available at: <<https://www.mmtimes.com/national-news/7376-origin-of-most-persecuted-minority-statement-unclear.html>> accessed on 2 February 2019.

<sup>26</sup> Azeem Ibrahim, *The Rohingyas Inside Myanmar’s Hidden Genocide* (United Kingdom: C Hurst & Co (Publishers) Ltd., 1st edn, 2016) p. 114; See also, Brad K. Blitz, ‘Rescue for the Rohingya’ *The World Today* (2010), available at: <<http://com/docview/89204935?accountid=11091>> accessed on 25 January 2019.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Id. at 115; See also, Ashley South, “Hybrid Governance” and the Politics of Legitimacy in the Myanmar Peace Process’, [2017] 48(1) *Journal of Contemporary Asia* 50, 62.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

The military created their own political party named “Burma Socialist Program Party (BSPP)” and his BSPP started demolishing the social and political establishments of the Rohingya populations.<sup>34</sup> In its continuation, the “State Peace and Development Council (SPDC)” replaced the role of the BSPP and authorized members of overall 135 ethnic groups as Burmese nationals.<sup>35</sup> Consequently, the *Arakans* became the majority ethnic groups and some other recognized ethnic groups were namely, ‘*Kamans, Kamis, Daingnets, Mayagyis, Myoes, and Thets*’.<sup>36</sup>

**2.3** During 1962, the coup leaders created policies to eradicate social corruption from Myanmar.<sup>37</sup> The anti-foreign policy was the core idea since the State had suffered much during colonial period.<sup>38</sup> They intended to reincarnate the Burmese culture, tradition and religions.<sup>39</sup> As a matter of fact, their rule was similar to that of 1800s royal elite who tried to minimize the influence of foreigners in Burma. The Indians, Chinese as well as the some other foreigners fled from Myanmar during the military period.<sup>40</sup> The military also targeted the Muslim communities and forced them to leave Myanmar.<sup>41</sup> Seemingly, the purpose of the coup leaders was to remove all the non-Burmese people from the country.<sup>42</sup> Through the creation of the second Constitution in 1974 by referendum, the “Socialist Republic of the Union of Burma” came into practice.<sup>43</sup> In the same year, the Emergency Immigration Act was enacted under the regime of Ne Win government that had taken away nationality of most of the Rohingyas.<sup>44</sup> It should be mentioned that ‘the U Nu government (1948-58, 1960-62) recognized the Rohingyas as an ethnic national group of Burma.’<sup>45</sup> Nevertheless, under the purview of the said Act, the Rohingyas were considered as illegal immigrants on the ground that they had settled in Myanmar during the British colonial rule.<sup>46</sup>

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<sup>34</sup> Larry Diamond, ‘Burma: Religious Intolerance is Threatening the Country’s Tenuous Transition to Democracy’, *The Atlantic*, 31 January 2014, available at: <<http://www.theatlantic.com/international/archive/2014/01/the-specter-of-masskillings-in-burma/283483/>> accessed on 2 February 2019.

<sup>35</sup> *Ibid*; See also, Kei Nemoto, ‘The Rohingya Issue: A Thorny Obstacle between Burma (Myanmar) and Bangladesh’ 1, 3, available at: <[http://burmalibrary.org/docs14/Kei\\_Nemoto-Rohingya.pdf](http://burmalibrary.org/docs14/Kei_Nemoto-Rohingya.pdf)> accessed on 17 April 2019.

<sup>36</sup> Ibrahim (n 26), 117.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*; See also, Ashley South, *Ethnic Politics in Burma: States of Conflict* (London and New York: Routledge, 1st edn, 2008) p. 139.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Id.* at 115.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*; See also, Rifat Islam Esha, ‘Maung Zarni: Myanmar feels like a big cage for Rohingyas’, *The Stateless Rohingya*, 19 February 2018, available at: <<http://www.thestateless.com/2018/02/maung-zarni-myanmar-feels-like-a-big-cage-for-rohingyas.html>> accessed on 19 April 2019.

<sup>46</sup> ‘Burma (Myanmar) - Politics, Government, and Taxation’ *Encyclopedia of the Nations (Burma)*, available at: <<http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Burma-Myanmar-POLITICS-GOVERNMENT-AND-TAXATION.html>> accessed on 15 April 2019.



**2.4** All through 1977, the Myanmar military continued the “Operation *Nagamin*” or “Operation *Dragon King*” that resulted in fleeing of more than 0.2 million Rohingyas to Bangladesh.<sup>47</sup> In 1978, some of the Rohingyas were sent back to Burma under an UN-brokered arrangement between Bangladesh and Myanmar. However, a law was passed in 1982 that denied citizenship of the Rohingyas with a view to curtailing their rights to have access to schools and health care services, and right of movement in and out of the country.<sup>48</sup> In this regard, the *Advisory Commission on Rakhine State* led by Kofi Annan issued an observation in August 2017 that states:

The 1982 Citizenship Law explicitly states that those who prior to its enactment were already citizens would retain their citizenship rights ... In 1989, a citizenship inspection process was carried out across Myanmar, and those found to meet the new requirements had their National Registration Cards (NRCs) replaced with new “Citizenship Scrutiny Cards” (CSCs). The majority of Muslims in Rakhine with NRCs surrendered their documents, but was never issued with CSCs, rendering them de facto stateless.<sup>49</sup>

The Myanmar government also imposed a two-child limit policy on the Rohingya families and restricted interreligious marriage.<sup>50</sup> In 1989, the ruling military government renamed Burma as “Myanmar”.<sup>51</sup> The new name of the country was considered as an “alternative and equivalent” term.<sup>52</sup> The government officials claimed that ‘distinguishing (in spelling) ‘Myanmar’ from the Burmans or ‘*Bamars*’ accentuates the multi-ethnic make-up of the country’ and this explanation was acknowledged by many of the “ethnic ceasefire groups”. Subsequently, the said government altered the name of “Arakan State” to “Rakhine State”.<sup>54</sup>

**2.5** After returning from London Aung *San Suu Kyi*, daughter of Major General *Aung San*, became the major spokesman for the National League for Democracy (NLD) which gained more popularity than other political parties.<sup>55</sup> In 1990, the NLD won three elections but its leaders were arrested by State Law and Order Restoration Council (SLORC), also formerly

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<sup>47</sup> Shamsuddin Illius, ‘Myanmar Conducts ‘Final Phase’ of Ethnic Cleansing’, *The Independent*, 27 October 2017, available at: <<http://www.theindependentbd.com/printversion/details/120832>> accessed on 5 February 2019.

<sup>48</sup> N. Ganesan & Kyaw Yin Hlaing, *Myanmar State, Society and Ethnicity* (Singapore: Institute of Southeast Asian Studies, 1st edn, 2007) p. 226.

<sup>49</sup> These relevant texts are quoted from the ‘Judgment of the Permanent Peoples’ Tribunal’ (n 10).

<sup>50</sup> Chris Lewa, ‘Two-Child Policy in Myanmar will Increase Bloodshed’, *CNN*, 6 June 2013, available at <<http://edition.cnn.com/2013/06/06/opinion/myanmar-two-child-policy-opinion>> accessed on 24 March 2020.

<sup>51</sup> Martin Smith, ‘Burma (Myanmar): The Time for Change’, *Minority Rights Group International*, May 2002, 1, 13.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Aye Chan, ‘The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)’, [2015] 3(2) *SOAS Bulletin of Burma Research* 396, 396-7.

<sup>55</sup> Smith (n 51), 119.

known as SPDC, mentioning the election null and void.<sup>56</sup> Aung Sung Sue Kyi was placed under house arrest many times in that period.<sup>57</sup> During 1991, the Myanmar army forced more than 0.25 million Rohingyas to flee from Myanmar in the name of bringing order in Rakhine State.<sup>58</sup> However, approximately 0.23 million Rohingyas were repatriated in Rakhine State under another agreement between Bangladesh and Myanmar from 1992 to 1997.<sup>59</sup> Meanwhile, the Myanmar authorities started distributing “Temporary Residency Card” (TRCs, or white cards) to the Muslims of Rakhine State.<sup>60</sup> Specifically, TRCs were issued to the Muslims who did not possess any identity documents, and who were returning refugees.<sup>61</sup>

**2.6** On 29 May 2008, the third and current constitution of Myanmar was adopted.<sup>62</sup> The *Constitution of the Republic of the Union of Myanmar 2008* upholds Myanmar’s restrictive approach to citizenship.<sup>63</sup> On the one hand, this constitution keeps alive the provision that the ethnicities which are recognized as nationals of Myanmar such as ‘*Arakanese, Burmese, Chin, Kachin, Karen, Kayah, and Mon or Sha*’ are eligible to hold their citizenship and provide the same to their children. On the other hand, it promotes the idea that any other group except the aforesaid ethnicities must prove their presence in the territory of Burma back to 1823. Subsequently, a major riot took place between the Rohingyas and Rakhine Buddhists in 2012 that drove thousands of Rohingyas into the territory of Bangladesh.<sup>64</sup> The Buddhist men conducted a series of coordinated attacks on Muslim Rohingya villages of Rakhine State for the duration of October 2013.

**2.7** As a continuance of the aforementioned process of issuing TRCs to the Rohingyas, a pilot project was initiated in Myebon Township, Myanmar in 2014.<sup>65</sup> According to this project, the TRC-holders were permitted to apply for citizenship on the condition that they listed their ethnicity as “Bengali”.<sup>66</sup>

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Edith M. Lederer, ‘UN Chief: Myanmar Rohingyas are Victims of Ethnic Cleansing’, *The Washington Post*, 13 September 2017, available at: <<https://www.apnews.com/a0bf75ec1f41490cacbfec49d1911718>> accessed on 5 February 2019.

<sup>59</sup> Ibid; See also, Ray Sanchez, Ben Westcott and Jamie Tarabay, ‘UN Chief Calls Myanmar’s Rohingya Crisis “Catastrophic” as Security Council Condemns Violence’, *CNN*, 13 September 2017, available at: <<https://edition.cnn.com/2017/09/13/asia/rohingya-un-guterres/index.html>> accessed on 3 February 2019.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid; See also, Department of Foreign Affairs and Trade, ‘DFAT Country Information Report Myanmar’, 18 April 2019, 1, 54, available at: <<https://dfat.gov.au/about-us/publications/Documents/country-information-report-myanmar.pdf>> accessed on 21 May 2019.

<sup>62</sup> The Constitution of the Republic of the Union of Myanmar 2008, available at: <[http://www.burmalibrary.org/docs5/Myanmar\\_Constitution-2008-en.pdf](http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf)> accessed on 3 April 2019.

<sup>63</sup> Ibid, Chapter VIII.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid; See also, Department of Foreign Affairs and Trade (n 61).

<sup>66</sup> Ibid, 35-6.

Even though such process was postponed following a protest, it was revived in January 2015 and expanded to all of Rakhine State.<sup>67</sup> Surprisingly, the Myanmar government annulled all the TRCs, and the Constitutional Tribunal of Myanmar concurrently ruled that the TRC-holders were ineligible to vote during early 2015.<sup>68</sup> Therefore, the Rakhine Muslims were deprived of their right to vote and stand as candidate in the elections of November 2015.<sup>69</sup>

**2.8** After that, the Myanmar government began issuing Identity Cards of National Verification (ICNV) in June 2015 as the replacement of the former ones.<sup>70</sup> It should be mentioned that a package of “protection of race and religion laws” was adopted in 2015 in Myanmar which were evidently prejudicial toward Muslims.<sup>71</sup> Such laws were strongly supported by *MaBaTha*, a group led by ultranationalist Buddhist monks.<sup>72</sup> Under the leadership of a monk named *Ashin Wirathu*, this group contributed to implement certain policies exclusively among the Rohingya Muslims concerning population control, forbidding polygamy, and limiting religious conversion and interfaith marriage.<sup>73</sup> During October 2016, as a retaliation of an attack initiated by a Rohingya militant group, *Harakah al-Yaqin*, on the border guard posts, the Myanmar army started the “area clearance operations” for destroying the Rohingyas.<sup>74</sup> Reportedly, more than 0.066 million Rohingyas fled to Bangladesh from 9 October 2016 to/ before 25 August 2017 due to such intense military operations.<sup>75</sup>

**2.9** Most recently, the Myanmar military began a widespread and systematic operation against the Rohingyas on 25 August 2017 that caused almost 0.744 million Rohingyas to flee from northern Rakhine State of Myanmar to Cox’s Bazar region, Bangladesh hitherto.<sup>76</sup>

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<sup>67</sup> Id at 38.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Id at 39.

<sup>71</sup> Joe Freeman, ‘Can Anyone Stop Burma’s Hardline Buddhist Monks?’, *The Atlantic*, 6 September 2017, available at: <<https://www.theatlantic.com/international/archive/2017/09/can-anyone-stop-burmas-hardline-buddhist-monks/538992/>> accessed on 21 April 2019; See also, International Crisis Group, ‘Buddhism and State Power in Myanmar’, 5 September 2017, 1, 11, available at: <<https://d2071andvip0wj.cloudfront.net/290-buddhism-and-state-power-in-myanmar.pdf>> accessed on 7 August 2019.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> International Crisis Group, ‘Myanmar: A New Muslim Insurgency in Rakhine State’, 15 December 2016, available at: <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state>> accessed on 2 February 2019.

<sup>75</sup> Ibid; See also, Queen Mary University of London, ‘Genocide of Rohingya May Be Entering New and Deadly Phase’, 17 October 2016, available at: <<http://www.thestateless.com/2016/10/genocide-of-rohingya-in-myanmar-may-be-entering-new-and-deadly-phase.html>> accessed 14 April 2019.

<sup>76</sup> The ICJ’s “Order” issued on 23 January 2020 in the “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)”, para. 71, page. 21, available at: <<https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> accessed on 19 April 2020; See also, Zeba Siddiqui, ‘Rohingya Crisis: Bangladesh and Myanmar Agree Repatriation Timeframe’, *BBC News*, 16 January 2018, available at: <<http://www.bbc.com/news/world-asia-42699602>> accessed on 5 February 2019; Queen Mary University of London, ‘Rohingya Crisis: This is What Genocide Looks Like’, 15 September 2017, available at: <<https://www.qmul.ac.uk/media/news/items/hss/199888.html>> accessed on 16 April 2019.

The Rohingyas were allegedly victims of mass gang-rape, killings of men and women including babies and young children, brutal beatings, disappearances and other serious human rights violations to a greater magnitude. It has been reported that a minimum of 354 villages were totally or partially ruined by fire in northern Rakhine State during that operation.<sup>77</sup> The Rohingyas including men, women and children reached southern Bangladesh risking death by sea or on foot. The *Kutupalong* refugee camp, situated at Teknaf Hwy, Ukhia, Cox's Bazar, has become the largest refugee settlement in the world where more than 0.62 million Rohingya refugees are living.<sup>78</sup> Thousands of Rohingyas are living in makeshift or other settlements outside the camp in the surrounding countryside and nearby *Balukhali*.<sup>79</sup> For this reason, they are occupying different places of the host communities as well.<sup>80</sup>

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<sup>77</sup> Kubra Chohan, 'Over 350 Rohingya Villages Burned in Rakhine State: HRW', Anadolu Agency, 18 December 2017, available at: <<https://www.aa.com.tr/en/asia-pacific/over-350-rohingya-villages-burned-in-rakhine-state-hrw/1008043>> accessed on 13 April 2020; See also, 'HRW: New Rohingya Villages Destroyed in Myanmar', VOA News, 18 December 2017, available at: <<https://www.voanews.com/east-asia-pacific/hrw-new-rohingya-villages-destroyed-myanmar>> accessed on 12 April 2020.

<sup>78</sup> Please visit the UNHCR's website on "Operational Portal (Refugee Situations)", available at: <[https://data2.unhcr.org/en/situations/myanmar\\_refugees](https://data2.unhcr.org/en/situations/myanmar_refugees)> accessed on 24 September 2019.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid; See also, 'Satellite Images Show Sprawling Rohingya Refugee Camps', Mail Online, 21 September 2017, available at: <<http://www.dailymail.co.uk/wires/ap/article-4906184/Satellite-images-sprawling-Rohingya-refugee-camps.html>> accessed on 8 February 2019.

## CHAPTER III

### THEORETICAL FRAMEWORK OF ETHNIC CLEANSING AND GENOCIDE

#### 3. Preliminary Notes

**3.1** The term “ethnic cleansing” is an oblique expression which is generally used to avoid the liability of committing “genocide” or any other mass “violations of human rights”.<sup>81</sup> This expression has not gained any formal status in the contemporary international law whereas the Genocide Convention defined genocide for the first time denoting the same as a punishable offence.<sup>82</sup> The following discussion essentially explains the meticulous concepts of ethnic cleansing and genocide. However, since many reports refer to the Rohingya persecution as “crimes against humanity” as well, its notions have been discussed in this chapter.

#### 3.2 Ethnic Cleansing

**3.2.1** “Ethnic cleansing” is a newly developed term that means making an area “clean of a group of people” who were living in such area for a long period of time.<sup>83</sup> It is claimed that the term “ethnic cleansing” created its place in the vocabulary of diplomacy during the 1990s when several incidents of maltreatment were happening in the former Yugoslavia.<sup>84</sup> At that time, this term evolved as an umbrella expression that covers various acts to drive away the members of an ethnic group from their home place with the purpose of reducing the number of population of that particular group.<sup>85</sup>

**3.2.2** During the 1990s, the UN Security Council (UNSC) initiated prosecuting the committers of “ethnic cleansing” in the former Yugoslavia for breaches of international humanitarian law for the first time.<sup>86</sup> A “Commission of Experts”, established by the UNSC, started investigating the incidents of ethnic cleansing that took place in the former Yugoslavia to analyze its facts and preparing for prosecutorial proceedings.<sup>87</sup> The said Commission submitted an interim report to the UNSC which included that ‘large-scale victimization has taken place’ in the former Yugoslavia and it was considered that such acts constituted ‘a threat to peace and

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<sup>81</sup> Judgment of the Permanent Peoples’ Tribunal (n 10).

<sup>82</sup> Articles II and III of the Genocide Convention.

<sup>83</sup> Andrew Bell-Fialkoff, ‘A Brief History of Ethnic Cleansing’, [1993] 72 Foreign Affairs 110, 112; See also, Arman Murat Necip, ‘The Concept of Ethnic Cleansing: A Cautious Quest for Justice’, [2011] 1 Journal of Law, Policy and Globalization 6, 6-7.

<sup>84</sup> Ibid; Benjamin Lieberman, ‘The Roots of Ethnic Cleansing in Europe’, [2017] 4 Fletcher Security Review 60, 64.

<sup>85</sup> Catherine Phuong, ‘Freely to Return: Reversing Ethnic Cleansing in Bosnia-Herzegovina’, [2000] 13 Journal of Refugee Studies 165, 170; David M. Kresock, ‘Ethnic Cleansing in the Balkans: The Legal Foundations of Foreign Intervention’, [1994] 27 Cornell International Law Journal 203, 208.

<sup>86</sup> Marcus Cox, ‘The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina’, [1998] 47 International and Comparative Law Quarterly 599, 611.

<sup>87</sup> Ibid, 612.

security'.<sup>88</sup> The relevant observations of the Commission are stated below:

[...] grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing," including for the acquisition and the holding of territory.<sup>89</sup>

It was also reported that the perpetrators used to commit such activities of persecutions on the basis of a specific "ethnic identity" in the name of creating ethnically clean State.<sup>90</sup> Nonetheless, it was claimed that the term "ethnic cleansing" is not regarded as an act that bears responsibility under the international law while it was contrarily found that it covers a lot of acts for which a concerned State should bear responsibility under the said law.<sup>91</sup>

**3.2.3** According to the *Stockholm Accords on Ethnic Cleansing*, "ethnic cleansing" means the systematic annihilation or forced removal of the members of an ethnic, racial or religious group from a community or communities in order to change the ethnic, racial or religious composition of a given region'.<sup>92</sup> Now, it should be mentioned that the relationship between "ethnic cleansing" and "crimes against humanity" lies in the matter that the former one is more concerned with conflicts between ethnic enemy groups whereas deportation and forced transfer of people constitute the later crime irrespective of ethnic identity of the population.

**3.2.4** In 2005, all the Member States of the UN endorsed the Responsibility to Protect (R2P) (see Appendix IX) which addressed ethnic cleansing as one of the major concerns to be prevented.<sup>93</sup> However, as long as "genocide" is concerned, when "ethnic cleansing" is being committed with the specific intent to destroy any of the national, ethnic, religious, or racial group as articulated in Articles 2 and 3 of the *Genocide Convention*, it is considered as genocide.<sup>94</sup> It is imperative to mention that "ethnic cleansing" is yet to be considered in the international law as an independent crime; however, the similar criminal activities are purported to be treated

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<sup>88</sup> Ibid; See also, Marius Balan, 'Issues of Public International Law on Ethnic Cleansing', [2002] 48 *Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice* 33, 46.

<sup>89</sup> Id. at 613.

<sup>90</sup> Ibid.

<sup>91</sup> John Quigley, 'State Responsibility for Ethnic Cleansing', [1999] 32 *University of California Davis Law Review* 341, 346.

<sup>92</sup> Please find the definition in the "Preamble" of the *Stockholm Accords on Ethnic Cleansing*, available at: <<https://www.coursehero.com/file/p99ap0/9-THE-STOCKHOLM-ACCORDS-ON-ETHNIC-CLEANSING-INTRODUCTION-Forty-three/>> accessed 24 April 2019.

<sup>93</sup> Responsibility to Protect, available at: <<https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>> accessed on 8 March 2019.

<sup>94</sup> Maja Munivrana Vajda, 'Ethnic Cleansing as a Form of Genocide: Croatian Legislation and Practice in View of International Sources', [2011] 61 *Zbornik Pravnog Fakulteta U Zagrebu* 1921, 1927.



as the “crimes against humanity”.<sup>95</sup> As regards trials of “ethnic cleansing”, it has been seen in the case of the former Yugoslavia that the legal responsibility of only the individuals was the main concern.<sup>96</sup> Nevertheless, the international community should focus on the responsibility of the States too because involvements of the States are also found to commit ethnic cleansing in various ways.<sup>97</sup>

**3.2.5** With reference to the persecutions committed against the Rohingyas of Myanmar, it can be said that the intention of the government of Myanmar is not only to cleanse them from the Rakhine State, but also to destroy the whole group by implementing several discriminatory policies as discussed in the later parts of this study.<sup>98</sup> As a matter of fact, one State crime specialist at the Queen Mary University of London (QMUL) observed that ‘Aung San Suu Kyi is legitimising genocide in Myanmar and has entrenched the persecution of the Rohingya minority’.<sup>99</sup>

### 3.3 Genocide

**3.3.1** In the legal arena, “genocide” was first recognized as a distinct crime by the UN General Assembly on 11 December 1946.<sup>100</sup> Subsequently, this crime was codified in the 1948 *Genocide Convention*.<sup>101</sup> As of January 2018, a total of 149 States have ratified this Convention. The principles enumerated in this Convention are considered as “general customary international law”.<sup>102</sup> Accordingly, every State is bound to comply with the principle that ‘genocide is a crime prohibited under international law’.<sup>103</sup> In addition, the ICJ acknowledged that “prohibition of genocide” has acquired the status of “peremptory norm of international law” or *ius cogens* and thereby, derogation from this principle is forbidden.<sup>104</sup>

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<sup>95</sup> Micol Sirkin, ‘Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations’, [2010] 33 Seattle University Law Review 489, 493.

<sup>96</sup> Ibid; Linnea D. Manashaw, ‘Genocide and Ethnic Cleansing: Why the Distinction - A Discussion in the Context of Atrocities Occurring in Sudan’, [2005] 35 California Western International Law Journal 303, 312.

<sup>97</sup> Ibid; See also, Timothy William Waters, ‘Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing’, [2006] 47 Virginia Journal of International Law 63, 69.

<sup>98</sup> Nicholas Farrelly, ‘Treating Myanmar as a Normal Country’, [2013] 22 Human Rights Defender 24, 31; Yale Law School, ‘Genocide in Myanmar?’, January/February 2016, available at: <<https://yalealumnimagazine.com/articles/4207-genocide-in-myanmar>> accessed on 15 April 2019.

<sup>99</sup> Queen Mary University of London, ‘Aung San Suu Kyi is Legitimising Genocide in Myanmar, Warn State Crime Academics’, 25 November 2016, available at: <<https://www.qmul.ac.uk/media/news/items/hss/190109.html>> accessed on 20 April 2019.

<sup>100</sup> UN General Assembly, The Crime of Genocide, 11 December 1946, A/RES/96, available at: <<https://www.refworld.org/docid/3b00f09753.html>> accessed on 29 September 2019.

<sup>101</sup> The United Nations Treaty Collection, available at: <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en)> accessed on 29 September 2019.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid; See also, Article 53 of the Vienna Convention on the Law of Treaties 1969.

**3.3.2** There are two constitutive elements in the definition of genocide namely, (a) the special intent of the perpetrators to destroy, wholly or partly, a protected group such as national, ethnic, racial or religious group, and (b) the actions committed against the members of the targeted group.<sup>105</sup> Like many other international instruments, the definition of genocide provided in both Article 2 of the *Genocide Convention* and Article 6 of the *Rome Statute of the International Criminal Court 1998* (hereinafter referred to as the Rome Statute) (see appendix VII) reads as follows: -

[...] 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.<sup>106</sup>

**3.3.3** The most important element of genocide is the “special intent” of the perpetrators to destroy a particular group, in whole or in part, which can be determined taking into account the *facts and circumstances* of each case.<sup>107</sup> Specifically, the International Crimes Tribunal for

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<sup>105</sup> Ibid, Article II of the Genocide Convention reads as follows:

‘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.’

See also, William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge, UK: Cambridge University Press (Online Publication), 2nd edn, 2009) p. 291.

<sup>106</sup> Article II of the Genocide Convention; Article 6 of the Rome Statute 1998.

<sup>107</sup> *Prosecutor v. Athanase Seromba*, ICTR-2001-66-T, (13 December 2006), para. 176; *Aloys Simba v. Prosecutor*, ICTR-01-76-A, (27 November 2007), para. 264; *Prosecutor v. Theoneste Bagosora et al.*, ICTR-98-41-T, (18 December 2008), para. 2116; *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-T, (17 June 2004), para. 40; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze*, ICTR-99-52-T, (3 December 2003), para. 524; *Prosecutor v. Emmanuel Ndingabahizi*, ICTR-2001-71-I, (15 July 2004), para. 454; *Prosecutor v. Siméon Nchamihigo*, ICTR-01-63-T, (12 November 2008), para. 331; *Prosecutor v. Tharcisse Muvunyi*, ICTR-2000-55-A-T, (12 September 2006), para. 480; *Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, ICTR-96-3-A, (26 May 2003), para. 525; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, (21 May 1999), para. 93; *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-95-54A-T, (22 January 2004), para. 625; *Prosecutor v. Juvénal Kajelijeli*, ICTR- 98-44A-T, (1 December 2003), para. 806; *Prosecutor v. Jean Mpambara*, ICTR-01-65-T, (11 September 2006), para. 8; *Prosecutor v. Radislav Krstic*, Case No. ICTY-98-33-A, (19 April 2004), para. 513, para 34; *Prosecutor v. Mikaeli Muhimana*, ICTR- 95-1B-T, (28 April 2005), para. 496; *Prosecutor v. Goran Jelisić* Case No. IT-95-10, (14 December 1999), para. 78; *Prosecutor v. Radoslav Brdjanin*, ICTY-99-36-T, (1 September 2004), para. 704.



the Former Yugoslavia (ICTY) held in the case concerning *Brdjanin*<sup>108</sup> that the presence of a “destructive intent” of the perpetrators to commit genocide inflects this crime a particular scenario. Furthermore, the ICC observed in the *Al Bashir*<sup>109</sup> case that the ‘the crime of genocide is completed when the relevant conduct represents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the crime of genocide can be evidenced by the existence of a manifest pattern of similar actions committed by the perpetrators against a group.<sup>110</sup> Nonetheless, there is no numeric threshold of victims to establish the crime of genocide because it has been held in many cases of both the ICTY and International Criminal Tribunal for Rwanda (ICTR) that even killing merely one member of a group by the perpetrators may constitute genocide against the concerned group on a *case-by-case basis*.<sup>111</sup>

**3.3.4** As far as the determination of the protected groups is concerned, no universally accepted criteria have been evolved to date. In the case concerning *Akayesu*<sup>112</sup>, the ICTY initially referred to such groups as only stable and permanent groups. Later on, this Tribunal came up with an observation in a number of cases such as *Jelisić case*,<sup>113</sup> *Brdjanin case*,<sup>114</sup> *Blagojević & Jokić case*,<sup>115</sup> and *Stakić case*<sup>116</sup> that the facts and circumstances of each case are to be considered from both the objective and subjective perspectives to determine as to whether a group is stable and permanent. This observation has been reflected in many cases of the ICTR.<sup>117</sup> In some landmark cases namely, *Akayesu case*,<sup>118</sup> *Nahimana case*,<sup>119</sup> and *Kayishema and Ruzindana case*<sup>120</sup>, the ICTR determined “ethnic group” on the basis of certain factors such as the members must share a “common bond”, and “common language and culture”. Moreover, a very intrinsic criterion has been found in the *Kayishema and Ruzindana case*<sup>121</sup> because the ICTR held that whether a group would be considered as a stable and protected group depends on how the alleged perpetrators identify the members of the targeted group.

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<sup>108</sup> *Brdjanin* (n 107), para. 699.

<sup>109</sup> *Prosecutor v. Al Bashir*, ICC-02/05-01/09 (Pre-Trial Chamber I), para. 124.

<sup>110</sup> *Rutaganda* (n 107), para. 63.

<sup>111</sup> *Seromba* (n 107), para. 319; *Muvunyi* (n 107), para. 479; *Krstić* (n 107), para. 584; *Gacumbitsi* (n 107), para. 285; *Ndindabahizi* (n 107), paras. 116-7.

<sup>112</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, (2 September 1998), paras. 511, 516 & 701-2.

<sup>113</sup> *Jelisić* (n 107), para. 70.

<sup>114</sup> *Brdjanin* (n 107), para. 683.

<sup>115</sup> *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, ICTY (Trial Chamber), 17 January 2005, para. 667.

<sup>116</sup> *Prosecutor v. Milomir Stakić*, ICTY-97-24-T, (31 July 2003), para. 512.

<sup>117</sup> *Muvunyi* (n 107), para. 484; *Gacumbitsi* (n 107), para. 254; *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, (15 May 2003), para. 317; *Rutaganda* (n 107), para. 524; *Prosecutor v. Alfred Musema*, ICTR-96-13-A, (27 January 2000), para. 161; *Kamuhanda* (n 107), para. 630; *Seromba* (n 107), para. 318; *Ndindabahizi* (n 107), para. 468; *Kajelijeli* (n 107), para. 811.

<sup>118</sup> *Akayesu* (n 112).

<sup>119</sup> *Nahimana* (n 107), para. 969.

<sup>120</sup> *Ruzindana* (n 107), para. 98.

<sup>121</sup> *Kayishema* (n 107); *Akayesu* (n 112), para. 513.

**3.3.5** Another fundamental element of genocide is the “genocidal acts” which must be evidently committed against the members of a protected group to destroy the same. All the five genocidal acts are mentioned in the previous discussion while first three acts are apparently relevant in this study specifically: (a) ‘killing members of the group’, (b) ‘causing serious bodily or mental harm to members of the group, and (c) ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’. First of all, the term “killing” can be paralleled with murder.<sup>122</sup> In case of killing one or more members of a particular group to commit genocide requires, most importantly, proving the intention of the perpetrators.<sup>123</sup> The “burden of proof” to establish the perpetrators’ deliberate participation in the killing of one or more members of a protected group lies upon the prosecution of a case of genocide.<sup>124</sup>

**3.3.6** Next, “causing serious bodily or mental harm to the members of the group” involves certain premeditated acts committed against the members of a group that trigger grave physical or mental sufferings.<sup>125</sup> The term “harm” includes only a “serious harm” caused to the body of the victims but it must not be permanent and irremediable in nature that may lead to death of the victims.<sup>126</sup> Here, “bodily harm” means causing either grave injury to the health, or disfigurement, or any other grave injury to the external and/or internal organs of the victims.<sup>127</sup> Another term is “mental harm” which signifies causing hurt on the psychological aptitudes of the victims with a view to generating sturdy fear, or intimidating, or threatening the members of a group.<sup>128</sup> The list of acts that cause “mental harm” includes, but not limited to, ‘the acts of torture, inhuman or degrading treatment, sexual violence comprising rape,<sup>129</sup> ‘interrogations combined with beatings, threats of death,’<sup>130</sup> ‘forcible transfer’<sup>131</sup> and ‘deportation.’<sup>132</sup> In addition, concerning the third genocidal act, the ICTY in the *Brdjanin case*<sup>133</sup>

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<sup>122</sup> Ibid.

<sup>123</sup> *Blagojevic & Jokic* (n 115), para. 642.

<sup>124</sup> *Bagosora* (n 107), para. 2117; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki & Samuel Imanishimwe*, ICTR-99-46-T, (25 February 2004), para. 664; *Prosecutor v. Aloys Simba*, ICTR-01-76-T, (13 December 2005), para. 414; *Gacumbitsi* (n 107), para. 255; *Seromba* (n 107), para. 317; *Muvunyi* (n 107), para. 486; *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-95-54A-T, (22 January 2004), para. 632; *Semanza* (n 117), para. 319.

<sup>125</sup> *Krstic* (n 107), para. 513; *Kamuhanda* (n 107), para. 633.

<sup>126</sup> *Stakic* (n 116), para. 516; *Muvunyi* (n 107), para. 487; *Brdjanin* (n 107), para. 690.

<sup>127</sup> *Blagojevic & Jokic* (n 115), para. 645; *Muvunyi* (n 107), para. 487; *Gacumbitsi* (n 107), para. 291; *Muhimana* (n 107), para. 502; *Ntagerura, Bagambiki & Imanishimwe* (n 124), para. 664; *Seromba* (n 107), para. 317; *Kayishema* (n 107), para. 109.

<sup>128</sup> *Seromba* (n 107), para. 46; *Kamuhanda* (n 107), para. 634; *Kajelijeli* (n 107), para. 815; *Semanza* (n 107), para. 321; *Muvunyi* (n 107), para. 487; *Muhimana* (n 107), para. 502; *Gacumbitsi* (n 107), para. 291.

<sup>129</sup> *Akayesu* (n 112), para. 688.

<sup>130</sup> Ibid, paras. 711-2.

<sup>131</sup> *Krstic* (n 107), para. 31.

<sup>132</sup> *Brdjanin* (n 107), para. 690; *Krstic* (n 107), para. 513; *Kayishema* (n 107), para. 108; *Rutaganda* (n 107), para. 51; *Musema* (n 117), para. 156; *Akayesu* (n 112), para. 504; *Stakic* (n 116), para. 516; *Kamuhanda* (n 107), para. 634.

and the ICTR in the *Kayishema and Ruzindana cases*<sup>134</sup> held that the perpetrators generally create a situation that leads to gradual death of the members of the group.<sup>135</sup> More specially, the ICTY determined in the *Stakic case*<sup>136</sup> that the expression of intent “calculated to bring about physical destruction” does not essentially signify that the member of a group would be directly killed by the perpetrators, rather the members would die slowly owing to ‘lack of proper housing, clothing and hygiene, or excessive work or physical exertion’.<sup>137</sup>

### 3.4 Crimes against Humanity

**3.4.1** In condemning the mass killings of Armenians in the Ottoman Empire, the Allied governments (France, Great Britain and Russia) used the term “crimes against humanity” in 1915.<sup>138</sup> Nonetheless, after almost 30 years, the International Military Tribunal (IMT) in Nuremberg prosecuted “crimes against humanity” for the first time after the WWII in 1945.<sup>139</sup> With the passage of time, “crimes against humanity” is evident in the international customary law through its prosecution in many international courts such as ICC, ICTY, ICTR *etc.*<sup>140</sup> Some of the States recognized it as a crime in their national laws as well.<sup>141</sup>

**3.4.2** At the present time, the definition of “crimes against humanity” articulated in the *Rome Statute* 1998 is considered as the most accepted one. Under the purview of Article 7 of the *Rome Statute*, “crime against humanity” means committing any of the acts which are regarded as “physical elements” of this crime such as: ‘(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible

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<sup>133</sup> *Brdjanin* (n 107), para. 691.

<sup>134</sup> *Kayishema* (n 107), paras. 115-6; *Musema* (n 117), para. 157; *Rutaganda* (n 107), para. 52.

<sup>135</sup> *Akayesu* (n 112), paras. 505-6.

<sup>136</sup> *Stakic* (n 116), para. 518.

<sup>137</sup> *Akayesu* (n 112), para. 506.

<sup>138</sup> Crimes Against Humanity, available at: <<http://www.un.org/en/genocideprevention/crimes-against-humanity.html>> accessed on 15 April 2019.

<sup>139</sup> *Ibid*; See also, Brian Dub, ‘Understanding the content of crimes against humanity: Tracing its historical evolution from the Nuremberg Charter to the Rome Statute’, [2015] 9(5) *African Journal of Political Science and International Relations* 181, 183.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid*; See also, David Luban, ‘A Theory of Crimes against Humanity’, [2004] 29 *Yale Journal International Law* 85, 167.

under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.<sup>142</sup> It must be mentioned that the listed acts have to be committed as a part of a “widespread” or “systematic attack” and it must be directed against any civilian population which are certainly the “contextual elements” of this crime.<sup>143</sup> Finally, the mental element required for this crime is that the perpetrators must have knowledge of the acts or attacks.<sup>144</sup>

**3.4.3** The above-mentioned definition requires explanations and interpretations of some terminologies. Firstly, “civilian population” is defined in Article 50 of the *Additional Protocol I*<sup>145</sup> as any person who does not belong to one of the categories mentioned in Article 4(A)(1),(2),(3) and (6) of the *Third Geneva Convention*.<sup>146</sup> It is further mentioned that in case of doubt, a person would be considered as a civilian. It is stated in Article 51(3) of the *Additional Protocol I* that civilians shall enjoy protection against the dangers arising from military operations ‘unless and for such time as they take a direct part in hostilities’.<sup>148</sup> The direct participation in hostilities, as defined by the International Committee of the Red Cross (ICRC), refers to ‘acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’<sup>149</sup>. This legal provision was also applied by the ICTR in the Ignace. *Bagilishema case*.<sup>150</sup> In the *Fatmir Limaj case*, the ICTY observed that, ‘the term civilian should be interpreted broadly and it refers to population even if non-civilians are within it as long as it is predominantly civilian’<sup>151</sup>. Further, in the Stanislav Galic case, the ICTY stated that ‘[a] a

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<sup>142</sup> Article 7(1) of the *Rome Statute* 1998.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Additional Protocol I, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

<sup>146</sup> Article 4(A) of the *Third Geneva Convention* reads as:

[...] (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (4) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

<sup>147</sup> Article 50 of the *Additional Protocol I*.

<sup>148</sup> *Ibid.*, Article 51(3).

<sup>149</sup> Conduct of Military Operations in Urban Areas, ‘A project of the International Humanitarian Law Research Initiative’, May 2004, 2, available at: <[http://reliefweb.int/sites/reliefweb.int/files/reliefweb\\_pdf/node-22157.pdf](http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-22157.pdf)> accessed on 10 March 2019.

<sup>150</sup> *The Prosecutor v. Ignace Bagilishema*, ICTR (Trial Chamber), 7 June 2001, para. 104.

<sup>151</sup> *The Prosecutor v. Fatmir Limaj*, ICTY (Trial Chamber), 30 November 2005.

population may qualify as ‘civilian’ even if non-civilians are among it, as long as the population is predominantly civilian’<sup>152</sup>

**3.4.4** Besides, in the *Miroslav Deronjic case*, it was stated that, [i]n order to constitute a crime against humanity, the acts of the accused must be part of a *widespread* or *systematic* attack directed against a civilian population [...]’<sup>153</sup>. Further, it was stated in the *Vidoje Blagojevic and Dragan Jokic case* that ‘[a]ttack in the context of crime against humanity can be defined as a course of conduct involving the commission of acts of violence’<sup>154</sup>. The terms “widespread” has been defined in the *Dario Kordic & Mario Cerkez case* as: ‘[...] the phrase widespread refers to large-scale nature of attack and the number of the targeted persons’<sup>155</sup>. Further, in relation to the term “systematic”, the ICTY stated in the *Tihomir Blaskic case* that:

The systematic character refers to four elements [...] (1) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, [...] to destroy, persecute or weaken a community; (2) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; (3) the preparation and use of significant public or private resources, whether military or other; (4) The implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>156</sup>

As a whole, the phrase “systematic” refers to the organized nature of the attack. Finally, in the *Dragoljub Kunarac, Radomir Kovac & Zoran Vokovic case*, the ICTY observed that, ‘there must be knowledge of the accused that there is an attack on the civilian population and that his act is a part thereof’<sup>158</sup>. Besides, the concept of “knowledge” is defined as awareness of existence of such a fact or circumstance, which prescribes the existence for the crime to materialize.<sup>159</sup> *The Dario Kordic & Mario Cerkez case* goes on to elaborate on the requirement of the knowledge stating that the knowledge can be actual or constructive meaning that the accused either knew or should have known that his acts were part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan.<sup>160</sup>

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<sup>152</sup> *The Prosecutor v. Stanislav Galic*, ICTY (Trial Chamber), 5 December 2003, para. 143; Article 50(3) of the Protocol I of the *Geneva Conventions* 1949.

<sup>153</sup> *The Prosecutor v. Miroslav Deronjic*, ICTY (Appeals Chamber), 20 July 2005, para. 109; *Limaj* (n 151).

<sup>154</sup> *Blagojevic & Jokic* (n 115), para. 543.

<sup>155</sup> *The Prosecutor v. Dario Kordic & Mario Cerkez*, ICTY (Appeals Chamber), 17 December 2004; *Limaj* (n 151).

<sup>156</sup> *The Prosecutor v. Tihomir Blaskic*, ICTY (Trial Chamber), 3 March 2000, para. 203.

<sup>157</sup> *Kordic* (n 155).

<sup>158</sup> *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vokovic*, ICTY (Appeals Chamber), 12 June 2002, para. 99.

<sup>159</sup> M E Badar, ‘Mens Rea – Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals’, [2005] 5(2) *International Criminal Law Review* 203, 203.

<sup>160</sup> *Kordic* (n 155); *Limaj* (n 151).



## CHAPTER IV

### EVALUATIONS OF THE NARRATIVES OF THE ROHINGYAS

#### 4. Preliminary Notes

**4.1** Dr. Gregory H. Stanton, a research professor and the founder of Genocide Watch, developed “Eight Stages of Genocide” back in 1996 and then, expanded to “Ten Stages of Genocide” in which he described a formula as to how a society can engage in committing genocide.<sup>161</sup> He presented all the stages of genocide at the Yale University Center for International and Area Studies in 1998 and revised the same in 2013.<sup>162</sup> Dr. Stanton initially formulated 8 stages of genocide such as Classification, Symbolization, Dehumanization, Organization, Polarization, Preparation, Extermination, and Denial on the basis of his studies on genocide.<sup>163</sup> However, he added 2 more stages of genocide namely Discrimination and Persecution, and demonstrated that all the 10 stages function at a range of different levels throughout the entire process of persecuting members of a particular group.<sup>164</sup> The following table outlines Stanton’s ten stages of genocide and provides a brief description of actions conducted in each stage:-

**Table 2: Stanton’s Model of Ten Stages of Genocide<sup>165</sup>**

Stages	Actions
<b>Classification</b>	Categorizing a targeted group based on its ethnicity, race, religion, or nationality with the mindset of “us” versus “them”.
<b>Symbolization</b>	Symbolizing the members of the targeted group by forcing them to wear dresses or emblematic articles of specific colours, or differentiating them as “others” based on their physical uniqueness.
<b>Discrimination</b>	Denying civil rights or even citizenship of the members of the targeted group using arbitrary laws, customs, and political power.
<b>Dehumanization</b>	Treating the members of the discriminated group as “no-human” or “sub-human” and comparing them with animals, insects or diseases.
<b>Organization</b>	Designing plans of killing the members of the targeted group and arranging military, paramilitary forces and even local groups for that purpose.
<b>Polarization</b>	Using propaganda to drive the targeted group away from other communities, norms of banning social interactions between groups, and policies to eliminate judicious individuals of the targeted group.
<b>Preparation</b>	Employing euphemisms such as “ethnic cleansing”, “clearance operation”, or “counter-terrorism” to justify the perpetrator’s actions conducted against the targeted group, and building up military and weapons.
<b>Persecution</b>	Beginning of genocidal massacres against the targeted group through creation of their death lists, confiscation of their property, and detaining them in the concentration camps.
<b>Extermination</b>	Committing violent acts especially mass killing and mass rape against the members of the targeted group in a deliberate and systematic manner.
<b>Denial</b>	Refusing the facts of committing any crimes, burning dead bodies or digging up mass graves or threatening witnesses to destroy evidences, and blaming the victims for the violence.

<sup>161</sup> Dr. Stanton initially formulated the “Eight Stages of Genocide” and later on, developed it as “Ten Stages of Genocide”. See, Dr. Gregory H. Stanton, ‘Ten Stages of Genocide’, [2016] Genocide Watch, available at: <<http://genocidewatch.net/genocide-2/8-stages-of-genocide/>> accessed on 12 April 2019; Dr. Gregory H. Stanton, ‘Ten Stages of Genocide’ The Genocide Education Project 1, 1, available at: <[https://genocideeducation.org/wp-content/uploads/2016/03/ten\\_stages\\_of\\_genocide.pdf](https://genocideeducation.org/wp-content/uploads/2016/03/ten_stages_of_genocide.pdf)> accessed on 15 April 2019.

<sup>162</sup> Ibid.

<sup>163</sup> Gregory H. Stanton, ‘The Eight Stages of Genocide’, [1996] Genocide Watch, available at: <<http://www.genocidewatch.org/genocide/8stagesofgenocide.html>> accessed on 1 May 2019; See also, Stanton (n 161).

<sup>164</sup> It should be mentioned that another genocide expert Daniel Feierstein outlined a framework of six stages of genocide in his 2014’s book titled, ‘Genocide as Social Practice’. The stages of genocide outlined by Daniel Feierstein are similar to the stages framed by Dr. Stanton to some extent but there are some differences of opinion too. Daniel Feierstein’s stages are namely, Stigmatization (Stage 1), Harassment (Stage 2), Isolation (Stage 3), Policies of Systematic Weakening (Stage 4), Extermination (Stage 5), and Symbolic Enactment (Stage 6).

<sup>165</sup> Stanton (n 161).

**4.2** Dr. Stanton’s 10 stage-model of genocide has been used in this chapter in order to examine the patterns of the Rohingya genocide by stages considering the restriction of existing literature of genocide. Some of the definitions of these stages overlap and they do not essentially follow a linear sequence. Therefore, as the stages have reciprocally underpinning connection to lead genocide against a particular group of people and they cannot be extricated as they are entangled very closely, the pertinent stages have been assigned to each stage of genocide. For example, a 32-year-old Rohingya man said that, ‘the military and local maghs looted their belongings, sexually assaulted and raped women, and killed their people indiscriminately’. This statement includes “looting” that serves Discrimination and Persecution, and “sexual assault and rape of women” which relate to Dehumanization and Persecution. In addition, the events of indiscriminate “killing” of the Rohingya people can be tagged as Extermination. Thus, a single account may indicate multiple stages of genocidal processes in a particular scenario.

**Table 3: Data of Stages of Rohingya Genocide**

Name of Stages	Male Respondents <sup>166</sup>	Percentage of Male Respondents	Female Respondents <sup>167</sup>	Percentage of Female Respondents	Total Respondents <sup>168</sup>	Percentage of Total Respondents
Classification	55	93.22%	22	59.46%	77	80.21%
Symbolization	55	93.22%	26	70.27%	81	84.38%
Discrimination	57	96.61%	29	78.38%	86	89.58%
Dehumanization	57	96.61%	34	91.89%	91	94.79%
Organization	58	98.31%	32	86.45%	90	93.75%
Polarization	57	96.61%	30	81.08%	87	90.63%
Preparation	58	98.31%	31	83.78%	89	92.71%
Persecution	59	100.00%	37	100.00%	96	100.00%
Extermination	48	81.36%	26	70.27%	74	77.08%
Denial	43	72.88%	22	59.46%	65	67.71%

### 4.3 Classification (Stage 1)

**4.3.1** This stage refers to the fact that the dominant group categorizes the targeted group into “us” and “them” based on ethnicity, race, religion, or nationality such as *German* and *Jew*, *Hutu* and *Tutsi* etc.<sup>169</sup> Generally, the differences between communities are disrespected and the

<sup>166</sup> Please note that total 59 respondents were male (61.45 percent) out of total 96 Rohingya respondents in this study.

<sup>167</sup> Please note that total 37 respondents were female (38.54 percent) out of total 96 Rohingya respondents in this study.

<sup>168</sup> Please note that the Focus Group Discussions (FGDs) of this study were conducted with total 96 Rohingya respondents.

<sup>169</sup> Stanton (n 163).

dominant group becomes powerful while the targeted group gradually turns into powerless. For the purpose of differentiating the members and taking away the civil rights including citizenship of the powerless group, the powerful group enacts and/or uses different policies, laws, customs, or political powers.<sup>170</sup> It is usually seen that the members of the communities who are separated for a long period of time are at high risk of being segregated and distinctly classified. For example, in order to make a classification of the *Tutsi*, *Hutu*, and *Twa* ethnic groups, the colonizers of Belgium initiated a policy of distributing identity cards in Rwanda during 1926 which created an intensified tension between the said groups.<sup>171</sup>

**4.3.2** In this study, Classification stage accounts for 80.21 percent of the total Rohingya respondents.<sup>172</sup> This study raises questions to the respondents regarding the actions of the dominant group<sup>173</sup> to identify them as members of a powerless group in Myanmar. Among all the respondents, 93.22 percent male respondents and 59.46 percent female respondents confirmed altogether that they were differentiated as “*Rohingyas*” and/or “*Bengalis*”, and given various “identity cards” in different periods. An example of entry of this stage is that a 22-year-old Rohingya man stated:

The *Hukumat* [government], military, and *maghs*<sup>174</sup> were all against our ethnic community. Majority Muslim people used to live in our locality. We had good relationship with our neighbours even though they belonged to different religions. But we used to dislike the Buddhist *maghs*. They used to torture us with the help of our local police and Chairmen in different times. We were always exploited because of our Rohingya ethnicity such as I studied till class VIII and I could not continue my education because all the schools and madrasas [institutions of Islamic education] of our community had been closed since 2012. Recently, one or two days before [dated: 28/29 August 2017] *Eid-ul-Adha* [Feast of Sacrifice], our villages were attacked by the military and local *maghs*. They killed thousands of our people, raped our mothers, sisters and daughters, and robbed our houses. We are lucky because we are still alive and living in this *Kutupalong camp*.

The history of Rohingyas of being fragmented and ceasing to be citizens of Myanmar under its 1982 Citizenship Law set them apart as a minority ethnic group. All the respondents confirmed that they were given a variety of identity cards issued by the authorities of Myanmar in different phases while 12.5 percent of them showed us “white cards”<sup>175</sup> which were provided considering them as unverified citizens of Myanmar. Since the cards were issued for a specific time, these were supposed to be invalid by 2015 to the maximum.<sup>176</sup>

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<sup>170</sup> Ibid.

<sup>171</sup> Kigali Genocide Memorial, ‘The Ten Stages of Genocide’, available at: <<https://genocide.mhmc.ca/en/genocide-stages>> accessed on 18 March 2020.

<sup>172</sup> Discrimination (stage 3), Organization (stage 5) and Persecution (stage 8) have been assigned to this stage.

<sup>173</sup> The respondents were described that the “dominant groups” include the Government, the political parties, the military, and the local authorities of Myanmar.

<sup>174</sup> The term “Magh” is used by the Rohingya people to refer to the Rakhine Buddhists.

<sup>175</sup> “White Cards” were given to the Rohingyas by the Immigration Ministry of Myanmar as “Temporary Identity Certificates”.

<sup>176</sup> Green and MacManus (n 22), 8.



**4.3.3** After the independence, there were people of only two categories in Myanmar: firstly, the holders of “National Registration Cards (NRCs)” who were citizens; and secondly, the possessors of “Foreigners Registration Cards (FRCs)” which were issued to the non-citizens under the 1948 *Foreigners Registration Act and Rule*.<sup>177</sup> Meanwhile, the “Temporary Registration Certificates (TRCs)” were introduced which were only issued to the applicants who used to apply at the age of 12 for the registration under the *Residents of Burma Registration Rules* of 1951.<sup>178</sup> Thus, the NRCs were main evidences of citizenship of the Rohingyas in Myanmar through which they were entitled to enjoy their civil rights.

**4.3.4** In the one hand, although each and every individual of the Rohingya community above the age of 12 years was permitted to get the NRC, no such cards were issued to them since 1970.<sup>179</sup> On the other hand, during “*Sabe Operation*” launched by the military of Myanmar from 1974 to 1978, the NRCs of thousands of Rohingyas were snatched away without any lawful authority and they were never returned back to them.<sup>180</sup> As a result, even the natural born Rohingya people were identified as non-citizens and the Myanmar authorities started alleging that they [the Rohingyas] have come from Bangladesh. In line with this, the “white cards” were first issued in 1993 referring to the Rohingyas as “Bengalis”.<sup>181</sup>

**4.3.5** It is, therefore, evident that the well-planned policy of de-nationalizing the Rohingyas of Rakhine State has been around for almost 50 years. As regards marginalizing the members of Rohingya community as either “*Rohingyas*” or “*Bengalis*”, a 47-year-old Rohingya man narrated:

We were given some cards wherein we were identified as “*Bengalis*” living in Myanmar [he showed a “white card” issued by the Myanmar authorities]. Our movement was restricted within our locality and we always had to display an access card for shopping in the markets. We could not even gather in a public place because the police used to beat us at random.

A 36-year-old Rohingya woman added that the military of Myanmar government with the help of local *maghs* including *Chakma maghs* attacked them at different times. At the time of such attacks, they used to target mostly the Muslim women and drag them from their households and shout, ‘*this is not your country, you are Rohingyas, go somewhere else.*’ John Zaw, Myanmar-based journalist working for UCA News, pointed out that ‘*Rohingya is still a dirty word in Myanmar*’.<sup>182</sup> This study, thus, posits that the Rohingya people have been classified as a different “ethnic group” as well as “religious group” from the mainstream population of Myanmar. Moreover, they were identified as “*Bengalis*” and even the general term “*Rohingya*” was used to split them from all the communities of Myanmar. Existence of these factors in the situation of the Rohingya people in Myanmar indeed imposed the idea of “us versus them”.

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<sup>177</sup> Ibid.

<sup>178</sup> Amman Ullah, ‘The Rohingya and the White Cards Saga’, *The Stateless Rohingya*, 18 May 2016, available at: <<https://www.thestateless.com/2016/05/the-rohingya-and-the-white-cards-saga.html>> accessed on 20 March 2020.

<sup>179</sup> Ibid.

<sup>180</sup> Kawser Ahmed, Helal Mohiuddin, *The Rohingya Crisis: Analyses, Responses, and Peace-building Avenues* (United States: Rowman & Littlefield, 2019) 214-5.

<sup>181</sup> Ullah (n 178).

<sup>182</sup> John Zaw, ‘Rohingya Still a Dirty Word in Aung San Suu Kyi’s Myanmar’, *The UCA News*, 16 May 2016, available at: <<http://www.rohingyablogger.com/2016/05/rohingya-still-dirty-word-in-aung-san.html>> accessed on 20 March 2020.

## 4.4 Symbolization (Stage 2)

**4.4.1** This stage is initiated from Classification by giving names or symbols to the members of the targeted group often based on their “physical distinctiveness”, or differentiating them by colors or dress, or intensifying stereotypes through propaganda to represent them as an “other”.<sup>183</sup> For instance, throughout the World War - II genocide of the European Jews, the Jews were primarily classified as the priority enemy for the Nazis and thus, they were symbolized by having to wear a badge in the shape of a “yellow star”.<sup>184</sup> Likewise, during last six months of the Khmer Rouge regime, the people of Eastern Zone of Cambodia were forced to wear a “blue-and-white checked scarf” as a means of visible identification.<sup>185</sup> Such symbolizations show the degree of difference between the dominant group and the targeted community. For this purpose, the targeted group is also exposed as fragile, unattractive, and disgraceful, sometimes on account of the traits or features of its members’ bodies such as colours. This is how Symbolization signifies Dehumanization because the members of the targeted group are treated as danger to society or as sub-human or non-human.

**4.4.2** In this study, Symbolization makes up 84.38 percent of the total Rohingya respondents.<sup>186</sup> In relation to this stage, this study brought queries to the respondents concerning any names or symbols, and sarcastic expressions that the dominant group might have used to label the Rohingyas, and address them based on their outward appearance. A total of 93.22 percent male respondents and 70.27 percent female respondents affirmed en bloc that they were often addressed as *Bengalis*, or *Muslim Bengalis*, and called as *Kalar* [meaning dark] because skin colour of most of the Rohingya people is brown. A 32-year-old Rohingya man recounted:

When I was a child, my father told me that my predecessors have been living in *Maungdaw* since the 14th century but we do not have good relationship with the Burmese Buddhists. When I started growing up, I personally experienced that the Buddhist *maghs* were in the habit of referring to us as “*Muslim Kalar*”. Even during the attacks of 2012, we have seen that the military targeted our women indiscriminately but they used to pick good looking women for sexually violating and raping. However, the rest of the women who are not so good-looking and have brown colour skin in their bodies were literally forced to look at the shining sun by raising their heads up.

Recently, as a reaction to the charge of raping and sexually violating the Rohingya women brought against the military at the International Court of Justice, the concerned authorities of

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<sup>183</sup> Stanton (n 161); See also, Shelley J. Burlison and Alberto Giordano, ‘Spatiality of the Stages of Genocide: The Armenian Case’, [2016] 10(3) *Genocide Studies and Prevention: An International Journal* 39, 42.

<sup>184</sup> The Sentinel Project, ‘Operational Process - Stages of Genocide Model’, available at: <<https://thesentinelproject.org/what-we-do/early-warning-system/operational-process-stages-of-genocide-model/>> accessed on 21 March 2020.

<sup>185</sup> Stanton (n 161).

<sup>186</sup> Organization (stage 5), Polarization (stage 6), and Preparation (stage 7) have been assigned to this stage.

Myanmar uttered that it cannot even be imagined because the Rohingya women are too “dirty” to rape.<sup>187</sup> This response gives the impression that the Rohingya people were marked as “dirty people” from the very beginning by the dominant group. With regard to this, a 41-year-old Rohingya woman described:

After attacking our village before the *Qurbani Eid* [2017], the military divided the men and women into two groups. Then they shot the men and threw them into a cave. They poured petrol on the dead bodies and set fire. After that, they separated the beautiful women [light brown skin women] from the dark brown and old women, and children. They burned the dark brown and old women and children alive. They also dishonoured the beautiful women including me by putting their hands in our genitals. Later on, they locked all of us [around 40-50 women] in a nearby house and raped us one by one. At the early morning, I along with 6 other women somehow escaped from there and we do not know what happened with others.

**4.4.3** With regard to naming the respondents as “*Bengalis*”, the relevant events of Classification have been assigned to Symbolization. In this context, a 27-year-old Rohingya man said that, ‘*the Myanmar government authorities used to say to us that we are “Bengalis”, we look like Bangladeshi people, we have come from Bangladesh, and so we are just their guests*’. It seems that the Myanmar authorities used to use the term “*Bengali*” to refer to the Rohingyas on purpose for a long period of time. Dr. Maung Zarni, a Burmese human rights activist, affirmed that the Rohingyas are called as “*Muslim Kalar*” for their black-skinned bodies which is certainly a derogatory term employed for Muslims who are of South Asian descent.<sup>188</sup> This study, thus, asserts that the derogatory racist terms “*Muslim Kalar*” and “*dirty people*” are used to symbolize the Rohingyas as “others” and specify them as unwanted people in Myanmar.

### **4.5 Discrimination (Stage 3)**

**4.5.1** The laws, policies, customs or political powers which are created and/or used to classify the members of the targeted group are greatly implemented in the Discrimination stage to deprive them of their civil and political rights including their citizenship.<sup>189</sup> In most of the cases, the dominant group put into practice the prejudicial laws to restrict the rights, freedoms and liberties of the members of the powerless group such as they are arrested and unlawfully confined, their properties are confiscated, and businesses are interrupted.<sup>190</sup> As for example,

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<sup>187</sup> Azeezah Kanji, ‘Myanmar: Defending Genocide at the ICJ’, Al Jazeera, 22 December 2019, available at: <<https://www.aljazeera.com/indepth/opinion/myanmar-defending-genocide-icj-191219113440939.html>> accessed on 22 March 2020.

<sup>188</sup> Dr. Maung Zarni was interviewed at the Liberation War Museum by the principal researcher on 7th July 2018; See also, SaiLatt, ‘Intolerance, Islam and the Internet in Burma’, New Mandala, 10 June 2012, available at: <<https://www.newmandala.org/intolerance-islam-and-the-internet-in-burma-today/>> accessed on 22 March 2020.

<sup>189</sup> Stanton (n 161).

<sup>190</sup> Burleson and Giordano (n 183).

the 1935 *Nuremberg Laws* were used to cease the right of the Jews to get employment at any government organization or university.<sup>191</sup> We know that the members of the targeted group are portrayed as undesirable in Symbolization. Accordingly, they are gradually made realize that they do not deserve to get equal treatment in Discrimination.<sup>192</sup> Similarly, this realization sets them to be considered as non-human or sub-human and second-class citizens which lead the dominant group to move forward to the following stage as well. It is to be noted that not only official strategies but also unofficial approaches are adopted in Discrimination.<sup>193</sup>

**4.5.2** In case of the Rohingyas, Discrimination accounts for 89.58 percent of the total respondents of this study.<sup>194</sup> The essences of discriminatory policies or practices have been found in the statements of total 96.61 percent male respondents and 78.38 percent female respondents. With reference to the implementation of the policies or practices regarding the issues of marriage and children of the Rohingyas in Myanmar, a 35-year-old woman stated:

Although we would marry within our own community, we were required to provide money, ranging from 0.2 to 0.3 million Burmese Kyat, to the government officials. Again, remarriage of a widow was not permitted in our society. According to our marriage document, it was strictly prohibited to have more than two children in a family. We had to maintain a mandatory family picture through which the government officials used to make sure if there were more children after the previous year. If we had more than two babies, we were immediately fined or put into prison. We were given an injection known as *Dibu* in order to prevent us from having children. Sometimes the military personnel used to offer toxic chocolates to our kids as well.

The *Fortify Rights* reported in 2014 that the Rohingya people need permission to marry even within their own community and the authorities demand unofficial payments as high as 0.1 million *Burmese* kyat for merely marriage permission.<sup>195</sup> If a Rohingya person desires to marry someone from another township, he/she requires to pay an added 0.1 million *Burmese* kyat.<sup>196</sup> In both the cases, the authorities used to take almost two years for giving such permission.<sup>197</sup> If they violate this rule regarding their marriage, they are punished with imprisonment for up to 10 years, or fines, or both under the purview of Sections 188, 417 and 493 of the Criminal Law of Myanmar.<sup>198</sup>

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<sup>191</sup> Montreal Holocaust Museum, 'The Ten Stages of Genocide', available at: <<https://genocide.mhmc.ca/en/genocide-stages>> accessed on 23 March 2020.

<sup>192</sup> The Sentinel Project (n 184).

<sup>193</sup> Ibid.

<sup>194</sup> Dehumanization (stage 4), Organization (stage 5), and Persecution (stage 8) have been assigned to this stage.

<sup>195</sup> See, Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies against Rohingya Muslims in Myanmar', February 2014, 1, 31, available at: <[http://www.fortifyrights.org/downloads/Policies\\_of\\_Persecution\\_Feb\\_25\\_Fortify\\_Rights.pdf](http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf)> accessed on 22 March 2020.

<sup>196</sup> *Id* at 32.

<sup>197</sup> *Id* at 31-2.

<sup>198</sup> *Id* at 31.

**4.5.3** It is also reported that the Myanmar Government has been enforcing a strict two-child policy made under the “Regional Order 1/2005” for only the Rohingya people.<sup>199</sup> For the purpose of inspecting the number of children, it imposes a compulsory rule for the Rohingya families to maintain family pictures.<sup>200</sup> Moreover, the Government officials used to compel the Rohingya women to breastfeed infants in front of them so that they can determine whether the women are the birth mothers of the child.<sup>201</sup> If any Rohingya family is found to have violated this policy, they are given imprisonment for up to 10 years, fines, or both as per Section 188 of the Criminal Law of Myanmar.<sup>202</sup> Due to the two-child policy, many Rohingya women have undergone abortion and faced medical complications.<sup>203</sup> It is to be noted that the aforementioned rules and orders were initially dated from 1993 to 2008 and similar rules and orders were made in 2009 as well.<sup>204</sup> With respect to the discriminations that the Rohingyas used to face in their daily lives, a 46-year-old Rohingya man narrated:

After 2012, our schools, Mosques and *madrassas* were shut down or burnt to ashes by the government officials and military forces. For this reason, our children were deprived of all kinds of education. We were subjected to torture if we went to Mosques for saying our prayers. On the occasion of *Eid-ul-Adha*, we used to sacrifice cows or goats secretly because if we were caught, the military used to torture us and impose huge fine. We could not enjoy our right of livelihood, freedom of assembly, freedom of religion and so on. Our citizenship was also ceased by the government. We could not give vote. The government used to elect the local representatives such as Chairmen and Members of our villages from the Buddhist *maghs*. They were often asked to distribute leaflets to introduce new religious rules to us.

He added that the leaflets were written in Burmese language and they were banned to do some activities through the leaflets such as, chatting in groups of more than two persons, moving after eight o'clock at night, saying prayers for five times, and meeting people to spread Islamic faith in the Mosques.

**4.5.4** Since the mid 1980s, the Rohingya people were viewed as illegal immigrants and each of their right of citizenship was denied. They also started encountering fear, oppression and different forms of violence. The Citizenship Law of Myanmar was enacted in 1982 but it was increasingly implemented over the following decades.<sup>205</sup> This law overlooked the term

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<sup>199</sup> *Id* at 24.

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid*; See also, Lewa (n 50); Human Rights Watch, ‘Joint Submission to CEDAW on Myanmar’, 24 May 2018, available at: <[https://www.hrw.org/news/2018/05/24/joint-submission-cedaw-myanmar#\\_ftn25](https://www.hrw.org/news/2018/05/24/joint-submission-cedaw-myanmar#_ftn25)> accessed on 24 March 2020.

<sup>203</sup> *Ibid*.

<sup>204</sup> *Ibid*.

<sup>205</sup> Ullah (n 178).



“Rohingya” which is generally referred to identify an ethnic group in Myanmar and made its members ineligible to obtain any government documentation using this term to identify them.<sup>206</sup> In 1989, the Scrutiny Cards (also known as pink cards or pink national registration cards”) were introduced substituting the then NRCs.<sup>207</sup> When the Rohingya people made application for issuing their individual Scrutiny Card replacing their NRCs, they were provided TRCs (also known as “white cards”).<sup>208</sup> Through this method, citizenship of the Rohingya people was taken away and they were converted into residents of Myanmar.

**4.5.5** During the election of 2010, the military government of Myanmar drafted the *Political Parties Registration Law*. This bill specified that the people who held one of five types of cards in Myanmar such as, (a) national scrutiny card, (b) national registration card, (c) guest citizenship card, (d) naturalized citizen card, or (e) white card were eligible to form a political party and exercise the right to vote in the election. On the other hand, it was stated in the bill that in order to stand as a candidate in the election, a person must be a holder of the “Scrutiny Card”.<sup>210</sup> Thereby, most of the Rohingya people were allowed to give vote in the 2010’s election although they could not participate as candidates. Later on, the Parliament of Myanmar passed the *Referendum Law* on 2<sup>nd</sup> February 2015 that allowed the white card holders to vote on a referendum on the constitutional amendments.<sup>211</sup> However, President Thein Sein declared on 11<sup>th</sup> February 2015 that all the “white cards” would expire on 31<sup>st</sup> March 2015.<sup>212</sup> As a result, the Rohingya people were not able to vote in any referendum or in the election which was due in November 2015. This is how the Rohingya people’s right to vote and to stand as a candidate at elections of Myanmar was revoked.<sup>213</sup>

**4.5.6** Verena Hölzl, a journalist of the New Humanitarian based in Yangon covering conflict, displacement, and politics, indicated that the Myanmar authorities enacted some strict regulations with a view to handling birth, death, marriage, immigration, and migration of the Rohingyas.<sup>214</sup> She added that they were given very limited employment opportunities, and the issues concerning construction of private buildings as well as religious buildings, and land

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<sup>206</sup> Radio Free Asia, ‘Myanmar Authorities Step up Collection of Temporary Identification Cards’, 6 April 2015, available at: <<https://www.refworld.org/docid/552e19a034.html>> accessed 30 March 2020.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Sithu Aung Myint, ‘White Cards: The Junta’s Toxic Legacy’, *The Myanmar Times*, 7 April 2014, available at: <<https://www.mmtimes.com/opinion/10076-white-cards-the-junta-s-toxic-legacy.html>> accessed on 25 March 2020.

<sup>210</sup> Ibid.

<sup>211</sup> Ullah (n 178); Radio Free Asia, ‘Hundreds protest Rohingya vote on Myanmar charter change’, 11 February 2015, available at: <<https://www.refworld.org/docid/5507ea2015.html>> accessed on 30 March 2020.

<sup>212</sup> Ibid.

<sup>213</sup> ‘Myanmar Revokes Rohingya Voting Rights after Protests’, *BBC News*, 11 February 2015, available at: <<https://www.bbc.com/news/world-asia-31421179>> accessed on 30 March 2020.

<sup>214</sup> Verena Hölzl was interviewed at the Liberation War Museum by the principal researcher on 3<sup>rd</sup> April 2019.

ownership of the Rohingyas were controlled by stringent laws.<sup>215</sup> A 28-year-old Rohingya man expressed:

I left Rakhine State and went to Yangon because I wanted to shift to Australia. I searched for jobs in Yangon but as I am Rohingya nobody gave me any job. I found similar type of discrimination in Yangon that existed between the members of Rohingya community and other communities in Rakhine. We were always deprived of work opportunities. We had restrictions to move from one place to another but other people of Rakhine could travel everywhere in Myanmar.

The aforementioned discussions demonstrate that the Rohingya people were not only deprived of their basic rights and access to resources but also left without employment opportunities in some or all categories. More specifically, this study suggests that they were denied their citizenship, right of education, freedom of religion, right to vote and to stand as a candidate, right to get medical treatment, and right to employment. Their family lives were interrupted by the government officials by demanding money during their marriage and asking for their personal information, providing restrictions on their family planning, and violating their right to determine the number and spacing of children. It is, therefore, evident that the Myanmar government officials and military used to treat the Rohingyas in accordance with the prejudicial laws, policies, customs and political powers. Besides, the local *maghs* were given impunity as an unofficial method of discriminating against the Rohingyas in different forms.

#### **4.6 Dehumanization (Stage 4)**

**4.6.1** This stage brings a noticeable result in carrying out the previous three stages *i.e.* Classification, Symbolization, and Discrimination. The members of the targeted group are finally treated as “second-class citizens” and compared with various “animals, parasites, insects or diseases” in this stage.<sup>216</sup> For example, many individuals who took part in the Rwandan Genocide failed to realize that the *Tutsi* victims were human; rather they were considered as “cockroaches” and “vermin” to be destroyed.<sup>217</sup> Seemingly, the humanity of the powerless group is denied by the dominant group and the members of other groups *en bloc* in the Dehumanization stage. Moreover, the acts committed in Discrimination are justified by portraying the members of the targeted group as sub-human or no-human, and propagating that they are threats to the social security of the particular nation.<sup>218</sup> Thus, even if any crime is committed against them, the law enforcement agencies do not pay any attention to arrest and prosecute the offenders. In this way, the encouragement of the members of other communities is strengthened to persecute the members of the targeted group.

**4.6.2** With respect to this stage, this study tried to explore the nature of interpersonal relationship of the Rohingyas with their neighbours and the *maghs*, and the approaches of treatment of the Rohingya men and women by the law enforcement agencies. Again, it has been

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<sup>215</sup> Ibid.

<sup>216</sup> Stanton (n 161).

<sup>217</sup> Montreal Holocaust Museum (n 191).

<sup>218</sup> Burleson and Giordano (n 183).

attempted to find any other term except “Rohingya” and “Bengali” that might have been used by the local *maghs*, police, security forces, and border guards to refer to them. In this study, Dehumanization makes up 94.79 percent of the total Rohingya respondents.<sup>219</sup> Testimonies of 96.61 percent male and 91.89 percent female respondents affirmed the presence of events that would be tagged as dehumanization. The events involve violation of women and children, and torture together with other factors because the perpetrators intended to treat the members of the Rohingya community as sub-human or no-human through these actions. The respondents of this study expressed that the “*Kala Party*”<sup>220</sup> consisting of armed men wearing black cloaks revealing only their eyes increased their level of violence in their villages after 2012. They were sometimes accompanied by the Myanmar military. A 36-year-old Rohingya man said:

Most of the people of our village were Muslims but a small number of Hindus were living with us peacefully. Since 2012, a group of *maghs* used to visit our village and rob our valuable belongings. After a few incidents of such robbery, some of the villagers complained to the local police but they did not give us any protection. Meanwhile, the same group of *maghs* began coming to our village again and again and threatened us not to make any complaint to the police in future. They used to shout, ‘who are the mad dogs that went to the police to give compliant against us? Come in front of us, we will send you to your Allah’.

**4.6.3** There were reports of several crimes committed against the Rohingyas of Northern Rakhine State such as extrajudicial killings, arbitrary detention, mistreatment in detention, deaths in custody, rape and sexual violence, sex trafficking, different forms of torture, and forced labor.<sup>221</sup> In addition, their right to a fair trial and due process, and right to a speedy trial were thoroughly denied.<sup>222</sup> For example, on 7 December 2014, a 25-year old Rohingya man named Mohammed Musa refused to stop his vehicle at a Border Guard Police checkpoint and resisted paying a bribe to the officers.<sup>223</sup> Consequently, one of the officers shot in his head and killed him.<sup>224</sup> After the incident, the Border Guard Police allegedly came to meet the deceased’s family and threatened them not to file any request for a police investigation.<sup>225</sup> However, his family complained to the police and the officer was charged with causing death by negligence.<sup>226</sup> Moreover, the case was still pending before the Court even at the end of 2015.<sup>227</sup>

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<sup>219</sup> Classification (stage 1), Discrimination (stage 3), and Persecution (stage 8) have been assigned to this stage.

<sup>220</sup> The members of “*Kala-Party*” used to wear “*Burkhas*” (black cloaks) covering their face. They used to speak in the language of the *maghs* during the attacks.

<sup>221</sup> United States Department of State, ‘2015 Country Reports on Human Rights Practices – Burma’, 13 April 2016, available at: <<https://www.refworld.org/docid/57161291c.html>> accessed 31 March 2020.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.



**4.6.4** Despite many credible reports alleged that human rights of the Rohingyas were abused persistently by security forces, the concerned authorities of Myanmar failed to investigate the same. Instead, the reports were rejected as fabricated rumors and this is how immunity for these abuses and crimes continued from year to year.<sup>228</sup> Using derogatory terms *e.g.* “dirty” for the women and providing immunity for rape and sexual violence show the ethnic hatred of the Myanmar authorities and military towards the Rohingya women. The *Global Justice Center* reported in 2018 that the use of rape and sexual violence by the Myanmar forces to terrorize the entire Rohingya community increased during 2016 and 2017.<sup>229</sup> According to this report, the Myanmar forces started raping and sexually violating the Rohingya women in front of other members of the community while sometimes the women were shamed through forced nakedness and other forms of torture.<sup>230</sup> A 21-year-old Rohingya woman recounted:

I got married in February 2015. After a few days of my marriage, around 10-15 soldiers entered into our house breaking the front door. I was lying in bed with my husband at that evening. Some of them took my husband outside. Five or six soldiers forcibly undressed me and raped me. After that, they took me outside, naked, and pushed me to the ground. I saw that there were also some naked women lying on the ground and screaming. I was a new bride there, I was feeling very ashamed. Meanwhile, a few women were dragged outside as well. The soldiers forced all of us to stand and make a queue. Then we were forced to march toward the paddy fields. The men, children and old women of our locality including my husband were blocked by the soldiers. After walking for a while, I felt blood running down my legs. I began praying to Allah to save us. After 1-2 hours, the soldiers walked out, fired their guns toward the sky, and shouted not to bring any complaint about the occurrence to anyone. My husband is a good human. I could not eat and walk properly for many days. But he took care of me after the incident.

It should be noted that regarding the conflict in the former Yugoslavia during 1991-95, the

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<sup>228</sup> Altsean-Burma, ‘Burma/Myanmar: Flawed Domestic Investigations Necessitate UN Commission of Inquiry on Serious Crimes’, 7 March 2017, available at: <<https://progressivevoicemyanmar.org/2017/03/07/burmamyanmar-flawed-domestic-investigations-necessitate-un-commission-of-inquiry-on-serious-crimes/>> accessed on 26 March 2020.

<sup>229</sup> UN Office of the High Commissioner for Human Rights (OHCHR), ‘Report of OHCHR Mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016’, 3 February 2017, 1, 39, available at: <<https://www.refworld.org/docid/5899cc374.html>> accessed on 25 March 2020; See also, Global Justice Center, ‘Discrimination to Destruction: A Legal Analysis of Gender Crimes against the Rohingya’, September 2018, 1, 44, available at: <[http://www.globaljusticecenter.net/files/Discrimination\\_to\\_Destruction.pdf](http://www.globaljusticecenter.net/files/Discrimination_to_Destruction.pdf)> accessed on 30 March 2020; See also,

<sup>230</sup> Ibid.

army's special services as well as experts of psychological warfare put forward a “*chilling sociological rationale*” of raping and sexually violating women.<sup>231</sup> They have depicted:

[...] the morale, will, and bellicose nature of their groups [Bosnian Muslims] can be undermined only if we aim our action at the point where the religious and social structure is most fragile. We refer to the women, especially adolescents, and to the children. Decisive intervention on these social figures would spread confusion ..., thus causing first of all fears and then panic, leading to a probable retreat from the territories involved in war activity.<sup>232</sup>

Likewise, the Myanmar soldiers adopted the tactic to rape, sexually violate and humiliate the women as the most effective way to create terror and panic among the Rohingya people.

**4.6.5** Besides, the propaganda of fears of Islamic encroachment gradually incited the Buddhists of Myanmar to back the Rohingya Muslims into a corner for decades. Even Nobel Peace Prize laureate *Aung San Suu Kyi* referred to the tensions between Muslims and Buddhists as a “climate of fear” to the BBC reported on 24 October 2013.<sup>233</sup> She added that ‘global Muslim power is very great’ and it is the awareness that has provoked the tensions.<sup>234</sup> It can be argued that these perceptions mobilized public opinion against the Muslims in Myanmar and tarnished the image of Islam in order to justify the future acts against them. For illustration, Myanmar has portrayed the Rohingya Muslim community as a threat to its national security and justified their “clearance operations” against them as a counter-terrorism strategy.<sup>235</sup> Hence, this study presents that the Rohingyas were forced to lead substandard life in their own community. Their women were publicly humiliated and violated in order to vilify the Rohingya community. On the one hand, the concerned authorities hardly investigated any matter of their human rights abuses and in contrast, they used to remain silent regarding any credible reports of the same.<sup>236</sup> As a matter of fact, the Rohingyas were always blamed for the violence that took place between them and the military or Buddhist extremists. These types of physiological processes were continued to represent them as sub-human or no-human in the eyes of all other communities in Myanmar.

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<sup>231</sup> Oytun Eskiyeenturk, ‘Balkan Tragedy: Who is to Blame?’, *Ethics of Development in a Global Environment (EDGE)*, available at: <[https://web.stanford.edu/class/e297c/war\\_peace/confrontation/hformeryugoslavia.html](https://web.stanford.edu/class/e297c/war_peace/confrontation/hformeryugoslavia.html)> accessed on 1 April 2020; See also, Abdus Sattar Ghazali, ‘24th anniversary: Srebrenica Genocide Remembered’, *The Milli Gazette Online*, 12 July 2019, available at: <<http://www.milligazette.com/news/16736-24th-anniversary-srebrenica-genocide-remembered>> accessed on 1 April 2020.

<sup>232</sup> Ibid.

<sup>233</sup> ‘Suu Kyi Blames Burma Violence on ‘Climate of Fear’, *BBC News*, 24 October 2013, available at: <<https://www.bbc.com/news/world-asia-24651359>> accessed on 1 April 2020.

<sup>234</sup> Ibid.

<sup>235</sup> Please find details in the discussion of Polarization stage; *See also*, International Crisis Group, ‘Myanmar’s Rohingya Crisis Enters a Dangerous New Phase’, 7 December 2017, available at: <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/292-myanmars-rohingya-crisis-enters-dangerous-new-phase>> accessed on 2 April 2020.

<sup>236</sup> Altsean-Burma (n 228).

## 4.7 Organization (Stage 5)

**4.7.1** Organization together with the following two stages such as Polarization and Preparation focuses on making genocidal policies and taking preparation to implement Persecution and Extermination. For example, the Minister of Internal Affairs of the Ottoman Empire made a policy to arrest the influential Armenians on 24 April 1915 in order to eliminate them within a few weeks.<sup>237</sup> This stage emphasizes more on expanding resources while the members of the targeted group are directly affected in Preparation. Besides, the ultimate goal of Organization is to form mechanisms for the purpose of Extermination. The army or militia forces and informal paramilitary groups are trained and armed.<sup>238</sup> Concentration or detention camps are also built to detain the victims.<sup>239</sup> In particular, planning for committing genocide in different phases and developing the resources for the same purpose are the main practices of Organization.<sup>240</sup>

**4.7.2** In this study, Organization makes up 93.75 percent of the total Rohingya respondents.<sup>241</sup> A total of 98.31 percent male and 86.45 percent female respondents described the incidents of military attacks on villages, and arrests, confinement and deportation which have been assigned in this stage to uncover the blueprints of the occurrences. A 56-year-old Rohingya man stated that, he left Myanmar in 2012 when clashes between them and Arakanese Buddhists took place. He added that during that conflict the military targeted their *Moulovis* [religious leaders] and rich Rohingya Muslims, and slaughtered them. This account gives an indication of the genocidal plan to destroy the religious leaders and affluent people of the Rohingya community. A 25-year-old Rohingya man expressed:

I was a very friendly person and I had both Buddhist and Muslim friends of our country. Some of my Buddhist friends used to visit my home on different occasions. We did not have any problem among us. But during 2012, the police, the *Nasaka*, and the Buddhist mobs attacked us. Those violent attacks made worse the peaceful life between the Muslim and Buddhist religious people.

**4.7.3** The Myanmar military started oppressing the Rohingyas during 1991-92 and repeated its mass violence of 1978 against the members of the same group.<sup>242</sup> It should be noted that the border security force such as “*Nasaka*” was formed in 1992 to subjugate the Rohingyas of *Maungdaw*. Accordingly, when the mass violence took place in 2012 against the Rohingyas, they were victimized by the Myanmar military, *Nasaka* personnel, and the violent mobs of

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<sup>237</sup> Ottoman Archives, ‘The Ten Stages of Genocide’, available at: <<https://genocide.mhmc.ca/en/genocide-stages>> accessed on 2 April 2020.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Burleson and Giordano (n 183).

<sup>241</sup> Polarization (stage 6) and Preparation (stage 7) have been assigned to this stage.

<sup>242</sup> Human Rights Watch, ‘Burma/Bangladesh Burmese Refugees in Bangladesh: Still No Durable Solution’, May 2000, 1, 5, available at: <<https://www.hrw.org/reports/2000/burma/index.htm>> accessed on 11 September 2019.

the Buddhist *maghs*.<sup>243</sup> After such violence which caused destruction of houses of thousands of Rohingyas, many of them were confined to a wasteland of camps with increasing risk of livelihood.<sup>244</sup> *Christopher Sidoti*, a member of the UN fact-finding mission into crimes against the Rohingya, described in July 2019 that:

There are concentration camps – let’s call it what it is – with 128,000 [0.128 million] internally displaced people in central Rakhine, outside Sittwe. In Sittwe, there are three areas where Rohingya people live and they have become urban ghettos like those Jews lived under Nazi-occupied Europe.<sup>245</sup>

From this observation, it is clear that a large number of Rohingyas have been living in such camps since 2012 in a condition similar to the “Nazi concentration camps”. After the violence of 2012, two major attacks were launched in October 2016 and August 2017 that drove thousands of people over the border to the neighbouring countries mainly Bangladesh. Regarding the attacks that commenced in August 2017, it has been reported in the *Reuters* that the Myanmar military and paramilitary police forces mobilized the Buddhist villagers of Rakhine State’s *Inn Din* and a minimum of two more villages to set the Rohingya houses on fire.<sup>246</sup> Accordingly, they were ordered to clear the *Inn Din* Rohingya settlements.<sup>247</sup> A 37-year-old Rohingya man narrated:

The *magh Rabata*<sup>248</sup> [Chairman] was our neighbour and he informed us that he told the military not to attack us. Thus, we initially did not leave our residents but that was a back-stabbing against us. Suddenly, our village was attacked on the night of *Eid-ul-Azha* of 2017. I can still remember that some of the people who attacked were local police and *maghs*, and some of them were dressed in military uniforms bearing patches of “star”. The colour of the dresses was “khaki” [dark yellowish-green]. They were cutting our children into pieces and throwing to the canal in front our eyes. Many men and women were arrested and confined in unknown places. The Buddhists villagers also burnt our houses and looted our properties.

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<sup>243</sup> Human Rights Watch, ‘Rohingya Crisis’, available at: <<https://www.hrw.org/tag/rohingya-crisis>> accessed on 6 October 2019; Minority Rights Group International, ‘World Directory of Minorities and Indigenous Peoples - Myanmar/Burma: Muslims and Rohingya’, October 2017, available at: <<https://www.refworld.org/docid/49749cdcc.html>> accessed on 20 November 2019.

<sup>244</sup> Jason Motlagh, ‘These Aren’t Refugee Camps, They’re Concentration Camps, and People Are Dying in Them’, 17 June 2014, available at: <<https://time.com/2888864/rohingya-myanmar-burma-camps-sittwe/>> accessed on 29 March 2020.

<sup>245</sup> ‘UN official likens Rohingya living conditions to Nazi concentration camps’, *The Guardian*, 4 July 2019, available at: <<https://www.theguardian.com/world/2019/jul/04/un-warns-of-possible-new-war-crimes-in-myanmar>> accessed on 29 March 2020.

<sup>246</sup> Wa Lone, Kyaw Soe Oo, Simon Lewis, and Antoni Slodkowski, ‘Myanmar Forces and Buddhist Villagers Torched Rohingya Homes, Then Killed’, *Reuters*, 9 February 2018, available at: <<https://www.reuters.com/article/us-myanmar-rakhine-events-precis/myanmar-forces-and-buddhist-villagers-torched-rohingya-homes-then-killed-idUSKBN1FS3BL>> accessed on 30 March 2020.

<sup>247</sup> *Ibid.*

<sup>248</sup> The term “*Magh Rabata*” stands for local Chairman in Burmese language.

**4.7.4** It is, therefore, evident that not only the military and *Nasaka* personnel but also the private individuals such as local representatives [e.g. Chairman and Member] and Buddhists villagers were trained and involved to execute a very well-thought-out plan against the Rohingyas. It seems that the Myanmar militia forces were organized since or prior to 1992 and the informal paramilitary groups were trained and armed afterwards to persecute the Rohingya people. In addition, concentration or detention camps were built to detain the victims of 2012's attacks where they are now living in an inhuman condition with a number of restrictions.

#### **4.8 Polarization (Stage 6)**

**4.8.1** The perpetrators aim to drive the members of the targeted group away from their own society and even country in Polarization.<sup>249</sup> They broadcast propaganda to encourage hate, and implement laws on prohibiting intermarriage and social interaction between communities.<sup>250</sup> The members of the targeted group are often forbidden to attend school or gather in public or participate in politics.<sup>251</sup> The most common event of Polarization is blaming the members of the targeted group for any terrorist attacks that take place in the concerned country.<sup>252</sup> Again, it is argued that the perpetrators sometimes commit terrorist activities to generate difference between the communities of the country.<sup>253</sup> For illustration, the Bosnian Muslims were identified as terrorists and Islamic extremists by the Serbian and Bosnian Serbs.<sup>254</sup> In one of the incidents, their state-run Belgrade TV broadcast that, 'Muslim extremists have come up with the most horrifying means in the world of torturing people. They fed the Serb children to the lions in the city's zoo'.<sup>255</sup> However, it was discovered that the news was false and thus, it was regarded as a polarizing propaganda to enhance hatred against the Bosnian Muslims.<sup>256</sup>

**4.8.2** In this study, Polarization accounts for 90.63 percent of the total Rohingya respondents. The events described by total 96.61 percent male and 81.08 percent female respondents have been tagged as Polarization.<sup>257</sup> This study showed in Discrimination that most of the schools, Mosques and *madrasas* of the Rohingya communities were closed since 2012, their right to vote and to stand as a candidate at political elections was rescinded in 2015, and restrictions were imposed on their marriage since or prior to 2005. Organization stage endeavours to highlight the dynamics and happenings that forced the Rohingyas to leave their own society

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<sup>249</sup> Stanton (n 161).

<sup>250</sup> Ibid.

<sup>251</sup> The Sentinel Project (n 184).

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Karmen Erjavec and Zala Volčič, 'War on Terrorism' as a Discursive Battleground: Serbian Recontextualization of G.W. Bush's Discourse', [2007] 18(2) *Discourse & Society*, 123, 137.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Classification (stage 1), Symbolization (stage 2), Organization (stage 5), and Persecution (stage 8) have been assigned to this stage.

and country ever more. A 30-year-old Rohingya man stated that, [...] during the military crackdown in 2012, they started threatening us to leave Myanmar. They used to say that, ‘you do not belong to Myanmar. But if you convert your religion from Islam to Buddhism, then you will belong to our country’.

**4.8.3** In July 2014, an allegation was made against the Muslim Rohingyas that, they have raped a Buddhist woman and this incident reinforced the “ethnic hatred” between the Buddhists in general and the Muslim Rohingyas.<sup>258</sup> Nonetheless, the Myanmar government did not take any authoritarian initiative to stop such hatred amongst them.<sup>259</sup> In this regard, a 32-year-old Rohingya woman described an event of 2015:

I was forcefully taken to a school camp by the military with the help of the local maghs. Entering into the camp, I found that there were hundreds of Muslim Rohingya women yelling inside the camp. After some time, a few men wearing military uniform came to us and shouted, ‘the Rohingya men raped our Buddhist women, now we will rape you all’. After torturing [raping] some of us, they burnt some bodies as well.

Besides, the perpetrators used to put “polarizing propaganda” among the general people against the Rohingya people on air. For example, a slogan was hung on every immigration office of Myanmar that read as: No soil can eliminate a Nation but a race can dominate the whole nation.<sup>260</sup> Besides, many respondents of this study alleged that they were termed as “extremists” in the broadcast media throughout Myanmar. More specifically, a 58-year-old Rohingya man recounted:

On the following day of clashes between the Rohingyas and Arakanese Buddhists in 2012, the Myanmar military and police force began arresting the people from our villages. They used to visit our villages repeatedly and arrest our people accusing them of joining a terrorist group. We thought that our people were taken to the police station but after a few days we found dead bodies of some of them and some were still missing. As a result, many of us left Myanmar including my family in 2012 and came to Bangladesh by boats.

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<sup>258</sup> ‘Buddhist monk uses racism and rumours to spread hatred in Burma’, *The Guardian*, 18 April 2013, available at: <<https://www.theguardian.com/world/2013/apr/18/buddhist-monk-spreads-hatred-burma>> accessed on 20 November 2019; Human Rights Watch, ‘All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State’, 22 April 2013, available at: <<https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>> accessed on 20 November 2019.

<sup>259</sup> Ibid.

<sup>260</sup> International Crisis Group, ‘Buddhism and State Power in Myanmar’, 5 September 2017, available at: <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/290-buddhism-and-state-power-myanmar>> accessed on 20 September 2019; See also, Penny Green, Thomas MacManus and Alicia de la Cour Venning, ‘Countdown to Annihilation: Genocide in Myanmar’, [2015] *International State Crime Initiative* 1, 47.



**4.8.4** When Pramila Patten, the special envoy on sexual violence in conflicts, visited Myanmar in 2017 to discuss the Rohingya issue with the government officials, she was told by the representatives of the military and civilian government that the Rohingyas fled because they were allied with the terrorists groups and they wanted to avoid law enforcement.<sup>261</sup> It should be noted that the *Arakan Rohingya Salvation Army (ARSA)* was allegedly emerged in 2013 as a Rohingya revolutionary group active in northern Rakhine State of Myanmar.<sup>262</sup> Nevertheless, the intention of the Myanmar government seems otherwise because the existence of entire Rohingya community has been endangered in the name of combating terrorism. Therefore, this study suggests that the Rohingyas were polarized for years by implementing discriminatory policies and practices in relation to their social and personal lives, blaming them as terrorists, and forcing them to leave Myanmar through persecutions of different forms.

#### **4.9 Preparation (Stage 7)**

**4.9.1** This stage involves outlining the processes of bringing “final solution” by the perpetrators through systematic methods of extermination.<sup>263</sup> These processes are justified as ethnic cleansing, or purification, or counter-terrorism measures.<sup>264</sup> The armies, militias, and even the general people favoured by the dominant group are trained and armed, and offered the clear-cut choice of “kill or be killed”.<sup>265</sup> The dominant group also weakens the targeted group by arbitrarily arresting or detaining its members, and seizing their belongings so that they cannot defend themselves.<sup>266</sup> Moreover, the members of the group are isolated through forced migration and/or detention into concentration camps.<sup>267</sup> For example, the authorities expatriated the whole Armenian population of Turkey to Syrian Desert within a very short time although they knew that they could hardly survive there.<sup>268</sup>

**4.9.2** Preparation comprises all the acts that reflect the intention of the perpetrators to destroy the targeted group. This specific stage directly interacts and overlaps with Organization (stage 5) and Polarization (stage 6). In this study, Preparation (stage 7) makes up 92.71 percent of the total respondents, including 98.31 percent male and 83.78 percent female Rohingyas.<sup>269</sup> It

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<sup>261</sup> Star Online Report, ‘Suu Kyi ‘Skipped’ Talks on Rohingya Rape at UN Meeting’, *The Daily Star*, 27 December 2017, available at: <<https://www.thedailystar.net/rohingya-crisis/suu-kyi-skipped-talks-on-rohingya-rape-at-un-meeting-1511170>> accessed on 1 April 2020.

<sup>262</sup> Iftekhharul Bashar, ‘Rohingya Crisis and Western Myanmar’s Evolving Threat Landscape’, [2019] 11(6) *Counter Terrorist Trends and Analyses* 1, 14; Please go through the Preparation stage for further details of ARSA.

<sup>263</sup> Burlison and Giordano (n 183).

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> The Sentinel Project (n 184).

<sup>267</sup> Ibid.

<sup>268</sup> Deutsche Bank AG, Historisches Institut, ‘The Ten Stages of Genocide’, available at: <<https://genocide.mhmc.ca/en/genocide-stages>> accessed on 25 March 2020.

<sup>269</sup> Persecution (stage 8) has been assigned to this stage.



has been evident in the Organization stage that the Myanmar military and paramilitary groups prepared themselves with the support of the concerned authorities and deliberately launched attacks on the Rohingyas in different periods as per their blueprints. Furthermore, the incidents of arbitrary arrests and confinement of the Rohingyas especially young people and looting of their properties after 2012 have evidently been tagged as Polarization because instead of giving them protection, they were blamed as terrorists by the authorities. Preparation is an advanced phase as the perpetrators usually start systematic implementation of their plan of exterminating the members of the targeted group in this stage. Concerning the actions and plans of the perpetrators, a 36-year-old Rohingya man said:

We did not know when the military installed land mines at our village. On one morning of October 2017, the mines started exploding and the military personnel started attacking us with guns, launchers etc. Due to the mine explosions, my left leg was severely injured. I became senseless and after awakening I found myself in the nearest forest. I started searching my family members but I found none. I came to know that some of my friends brought me to the forest. By putting mines near our villages, the military killed hundreds of people in a single spot. We all understood that the government made an arrangement to force us to leave our homeland.

**4.9.3** It has been seen that the perpetrators used to justify their actions committed against the entire Rohingya ethnic group as simply “ethnic cleansing” or “counter-terrorism measure” or “clearance operation”.<sup>270</sup> Although the clashes between the Rohingyas and Buddhists in Rakhine State can be traced back to World War II, Erin Blakemore claimed that the Rohingyas started becoming direct sufferers of state-sponsored persecution from 1962 when this country turned into a military State.<sup>271</sup> In the beginning, the military launched the “*Operation King Dragon*”, also known as “*Operation Nagamin*”, targeting the Rohingya Muslims during 1977-78.<sup>272</sup> According to several reports, this operation resulted in forcible transfer of 0.2 million Rohingyas into Bangladesh.<sup>273</sup> After that, the most prominent attacks, *inter alia*, were conducted against particularly the Rohingya people by the military in 1982, 1991-92, 2001, 2012, 2016, and 2017. During attacks of all these years including 1978, the perpetrators were accused of committing killings, rape, arson and robbery against the Rohingya people.<sup>274</sup>

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<sup>270</sup> Sufyan bin Uzayr, ‘Buddhism and Ethnic Cleansing in Myanmar’, *Foreign Policy in Focus*, 19 August 2014, available at: <<http://fpif.org/buddhism-ethnic-cleansing-myanmar/>> accessed on 1 November 2019; International Crisis Group (n 74).

<sup>271</sup> Erin Blakemore, ‘Who are the Rohingya People?’, National Geographic, available at: <<https://www.nationalgeographic.com/culture/people/reference/rohingya-people/>> accessed on 2 April 2020.

<sup>272</sup> Ibid.

<sup>273</sup> Human Rights Watch (n 258).

<sup>274</sup> Ibid.

**4.9.4** The “*Operation Clean and Beautiful Nation*”, officially known as “*Operation Pyi Thaya*”, was conducted by the military during 1991-92 purportedly as a response to the attacks carried out by the Rohingya Solidarity Organization (RSO) since its inception in the 1980s.<sup>275</sup> This operation forced more than 0.25 million Rohingya people to flee to Bangladesh.<sup>276</sup> In 2012, a number of anti-Rohingya leaflets and public statements were issued by the Buddhist monks (the *sangha*) and Rakhine Nationalities Development Party (RNDP)<sup>277</sup> with the demands of eliminating the Rohingyas from Myanmar using the term “ethnic cleansing” for the first time.<sup>278</sup> Despite releasing the statements in public meetings, no local, State, and national authorities raised any objection.<sup>279</sup> Instead, they acted in support of the campaigns through denying rights of the Rohingyas and forcing them to leave their country.<sup>280</sup> Consequently, several violent clashes continued from 2012 to 2015 in Rakhine State and around 0.125 million Rohingyas have fled to Bangladesh during this specified timeframe.<sup>281</sup> Meanwhile, the ARSA started organizing after the June 2012 deadly communal violence and claimed that its members were fighting for the protection of rights of the Rohingyas.<sup>282</sup> It also confirmed that the members of the ARSA do not have any affiliation with the terrorists groups.<sup>283</sup>

**4.9.5** The ARSA officially launched its initial attack on 9 October 2016 on the Myanmar Border Guard Police (BGP) headquarters and two other bases.<sup>284</sup> The government also made the “*Aqa Mul Mujahidin (AAM)*” group responsible for such attack.<sup>285</sup> It was reported that a total of 9 policemen were killed in that assault and hence, the Myanmar military began a “*clearance operation*” in the Rakhine State against the Rohingyas.<sup>286</sup> While allegations of mass killings and gang rapes of Rohingyas by the military created international criticism, the

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<sup>275</sup> Ibid; The Rohingya Solidarity Organization (RSO) was formed by the Rohingya nationalists as a radical militant group.

<sup>276</sup> Human Rights Watch (n 258).

<sup>277</sup> The RNDP was formed by the Arakanese nationalists in 2010.

<sup>278</sup> Human Rights Watch, ‘Burma: End ‘Ethnic Cleansing’ of Rohingya Muslims Unpunished Crimes against Humanity, Humanitarian Crisis in Arakan State’, 22 April 2013, available at: <<https://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>> accessed on 27 March 2020.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Ashutosh Pandey, ‘Myanmar’s Rohingya: A History of Forced Exoduses’, 09 September 2017, available at: <<https://www.dw.com/en/myanmars-rohingya-a-history-of-forced-exoduses/a-40427304>> accessed on 3 April 2020.

<sup>282</sup> Basher (n 262).

<sup>283</sup> Ibid.

<sup>284</sup> Ibid; *See also*, International Crisis Group (n 235).

<sup>285</sup> Counter Extremism Project, ‘Myanmar (Burma): Extremism & Counter-Extremism’, available at: <[https://www.counterextremism.com/sites/default/files/country\\_pdf/MM-12172019.pdf](https://www.counterextremism.com/sites/default/files/country_pdf/MM-12172019.pdf)> accessed on 2 April 2020.

<sup>286</sup> Reuters, ‘Myanmar says military operation in troubled Rakhine has ended’, 16 February 2017, available at: <<https://www.reuters.com/article/us-myanmar-rohingya-army/myanmar-says-military-operation-in-troubled-rakhine-has-ended-idUSKBN15V0BI>> accessed on 3 April 2020.

government responded that ‘the operation was a lawful counter-insurgency campaign’.<sup>287</sup> The UN projected that over 0.069 million Rohingyas escaped from their homeland in the Northern Rakhine State of Myanmar to Bangladesh due to the attack of 2016.<sup>288</sup> The perpetrators renewed such operation on 25 August 2017 and have been continuing the same against the Rohingyas since then.<sup>289</sup> As a result, most of the Rohingyas are fleeing to Bangladesh although a small number of them are migrating to Malaysia, India, Thailand, and Indonesia, too.<sup>290</sup>

**4.9.6** The aforesaid operations of diverse periods are officially referred to as either “clearance operation”, or “ethnic cleansing”, or “counter-terrorism measures” by the Myanmar security forces. On the other hand, it has been reported again and again that the Rohingya Muslims are being persecuted in Myanmar for decades. More specifically, the official line of the security forces is that they are responding to ‘a serious threat to Myanmar’s unity, stability, and sovereignty from Rohingya terrorists, who are supported by international Islamist groups’.<sup>291</sup> It is alleged that during the then ongoing crackdowns between the Rohingya and Buddhist extremists, the international terrorist groups such as *Al-Qaeda*, *the Islamic State (ISIS)*, *the Taliban*, and *Al-Shabab* tried to radicalize and engage the aggravated Rohingya individuals with their activities.<sup>292</sup> However, it is argued that there is perhaps no actual evidence to establish that the Rohingyas have any transnational Islamist or jihadist agenda and/or provided domestic assistance for those terrorists groups.<sup>293</sup> Furthermore, it is advised that the RSO, ARSA, and AAM operate more like guerilla movements than terrorist organizations.<sup>294</sup>

**4.9.7** In such scenarios, the security forces launched a number of operations to cut off an entire community instead of addressing the particular conflicts between the Rohingya and Buddhist extremists. Patrick Burgess, President of the Asia Justice and Rights, opined that while Myanmar is arguing that it adopted counter-terrorism measures, the scenario seems divergent because millions of Rohingyas have fled in fear of such measures.<sup>295</sup> With regards to Myanmar, he added that many Rohingya people have allegedly faced brutal atrocities and their whole generation has been wiped out from Myanmar. In line with his opinion, this study suggests that the perpetrators of Myanmar intended to justify their criminal actions *en bloc* against the entire Rohingya ethnic group by using the terms “ethnic cleansing” or “clearance operation” or “counter-terrorism measures” while their main goal was to expel them from Rakhine State of Myanmar.

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<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Andrew Selth, ‘Myanmar’s Armed Forces and the Rohingya Crisis’, [2018] *United States Institute of Peace*, 1, 6, available at: <<https://www.usip.org/sites/default/files/2018-08/pw140-myanmars-armed-forces-and-the-rohingya-crisis.pdf>> accessed on 4 April 2020.

<sup>290</sup> Eleanor Albert and Lindsay Maizland, ‘The Rohingya Crisis’, 23 January 2020, available at: <<https://www.cfr.org/backgrounder/rohingya-crisis>> accessed on 4 April 2020.

<sup>291</sup> Selth (n 6), 289.

<sup>292</sup> Counter Extremism Project (n 285).

<sup>293</sup> Ibid; *See also*, Selth (n 6), 289.

<sup>294</sup> Counter Extremism Project (n 285).

<sup>295</sup> Patrick Burgess was interviewed at Cox’s Bazar by the principal researcher on 19th December 2018.

#### 4.10 Persecution (Stage 8)

**4.10.1** This stage involves a rise in brutality and torture, both physical and mental, against the members of the targeted group.<sup>296</sup> The perpetrators usually mistreat the targeted group with the purpose of putting its members in a helpless situation so that they cannot fight against future exploitation and ultimate extermination.<sup>297</sup> In case of State sponsored genocide, the private properties such as homes, money, business, and material commodities of the victims are seized, and the individuals are isolated and then detained into concentration camps.<sup>298</sup> In other words, the victims are deprived of their access to food, water, shelter, and medical supplies and treatment that they need for their survival. On the other hand, the members of the targeted group are forcibly deported from their country. For example, thousands of Jews were persecuted by confining them into the concentration camps.<sup>299</sup>

**4.10.2** Persecution also involves making list of community leaders, intellectuals and young men to arrest and detain them.<sup>300</sup> This stage makes up the highest percentage *i.e.* 100.00 percent which means the events of Persecution have been found in the statements of all the male and female Rohingya respondents. As Persecution initiates with identifying the victims as members of a distinct ethnic or religious group, classification has been assigned to this stage along with Organization, Preparation, and Extermination. A 60-year-old Rohingya Muslim Imam said:

We had seven mosques in our village, Tumburu, Rakhine. I was an Imam<sup>301</sup> in one of the mosques of our village. The Myanmar military burnt all the mosques one after another. Before the military attacks of August 2017, the police raided our village, arrested many Imam's of our villages including my elder brother [62-year-old] who was Imam of another mosque, and opened fire on our locality. Subsequently, we came to know that the military burned the Imams alive.

It has also been evident in Organization that the *Moulovīs* and rich Rohingya people were particularly targeted and killed. Similarly, the aforementioned incident can be tagged as Persecution as it represents that the perpetrators targeted those individuals of Rohingya community who could potentially offer leadership to its members during operations conducted by the military. Moreover, Preparation demonstrates how the Rohingya young people were arrested at random and then viciously killed accusing them as terrorists. These actions clearly mirror the policy of the perpetrators to weaken the Rohingya group.

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<sup>296</sup> Burleson and Giordano (n 183).

<sup>297</sup> The Sentinel Project (n 184).

<sup>298</sup> Stanton (n 161).

<sup>299</sup> Montreal Holocaust Museum (n 191).

<sup>300</sup> The Sentinel Project (n 184).

<sup>301</sup> “*Imam*” is a Muslim person who used to lead prayers in the mosque.

**4.10.3** Organization also showed that the victims were forcibly relocated and confined into the concentration camps after 2012 where they were deprived of their freedom of movement, access to food, water, and medical supplies and treatment. Besides, rape of the women, and inhuman torture and indiscriminate killings are the common phenomenon in cases of the Rohingya persecution. A 25-year-old Rohingya woman stated:

One night before 2-3 days of Eid-ul-Adha of 2017, Myanmar military entered my house by breaking the main door. My husband and I woke up and became shocked to see them. They started beating my husband with their guns. I was around 8-month pregnant then. Two military personnel dragged me to the floor from my bed. I started begging them to leave me saying that I am pregnant. But, one of them started torturing [raping] me, I tried to resist but I could not protect myself and even my child. I don't know as to how many of them tortured [raped] me at that night. I fell unconscious. I could not protect my husband as well; they killed him too.

It has been unveiled again and again in this study that the perpetrators used to confiscate the belongings of the Rohingyas and threaten them to leave their homeland. A 45-year-old Rohingya man described the cruelty of the Myanmar military by sharing his hostile experiences of persecution:

2-3 days before of *Eid-ul-Adha* of 2017, the Chairman of our village came to our village and gathered 20-30 men and women, including me and my wife. He ordered us to go with him to a nearby hill but we were scared and some of us refused to go there. He assured us that we will be safe and he will ensure our protection. When we were heading towards the top of the hill, we noticed 40-50 Rohingya men and women surrounded by the military. We were told to keep quiet there and surrender all of our belongings to the military personnel. Later on, they confined us with the remaining Rohingya people. Some of us shouted at the Chairman and protested against his false promise. They were threatened to be killed by shooting. At the evening, they took around 8-10 young girls including my wife to their tents. We heard screaming of the girls but could do nothing for them. Some of us including me somehow escaped from there at night and fled to Bangladesh by boat. I lost my total family and I do not know whether my wife is living or not.

**4.10.4** According to the report of *Human Rights Watch*, a total of 0.2 million and 0.25 million Rohingyas were driven out of Myanmar in 1978 and 1991-92 respectively.<sup>302</sup> Subsequently, more than 1.0 million Rohingyas have fled to Bangladesh in different periods including the largest and fastest Rohingya influx since 25 August 2017.<sup>303</sup> Besides, an estimated 0.128 million Rohingya people were displaced and confined in the Internally Displaced Person (IDP) camps, also referred to as concentration camps in the previous stages, after the conflicts

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<sup>302</sup> Human Rights Watch (n 258).

<sup>303</sup> Human Rights Watch, 'India: 7 Rohingya Deported to Myanmar', 4 October 2018, available at: <<https://www.hrw.org/news/2018/10/04/india-7-rohingya-deported-myanmar>> accessed on 6 April 2020; See also, United Nations High Commissioner for Refugees (UNHCR), 'Rohingya Emergency', 31 July 2019, available at: <<https://www.unhcr.org/rohingya-emergency.html>> accessed on 6 April 2020; UNHCR, 'Rohingya Refugee Emergency at a Glance', available at: <<https://unhcr.maps.arcgis.com/apps/Cascade/index.html?appid=5fdca0f47f1a46498002f39894fcd26f>> accessed on 6 April 2020.

of 2012 where they are tortured, starved and even slaughtered.<sup>304</sup> Dr. Katherina Hoffman, member of the Working Group Migration – Gender – Politics at Carl Von Ossietzky University Oldenburg, Germany, opined that the Rohingyas are living in Cox’s Bazar as stateless people, and the pattern of their migration confirms that it was not voluntarily migration rather they were forced to leave their country.<sup>305</sup> This study suggests that the Rohingya people were persecuted and escaped from Myanmar because of persistent mistreatment, raping of their women, girls and young children, looting of their properties, and getting killing.

#### 4.11 Extermination (Stage 9)

**4.11.1** Extermination refers to the fastest and planned actions of committing “mass killing” of the members of the targeted group, and digging up mass graves to bury them.<sup>306</sup> This stage also involves the method of “mass rape” of the women of the targeted group to pollute purity of their future generations.<sup>307</sup> Forced sterilization of the victims is an additional process that the perpetrators sometimes use in this stage.<sup>308</sup> In case of State sponsored genocide, the armed forces of the government engage the private individuals of other groups and the paramilitary forces to conduct such mass killing and mass rape.

**4.11.2** Extermination is considered as nearly the final stage of genocide because mass killing of victims are usually committed to destroy the group as a whole. In this study, Extermination makes up 77.08 percent of the total Rohingya respondents.<sup>309</sup> It means that 81.36 percent male and 70.27 percent female Rohingya respondents have either directly witnessed or become victims of killing and raping of their family members, relatives, neighbours, and villagers. A 40-year-old Rohingya man stated:

On the night of 28<sup>th</sup> August 2017, about 100-150 Myanmar militarymen and many armed Buddhist *maghs* attacked our village without giving any warning. They indiscriminately started firing rockets to our village. When I was running away from my village, with my family members, I witnessed dead bodies of many Rohingya people in the streets. I even saw that some families were padlocked in their houses from outside and then set on fire to let the members of the family burn inside.

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<sup>304</sup> Global Conflict Tracker, ‘Rohingya Crisis in Myanmar’, 9 April 2020, available at: <<https://www.cfr.org/interactive/global-conflict-tracker/conflict/rohingya-crisis-myanmar>> accessed on 9 April 2020; ‘US Holocaust Museum highlights plight of Myanmar’s downtrodden Rohingya Muslims’, *Fox News*, 6 November 2013, available at: <<https://www.foxnews.com/us/us-holocaust-museum-highlights-plight-of-myanmars-downtrodden-rohingya-muslims>> accessed on 9 April 2020.

<sup>305</sup> Dr. Katherina Hoffman was interviewed at Sheikh Hasina Youth Training Center, Savar by the principal researcher on 22nd January 2019.

<sup>306</sup> Burleson and Giordano (n 183); The Sentinel Project (n 184).

<sup>307</sup> The Sentinel Project (n 184).

<sup>308</sup> Ibid.

<sup>309</sup> Organization (stage 5) and Persecution (stage 8) have been assigned in this stage.



**4.11.3** It has been demonstrated in Organization that the local Buddhist mobs and paramilitary forces were arranged to participate in the attacks on the Rohingyas with the Myanmar military. This study also explored that the local *maghs*, Chairmen, and Members took part in the operations launched by the military of Myanmar while the government barely took any action against them to protect the Rohingyas. The Myanmar government rather used to obstruct both global and self-governing media agencies from verifying the details of overall casualties of the military attacks on the villages of Rohingyas in the Northern Rakhine State and the camps of IDPs.<sup>310</sup> Therefore, the total number of Rohingyas killed during the military operations could not precisely be detected. However, it has been stated in many sources that more than 0.0010 million Rohingya people have been killed in the Rakhine State of Myanmar since 25 August 2017.<sup>311</sup> The *Independent Permanent Human Rights Commission* reported that ‘[o]n 10th January 2018, Myanmar’s military admitted that security forces and villagers summarily killed 10 captured Rohingya people and buried them in a mass grave outside *Inn Din*, a village in *Maungdaw*, Rakhine State.’<sup>312</sup> This account indicates the continuation of systematic killings of Rohingyas by the perpetrators for decades. A 38-year-old Rohingya woman who lost 16 members of her family stated:

On one morning of last week of August 2017, the Myanmar military randomly assembled about 400-450 people of our village in an agricultural field. After that, they classified the men and women. Approximately 200-300 men were placed in a row and killed by shooting at once in front of our eyes. Subsequently, they dragged around 100-150 women including me to a house and confined all of us inside the house. They did not provide us any food or water for hours. During the evening of the same day 20-30 military personnel entered the house and began torturing [raping] the women. I was also tortured [raped] but I had no choice but to scream and bear the pain. At mid-night, they put fire on the house and many women died while sleeping. I was among a few of us who ran outside the house and fled to Bangladesh.

**4.11.4** It should be mentioned that this study is based on interview of 37 Rohingya women, including 14 rape survivors who have fled Rakhine State to Bangladesh. According to the narration of 9 rape survivors, five or more uniformed military personnel raped them in a single

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<sup>310</sup> Independent Permanent Human Rights Commission, ‘Report of the OIC-IPHRC Fact Finding Visit to Rohingya Refugees’ Camps in Bangladesh to Assess Human Rights Situation of Rohingya Muslim Minority in Myanmar’, 2-6 January 2018, 1, 9, available at: <[https://www.oic-iphrc.org/en/data/docs/field\\_visits/652137.pdf](https://www.oic-iphrc.org/en/data/docs/field_visits/652137.pdf)> accessed on 9 April 2020.

<sup>311</sup> Ibid; See, Djaouida Siaci, ‘The Gambia Charges Genocide at the World Court: Pursuing and Achieving Justice for the Rohingya’, *Middle East Institute* (18 February 2020), available at: <<https://www.mei.edu/publications/gambia-charges-genocide-world-court-pursuing-and-achieving-justice-rohingya>>, accessed on 20 February 2020.

<sup>312</sup> Ibid.



event that qualifies to be “gang rape”<sup>313</sup>. In relation to the operation of 25 August 2017, the *Human Rights Watch* reported that although the exact number of rapes of Rohingya women cannot be estimated, the raping of women and girls conducted by the military of Myanmar seems to be widespread and systematic.<sup>314</sup> The aid groups working with Rohingyas in the camps of the Cox’s Bazar region of Bangladesh reported hundreds of rape cases and alleged that the Myanmar military was accountable for committing mass rape against the Rohingya women<sup>315</sup>

**4.11.5** Nicole Janisiewicz, International Attorney and Policy Advisor, who served as a prosecutor in the ICTY opined that, the patterns of persecuting the Rohingya people which includes killing them, raping their women, and obviously silence of Myanmar government reveal the existence of genocidal intent.<sup>316</sup> This study suggests that involving the Buddhists mobs, local *maghs*, and the paramilitary forces along with the military to conduct mass killing and mass rape indicates commission of a State-sanctioned genocide against the Rohingyas in Myanmar. This study also argues that the intensity of the killing and rapes across the Rakhine State of Myanmar ascertains Extermination as almost the concluding stage of Rohingya genocide.

#### **4.12 Denial (Stage 10)**

**4.12.1** This stage refers to denial of genocide by the authorities on legal or definitional justification.<sup>317</sup> The concerned authorities block investigation of the crimes and destroy the evidences by digging mass graves, burning the dead bodies, and threatening the witnesses.<sup>318</sup> They also blame the victims for the casualties and argue that their actions do not qualify to be genocide.<sup>319</sup> Besides, they deny implementation of their prejudicial policies and operational measures against the targeted group.

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<sup>313</sup> According to Cambridge dictionary, “gang rape” is defined as ‘an occasion when a group of people use violence or threatening behaviour to force someone to have sex with all of them’; *See*, Cambridge dictionary (online), available at: <<https://dictionary.cambridge.org/dictionary/english/gang-rape>> accessed on 10 April 2020.

<sup>314</sup> Rick Gladstone, ‘Rohingya Were Raped Systematically by Myanmar’s Military, Report Says’, *The New York Times*, 16 November 2017, available at: <<https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html>> accessed on 11 April 2020; *See also*, Human Rights Watch, ‘Burma: Widespread Rape of Rohingya Women, Girls Soldiers Commit Gang Rape, Murder Children’, 16 November 2017, available at: <<https://www.hrw.org/news/2017/11/16/burma-widespread-rape-rohingya-women-girls>> accessed on 11 April 2020.

<sup>315</sup> *Ibid.*

<sup>316</sup> Nicole Janisiewicz was interviewed at Liberation War Museum, Dhaka by the principal researcher on 25th March 2019.

<sup>317</sup> The Sentinel Project (n 184).

<sup>318</sup> Stanton (n 161).

<sup>319</sup> The Sentinel Project (n 184).

**4.12.2** In this study, Denial accounts for 67.71 percent of the total Rohingya respondents. More specifically, a total of 72.88 percent male and 59.46 percent female respondents responded that they have witnessed excavating mass graves, and/or burning dead bodies as well as they were either directly or indirectly intimidated not to give testimony against the perpetrators at different times. A 31-year-old Rohingya man detailed:

Many “*Muftis*” (Islamic scholars) were targeted, killed and their houses were burnt. In October 2016, the military initially gathered a total of 19 wealthy, religious, and educated Rohingya men to a camp. After that, they took them to a Buddhist temple. They first killed six of them at the Buddhist temple and severely tortured others to death. Later on, they dug up a mass grave and buried their dead bodies all together.

At the beginning of September 2017, the Myanmar government claimed that the Rohingyas deliberately set their own village and houses on fire.<sup>320</sup> Therefore, we tried to explore truthfulness of such information during the FGDs of this study. The Rohingya respondents denied this fact and replied that the military, and Rakhine mobs or local *maghs* did this in their village. A 26-year-old Rohingya man depicted:

I was sleeping in an afternoon. My mother suddenly woke me up and informed me that our neighbouring village had been set on fire. I immediately looked outside through the window of my room and saw that black smoke was floating in the sky. I went to a little closer to the village and noticed that the villagers were trying to put out the fires and chase away the military and Rakhine mobs. I still remember that some of them were throwing fireballs made from rope at the houses of that village.

**4.12.3** In early October 2017, the *Amnesty International* reported that a systematic burning of Rohingya villages were happening based on its active ‘fire-detection data, satellite imagery, photographs and videos from the ground’, and testimonies of the Rohingyas.<sup>321</sup> It has been reported on 18 December 2017 that a total of 354 villages of the Rohingya people were destroyed, fully or partly, in the Rakhine State of Myanmar since 25 August 2017.<sup>322</sup> However, the Myanmar government urged that the Rohingyas burned their villages themselves and attacked the Myanmar security forces.<sup>323</sup>

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<sup>320</sup> ‘Rohingya Muslims respond to claims they set fire to their homes’, *BBC News*, 14 September 2017; available at: <<https://www.bbc.com/news/av/world-asia-41262953/rohingya-muslims-respond-to-claims-they-set-fire-to-their-homes>> accessed on 18 March 2020; *See also*, ‘They burned their own houses and ran away’: Myanmar police tell journalists Rohingya torched their own village’, *South China Morning Post*, 7 September 2017, available at: <<https://www.scmp.com/news/asia/south-asia/article/2110155/they-burned-their-own-houses-and-ran-away-myanmar-police-tell>> accessed on 12 April 2020.

<sup>321</sup> Independent Permanent Human Rights Commission (n 310).

<sup>322</sup> Chohan (n 77).

<sup>323</sup> Independent Permanent Human Rights Commission (n 310).

**4.12.4** The government not only blamed the victims but also strove to conceal the evidences to block investigation of the crimes committed against the Rohingyas. *Tun Dr Mahathir Mohamad*, Prime Minister of Malaysia, raised a very pertinent question in the UN Headquarters on 24 September 2019 as regards the operations conducted by the Myanmar military by expressing that,

[t]he Myanmar authorities have also denied access to some UN officials and humanitarian aid workers. If Myanmar has nothing to hide, why bar others from seeing the situation in Rakhine? Let these officials and aid workers visit, inspect and assist those living in the camps.

The *Human Rights Watch* recently claimed that investigations carried out by the Myanmar officials on its 2017's attacks failed to address the human rights abuses against the Rohingyas.<sup>324</sup> However, it has been reported in the *South China Morning Post* on 25 October 2018 that *Aung San Suu Kyi's* government refused to accept the independent international investigations on the alleged crimes committed against the Rohingyas.<sup>325</sup> Likewise, while a couple of high-level UN officials including a UN Fact-Finding Mission alleged that mass atrocities have been committed against Rohingya people, but the political leaders of Myanmar denied the fact.<sup>326</sup>

**4.12.5** As a first ever attempt, the Republic of The Gambia, a Muslim West African nation, lodged a case at the International Court of Justice (ICJ) on 11 November 2019 against Myanmar for violating the obligations set out in the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948, and sought for emergency measures to be taken against the military.<sup>327</sup> In December 2019, Myanmar State Counselor *Aung San Suu Kyi* appeared before the ICJ and played down the atrocities committed against the Rohingyas.<sup>328</sup> Nonetheless, the Myanmar government was ordered by the Court's initial ruling to take emergency measures to stop persecution committed against the Rohingyas.<sup>329</sup> Hence, this study claims that in an

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<sup>324</sup> Human Rights Watch, 'Myanmar: Government Rohingya Report Falls Short War Crimes Admitted, but Full Findings Not Released', 22 January 2020, available at: <<https://www.hrw.org/news/2020/01/22/myanmar-government-rohingya-report-falls-short>> accessed on 13 April 2020.

<sup>325</sup> 'Myanmar's Genocide against Rohingya is Ongoing and Aung San Suu Kyi is in 'Total Denial', UN Investigator Warns', *South China Morning Post*, 25 October 2018, available at: <<https://www.scmp.com/news/asia/southeast-asia/article/2170125/myanmars-genocide-against-rohingya-ongoing-and-aung-san-suu>> accessed on 2 October 2019.

<sup>326</sup> Jonathan Head, 'Rohingya crisis: Villages destroyed for government facilities', *BBC News*, 10 September 2019, available at: <<https://www.bbc.com/news/world-asia-49596113>> accessed on 2 October 2019.

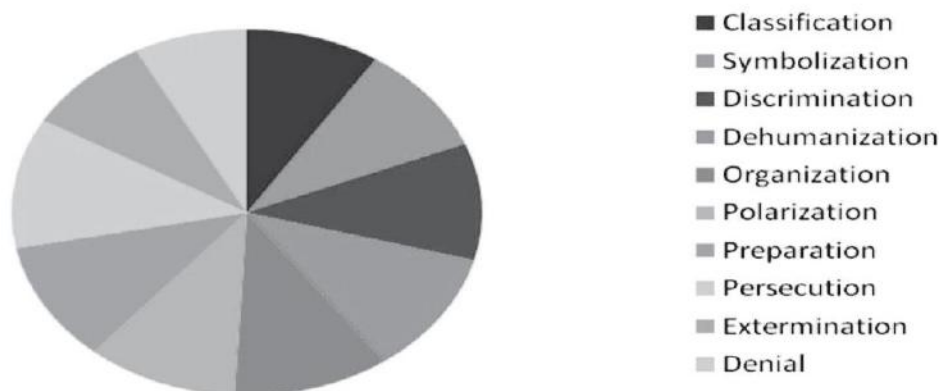
<sup>327</sup> Stephanie van den Berg, 'Gambia files Rohingya genocide case against Myanmar at World Court: Justice Minister', *Reuters*, 11 November 2019, available at: <<https://www.reuters.com/article/us-myanmar-rohingya-world-court/-1jhWrg0euHYOKbdx5UYtbXog>> accessed on 25 November 2019.

<sup>328</sup> 'Myanmar Rohingya: What you need to know about the crisis', *BBC News*, 23 January 2020, available at: <<https://www.bbc.com/news/world-asia-41566561>> accessed on 14 April 2020.

<sup>329</sup> *Ibid*; See also, D. Wes Rist, 'What Does the ICJ Decision on The Gambia v. Myanmar Mean?', [2020] 7(2) *American Society of International Law Insights*, available at: <[https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean#\\_edn7](https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean#_edn7)> accessed on 15 April 2020.

attempt to avoid international prosecution of the perpetrators for committing genocide and other crimes against the Rohingya people, Myanmar has indeed invoked a defense of “denial and defiance”.

### Stanton's 10-Stage Model of Genocide: Percentage of Respondents



*Figure 3: Respondents' Percentage in Genocide Stages*

**4.12.6** Conclusion of this chapter can be drawn by suggesting that the events narrated by the Rohingya respondents conform to Stanton’s model of ten stages of genocide. The analysis of this study found that the genocidal policies were not necessarily carried out following a literal sequence of stages by the perpetrators. However, all the ten stages of genocide were present in different phases of the overall situation of the Rohingya people in Myanmar. Based on the narratives of the respondents, this study also divided the perpetrators into three categories. The government belongs to the first category which made policies concerning Classification (stage 1), Symbolization (stage 2), Discrimination (stage 3), and Dehumanization (stage 4). Second type of perpetrator is the military personnel who were the primary executors of plans relating to Organization (stage 5), Polarization (stage 6), Preparation (stage 7), Persecution (stage 8) and Extermination (stage 9). Finally, the local police, *Maghs*, and Buddhist mobs are the third kind of perpetrators who have collaborated with the military mainly in the Persecution (stage 8) and Extermination (stage 9) stages.<sup>330</sup> In short, this study offers that the second and third categories of perpetrators played a vital role in conducting the genocidal acts against the Rohingyas by implementing the genocidal policies and orders of the Myanmar government.

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<sup>330</sup> Burleson and Giordano (n 183), 46.

## CHAPTER V

### LEGAL INFERENCES FROM THE PATTERNS OF CRIMES AND PATHWAYS TOWARDS JUSTICE

#### 5. Preliminary Notes

**5.1** The definition of genocide articulated in the *Genocide Convention* and the *Rome Statute* includes two core elements such as, (i) “mental element” which involves ‘intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such’; and (ii) “physical element” that entails five different acts.<sup>331</sup> The acts involve: (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”, and (e) “forcibly transferring children of the group to another group”.<sup>332</sup> These elements are discussed in light of the Rohingya situation in the following: -

#### 5.2 Rohingya Genocide: Perpetrators’ Special Intent

**5.2.1** In any case of genocide, the most difficult element to prove is the “special intent” (*dolus specialis*) because it must be established that the perpetrators had intention to physically destroy a national, ethnic, racial or religious group.<sup>333</sup> Generally, the perpetrators of genocide deliberately target the members of one of the four protected groups due to their actual or superficial membership in the group. Even if the perpetrators target “only a part of the group”, it may constitute genocide provided that part is “identifiable” and “substantial.”<sup>334</sup>

**5.2.2** In case of the Rohingya community, firstly, it has already been discussed that the historians trace the existence of Rohingyas in the Rakhine State to as early as the 9<sup>th</sup> century.<sup>335</sup> The term “Rohingya” was referred in English language for the first time in a 1799 British colonial ethnography.<sup>336</sup> Francis Buchanan stated three dialects, spoken in the Burma Empire, in his article and one of the dialects reads as, ‘the *Mohammedans*, who have long settled in *Arakan*, and who call themselves *Rooinga*, or natives of *Arakan*’.<sup>337</sup> Therefore, it is claimed that the Rohingyas have a historical link and they likely qualify to be members of a “national group” category under the *Genocide Convention*.<sup>338</sup> Secondly, majority of the Rohingya populations

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<sup>331</sup> Article II of the *Genocide Convention* and Article 6 of the *Rome Statute* 1998.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Please see chapter III and accompanying texts.

<sup>335</sup> Please see chapter II and appendix V, and accompanying texts.

<sup>336</sup> Francis Buchanan, ‘A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire’, [1799] 5 *Asiatic Researches* 219-40, reprinted: [2003] 1(1) SOAS Bulletin of Burma Research 1, 55.

<sup>337</sup> Ibid.

<sup>338</sup> Fortify Rights, Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State?, October 2015, available at: <[https://www.fortifyrights.org/downloads/Yale\\_Persecution\\_of\\_the\\_Rohingya\\_October\\_2015.pdf](https://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf)> accessed on 18 August 2019.

are “*Muslims*” while a small number of Rohingyas belongs to *Hindu religion*.<sup>339</sup> However, the perpetrators used to promote anti-Muslim attitude which is purportedly visible in the speeches of the Myanmar government officials, government documents, and testimonies of the Rohingya victims.<sup>340</sup> Hence, it is argued that the Rohingya people fall within the category of “religious group” of the *Genocide Convention*.<sup>341</sup> Finally, every member of the Rohingya community speaks in “*Rohingya language*” which is an Indo-European language more or less connected with the *Chittagonian language*.<sup>342</sup> Again, all the Rohingyas used to share a “*common culture*” and “*common bond*”.<sup>343</sup> Therefore, it is suggested that the Rohingya community is certainly a unique “*ethnic group*” under the *Genocide Convention* and they are the indigenous people of Rakhine State of Myanmar.<sup>344</sup>

**5.2.3** A question arose in this study as to whether the Myanmar authorities had any special intent to destroy, wholly or partly, the Rohingya group. This study argues that it is apparent that the perpetrators of Myanmar executed a range of “discrimination”, “exclusion, and marginalization” policies systemically against the Rohingyas for decades in the northern Rakhine State of Myanmar.<sup>345</sup> Concerning the attacks of 25 August 2017, this study suggests that the Myanmar authorities deliberately initiated and continued their “area clearance operations” of 9 October 2016 as a widespread pattern of violations and abuses against the people of Rohingya community. Many Rohingya respondents indicated that the military used to threaten them to leave Myanmar while they were rounded up, tortured, raped and even killed. For illustration, a 35-year-old Rohingya man said that, ‘not only had the military but also the *maghs* tortured us, they used to warn us by saying, ‘go away from here, otherwise we will kill you all.’<sup>346</sup> He also added that, ‘the Myanmar military used to utter that ‘you are Bangladeshis and you should go back’ and/or ‘[w]hat can your Allah do for you? See what we can do’’. This study, therefore, argues that the Myanmar military committed the alleged offences against the Rohingyas knowing the consequences of their acts very clearly. Hence, it is evident that the perpetrators of Myanmar had “special intent” to destroy the Rohingya ethnic group in whole.

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<sup>339</sup> Ibid, 27-8.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> Please note that a very few Rohingyas use Rakhine or Burmese languages; See, Su-Ann Oh, ‘Rohingya or Bengali? Revisiting the Politics of Labeling’, [2013] *The Network* (News from Asia), available at: <[http://www.iias.asia/sites/default/files/IIAS\\_NL66\\_36.pdf](http://www.iias.asia/sites/default/files/IIAS_NL66_36.pdf)> accessed on 5 February 2019.

<sup>343</sup> Ibid.

<sup>344</sup> International Crisis Group (n 74).

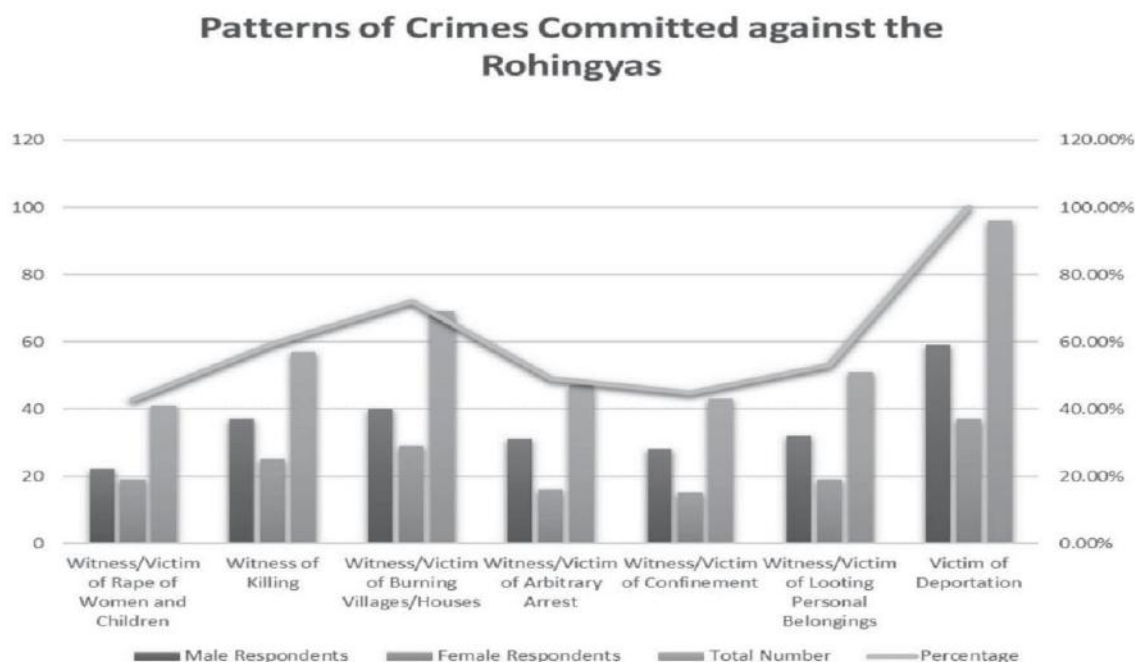
<sup>345</sup> UN Office of the High Commissioner for Human Rights (n 229).

<sup>346</sup> Please note that the respondent made this statement from his general experience of facing military attacks in different times.



### 5.3 Rohingya Genocide: Perpetrators' Genocidal Acts

**5.3.1** The “physical element” of genocide requires determining as to whether the genocidal acts have been committed against the members of the targeted group. The current research has found three physical elements of genocide in case of Rohingya ethnic group such as “killing of the members of the group”, “causing serious bodily or mental harm to them”, and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.



**Figure 4: Patterns of crimes committed against the Rohingyas**

**5.3.2** In this study, 59.37 percent of the Rohingya respondents reported witnessing “killings” of their family members, neighbours, relatives, and villagers. For example, a 29-year-old Rohingya man stated that, ‘the Myanmar military burned our entire village within a night. I witnessed the Myanmar military to kill all the members of my family. I lost my father, mother, and younger brother.’<sup>347</sup> It is, thus, evident that the Myanmar military committed a widespread killing of men, women, babies and young children of the Rohingya community in the northern Rakhine State to a greater magnitude. Hence, this study suggests that the ingredients of “killing members of the group” are present in the situation of the Rohingya ethnic group of Myanmar.

**5.3.3** Furthermore, this study offers that the perpetrators caused both bodily and mental harm to the members of the Rohingya community to an extremely serious degree. We know that “bodily harm to the members of the group” may become a genocidal act when it causes serious damage to either the external or the internal organs or senses of the members of the groups. In this study, 42.71 percent of the respondents witnessed and/or were victims of rape or other forms of sexual violence committed by the Myanmar military and/or local *Maghs*.

<sup>347</sup> Please note that the respondent experienced this event on 25 August 2017.



For instance, a 32-year-old Rohingya woman recounted that, ‘at one evening, the Myanmar military took me, my 10-year-old daughter and 17-year-old sister to a nearby school of our village. We found many women there who were also confined. After a few hours, 2/3 military men started raping my daughter and sister in front of my eyes. They also raped me and I fell unconscious’.<sup>348</sup> Hence, this study claims that such brutal actions caused not only bodily harm but also mental harm to the members of the Rohingya community because rape and sexual violence of women and children led to generate durable fear or intimidation or threat among the Rohingya population. It is also argues that some other acts such as arbitrary arrest, unlawful confinement and deportation caused both bodily and mental harm to the Rohingyas. In this study, 48.96 percent respondents were either witnesses or victims of “arbitrary arrest”, 44.79 percent respondents were either witnesses or subjected to “unlawful confinement” and 100 percent of the respondents were “deported” to Bangladesh from Myanmar. Hence, it is evident that the elements of “causing serious bodily or mental harm to the members of the group” are also present in the situation of the Rohingyas.

**5.3.4** Lastly, the perpetrators of Myanmar not only killed the Rohingyas but also created such a condition in their living areas that would ultimately lead to their gradual death. In this study, 71.88 percent of the respondents were either witnesses or victims of “burning their own villages and houses” and 53.13 percent respondents either witnessed or became victims of “looting their personal belongings”. For example, a 70-year-old Rohingya man expressed that, ‘the military personnel robbed my two jewellery stores. They also set my houses on fire at the end. I used to lead a life like a king in Burma but now I am leading a life like a beggar’.<sup>349</sup> This study also found that their houses, paddy fields, harvests, schools, markets, shops, medical centers, *Madrasas* and mosques were burned at different times, and their personal belongings were robbed during all the operations. Therefore, it is argued that as the basic necessities of life of the Rohingyas including food, clothing, shelter, education, medical treatment *etc.* were completely destroyed by the perpetrators, the elements of genocidal act of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” are also present in the case of the Rohingyas of Myanmar.

**5.3.5** Under the purview of the aforementioned discussions, it is apparent that the Myanmar military, other security forces and local *Maghs* deliberately killed hundreds of the Rohingya people, caused serious physical and mental harm to the members of the group, and barred the access to their basic necessities of their life all around. It is also clear that they have committed such actions with the intention of destroying the Rohingya ethnic group in whole. Hence, this study suggests that the Myanmar military and other security forces committed genocide against the members of the Rohingya ethnic group.

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<sup>348</sup> Please note that the respondent experienced this event on 28 or 29 August 2017.

<sup>349</sup> Please note that the respondent experienced this event on 25 August 2017.

## 5.4 Potential Avenues towards Justice for Rohingya Genocide

**5.4.1** This study recommends that the actions of the perpetrators of Myanmar constitute “genocidal acts” and the patterns of committing such actions lead to label their resolution as “genocidal intent”. Therefore, the presence of both “genocidal intent” and “genocidal acts” makes it evident that the persecutions committed against the Rohingya population should be termed “genocide” instead of mere “ethnic cleansing”. Even though the “Rohingya genocide” is now a universal epidemic, the perpetrators of such genocide are enjoying complete impunity. Therefore, it is imperative to demonstrate the major pathways to ensure justice for the Rohingya people such as, (i) individual criminal responsibility of the perpetrators, and (ii) responsibility of the State of Myanmar.

### 5.4.2 Rohingya Genocide: Perpetrators’ Individual Criminal Responsibility

**5.4.2.1** The individual perpetrators can be held liable by prosecuting them in one of the three venues: (i) the domestic Courts in Myanmar, or (ii) the domestic Courts of any third country under the principle of “universal jurisdiction”<sup>350</sup>, or (iii) the ICC. The first venue is not a workable choice because the government of Myanmar is still denying the fact that the perpetrators have committed any crimes against the members of Rohingya group. The second venue is related to “universal jurisdiction” which is defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’<sup>351</sup>. Accordingly, Argentina pursued a legal action against the major Myanmar officials including army chief *Min Aung Hlaing* and civilian leader *Aung San Suu Kyi* in recent times under this principle.<sup>352</sup> The third venue for prosecuting the individual perpetrators of Myanmar is the ICC which is situated in The Hague, Netherlands and this Court was established under the *Rome Statute* 1998.<sup>353</sup> The Statute became effective on 1 July 2002 and the ICC started functioning from this very day. It has jurisdiction to institute legal proceedings against the individuals who are responsible for the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>354</sup>

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<sup>350</sup> ‘The Scope and Application of the Principle of Universal Jurisdiction: The Report of The Sixth Committee A/64/452-RES 64/117’, available at: <[https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/Kenya.pdf](https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf)> accessed on 12 November 2019.

<sup>351</sup> Kenneth C. Randall, ‘Universal jurisdiction under international law’, [1988] 66 *Texas Law Review* 785, 788.

<sup>352</sup> ‘Myanmar’s Aung San Suu Kyi faces first legal action over Rohingya crisis’, *The Guardian*, 14 November 2019, available at: <<https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis>> accessed on 25 November 2019; ‘Suu Kyi named in Argentine lawsuit’, *The Daily Star*, 14 November 2019, available at: <<https://www.thedailystar.net/rohingya-crisis/news/suu-kyi-named-argentine-lawsuit-1827166>> accessed on 25 November 2019.

<sup>353</sup> Please visit the website of International Criminal Court, available at: <<https://www.icc-cpi.int/about>> accessed on 29 November 2019.

<sup>354</sup> Article 5 of the *Rome Statute* 1998; See also, articles 6, 7, 8, and 8 bis of the *Rome Statute* 1998 for further information.

**5.4.2.2** The jurisdiction of the ICC is not on the basis of the principle of “Universal Jurisdiction”.<sup>355</sup> Instead, under the purview of Articles 5(1)<sup>356</sup> and 11(1)<sup>357</sup> of the Rome Statute, the ICC can exercise jurisdiction in respect to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression committed after this Statute came into force. The preconditions of exercising the ICC’s jurisdiction have been mentioned in Article 12 of the *Rome Statute*. According to Article 12(1) and (3) of the *Rome Statute*, a State can accept its jurisdiction either by becoming State party to this Statute, or by making an *ad hoc* declaration lodged with the Registrar concerning the crime in question.<sup>358</sup> Here, Article 12(3) of the *Rome Statute* is concerned with the non-Party States only whose consent for accepting ICC’s jurisdiction is granted on a *case-by-case* basis.<sup>359</sup> However, the declaration under Article 12(3) of the *Rome Statute* and Rule 44<sup>361</sup> of the *Rules of Procedure* require that, (a) it ‘must be express, unequivocal, and precise as to the crime(s) or situation it applies to’; (b) it must be lodged with the Registrar of the ICC over ‘the crime in question’; and (c) the accepting State must collaborate with the ICC without any delay as if it is a State party.

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<sup>355</sup> ‘Situation in Palestine,’ The Office of the Prosecutor of the ICC, available at: <<https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9836106D2694A/284387/SituationinPalestine030412ENG.pdf>> accessed on 25 November 2019.

<sup>356</sup> Article 5(1) of the Rome Statute 1998 reads as follows:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

<sup>357</sup> Article 11(1) of the *Rome Statute* 1998 reads as follows:

The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

<sup>358</sup> Carsten Stahn *et al.*, ‘The International Criminal Court’s *Ad Hoc* Jurisdiction Revisited,’ [2005] 99 *American Journal of International Law* 427, 428; Stéphane Bourgon and Hans-Peter Kaul, in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (United Kingdom: Oxford University Press, 2002) p. 611; B R Philips, ‘The International Criminal Court Statute: Jurisdiction and Admissibility’, [1990] 10 *Criminal Law Forum* 61, 69.

<sup>359</sup> *Ibid* (Bourgon and Kaul), 563; William A. Schabas, *An Introduction to the International Criminal Court* (United Kingdom: Cambridge University Press, 4<sup>th</sup> edn, 2011) p. 88; A. Pellet, ‘The Palestinian Declaration and the Jurisdiction of the International Criminal Court’, [2010] 8(4) *Journal of International Criminal Justice* 981-999; Article 34 of the *Vienna Convention on the Law of Treaties*, 1969 depicts that ‘[a] treaty does not create either obligations or rights for a third State without its consent.’

<sup>360</sup> Article 12(3) of the *Rome Statute* 1998 reads as follows:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

<sup>361</sup> Rule 44(2) of the *Rule of Procedure* reads as follows:

When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.

**5.4.2.3** As regards the “crime in question”, it must take place in the territory of the State which has lodged a declaration under Article 12(3) of the *Rome Statute*, or a national of the concerned State must have committed the offence.<sup>362</sup> Moreover, the government or authority that accepts the ICC’s jurisdiction on behalf of a State by such *ad hoc* declaration must have “effective control” over the State in concern.<sup>363</sup> As per the legal test of “effective control,” the “effective government” of a State’s territory must enjoy the support from the majority people and must have a reasonable expectancy of permanence.<sup>364</sup> In case of occupying power, the defining feature of occupation is “effective control” by such power.<sup>365</sup> In other words, the occupying power must be the real power in the concerned country which will be responsible for administering government as well as maintaining law and order of that particular State.<sup>366</sup>

**5.4.2.4** In case of Rohingya genocide, the first issue is that Myanmar is not a Member State to the *Rome Statute*.<sup>367</sup> Thus, it is primarily argued that the ICC does not have jurisdiction in relation to the crimes that took place against the Rohingya people in Myanmar. In this situation, this State can accept the jurisdiction of the ICC either by becoming a Member State to the *Rome Statute*, or by lodging a declaration with the Registrar of the ICC concerning the crime of genocide.<sup>368</sup> However, the concerned authorities of Myanmar are apparently unwilling to become a Member State or to lodge a declaration with the ICC Registrar for the purpose of accepting ICC’s jurisdiction and prosecuting the perpetrators of Rohingya genocide.

**5.4.2.5** At this instant, according to Article 13(b) of the *Rome Statute*, the UN Security Council (UNSC) may refer to the situation of Myanmar to the ICC Prosecutor.<sup>369</sup> As Myanmar is a UN Member State, it would be obliged to facilitate the ICC for prosecuting the perpetrators.

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<sup>362</sup> ‘Situation in the Republic of Cote D’Ivoire,’ Pre-Trial Chamber III of the ICC-02/11, 3 October 2011, para. 187, available at: <<https://www.icc-cpi.int/pages/record.aspx?uri=1240553>> accessed on 29 January 2019; A. Wills, ‘Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court’, [2014] 12(3) *Journal of International Criminal Justice* 407, 435.

<sup>363</sup> Eugene Kontorovich, ‘Palestine’s Egypt Problem at the ICC,’ *The Washington Post*, 5 August 2014, available at: <[https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/05/palestines-egypt-problem-at-the-icc/?utm\\_term=.d5e22a99c969](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/05/palestines-egypt-problem-at-the-icc/?utm_term=.d5e22a99c969)> accessed on 24 April 2019; Eugene Kontorovich, ‘Effective Control and Accepting ICC Jurisdiction,’ *The Opinio Juris*, 4 August 2014, available at: <<http://opiniojuris.org/2014/08/04/guest-post-effective-control-accepting-icc-jurisdiction/>> accessed on 23 March 2019.

<sup>364</sup> ‘The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt,’ ICC-OTP-20140508-PR1003, available at: <<https://www.iccpi.int/Pages/item.aspx?name=pr1003&ln=en#1a>> accessed on 10 January 2019; S. Freeland, ‘How Open Should the Door Be? – Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court’, [2006] 75(2) *Nordic Journal of International Law* 211, 241.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, No. ICC-RoC46(3)-01/18, 6 September 2018, Pre-Trial Chamber I, para. 35, available at: <[https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-37](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-37)> accessed on 2 November 2019.

<sup>368</sup> Article 12(1) and (3) of the *Rome Statute* 1998.

<sup>369</sup> Article 13(b) of the *Rome Statute* 1998.

However, it is uncertain as to whether the UNSC would vote on a referral to the ICC for two specific reasons such as, (i) China and Russia are not Member States to the *Rome Statute*, and (ii) these two countries constantly resist the jurisdiction of the ICC over its non-Member States.<sup>370</sup> Hence, Myanmar is unlikely to be bound to bring the perpetrators of Rohingya genocide into the ICC's trial.

**5.4.2.6** It should be mentioned that the Pre-Trial Chamber I of the ICC delivered a ruling on 6 September 2018 by majority that, 'the Court [the ICC] may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh'.<sup>371</sup> This decision was given by the ICC Pre-Trial Chamber I following a request made according to Article 19(3) of the *Rome Statute* by an ICC Prosecutor who specifically argued that since one of the elements of the crimes against humanity such as "deportation of members of the Rohingya community" took place in Bangladesh, a Member State to the *Rome Statute*, the ICC can exercise its jurisdiction over this situation.<sup>372</sup> Accordingly, the ICC Pre-Trial Chamber I found that corresponding to the principle of "*la compétence de la compétence*" or "*Kompetenz-Kompetenz*" and Article 119(1) of the *Rome Statute*, it has power to deal with the Prosecutor's request.<sup>373</sup>

**5.4.2.7** Nevertheless, one of the judges of the ICC Pre-Trial Chamber I, Judge *Perrin de Brichambaut*, provided a partially dissenting opinion to the decision.<sup>374</sup> At the end of his opinion, he articulated that, '[...] it remains open to the [ICC] Prosecutor to present a request for authorization of an investigation to a Pre-Trial Chamber under article 15 of the Statute.'<sup>375</sup> As an alternative, under the purview of Articles 13(c) and 15(1) of the *Rome Statute*, the ICC Prosecutor may initiate investigations *proprio motu* considering the credible information of commission of crimes within the jurisdiction of the Court. Accordingly, the ICC Prosecutor, *Fatou Bensouda*, informed her willingness to the ICC judges on 5 July 2019 to present a request for authorization 'to investigate alleged crimes within the Court's jurisdiction in which at least one element occurred on the territory of the People's Republic of Bangladesh [...] as well as any other crimes which are sufficiently linked to these events.'<sup>376</sup> Therefore, the

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<sup>370</sup> Decision (n 367), para. 42.

<sup>371</sup> 'ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh', ICC-CPI-20180906-PR1403, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>> accessed on 5 November 2019.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*; The ICC Pre-Trial Chamber I delivered the rule considering that: (i) article 7(1)(d) of the *Rome Statute* includes two separate crimes i.e. forcible transfer and deportation, and (ii) the ICC Pre-Trial Chamber I may exercise its jurisdiction 'if either an element of a crime mentioned in article 5 of the Statute or part of such a crime is committed on the territory of a State that is party to the Statute under article 12(2)(a) of the Statute.'

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> 'ICC Prosecutor, Fatou Bensouda, requests judicial authorisation to commence an investigation into the situation in Bangladesh/Myanmar', ICC-OTP-20190704-PR1465, 4 July 2019, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1465>> accessed on 29 October 2019.



Presidency of the ICC created the Pre-Trial Chamber III which has recently taken a decision on 14 November 2019 in respect to authorizing the Prosecutor to open an investigation on the crimes within the ICC’s jurisdiction in the situation in Bangladesh/Myanmar.<sup>377</sup> Pursuant to Article 15 of the *Rome Statute*, the Pre-Trial Chamber III authorized the ICC Prosecutor to begin an investigation concerning “any crime”, including any potential crime, on condition that:

- a) it is within the jurisdiction of the Court, b) it is allegedly committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State accepting the ICC jurisdiction, c) it is sufficiently linked to the situation as described in the present decision, and d) it was allegedly committed on or after the date of entry into force of the Rome Statute for Bangladesh or other relevant State Party.<sup>378</sup>

**5.4.2.8** As regards the initiatives of the ICC, some scholars of international law namely, *John Packer* and *Payam Akhavan* criticized the ICC by articulating that, ‘[t]he ICC has serious resource constraints, is notoriously slow, and could not arrest any Myanmar officials.’<sup>379</sup> Moreover, Packer added that, ‘[a]ccountability mustn’t be limited to trials of individuals. The Myanmar state itself can and must be held to account.’<sup>380</sup> It is clear from this statement that Packer is not only recommending to prosecute the perpetrators but also to make Myanmar accountable as a State. The ICC may simply prosecute the individual perpetrators of Myanmar whose names, inter alia, have been revealed in the Independent International Fact-Finding Mission on Myanmar report.<sup>381</sup> However, unless and until the UN Security Council refers the situation of Myanmar to the ICC, the efforts of the ICC will be restricted to a great extent.

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<sup>377</sup> ‘ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar’, ICC-CPI 20191114-PR1495, 14 November 2019, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>> accessed on 30 November 2019.

<sup>378</sup> Ibid.

<sup>379</sup> This statement has been cited in Yuriko Cowper-Smith, ‘International legal options for addressing the Rohingya genocide in Myanmar and humanitarian crisis in Bangladesh’, Report from The Sentinel Project, 13 Aug 2019, available at: <<https://reliefweb.int/report/myanmar/international-legal-options-addressing-rohingya-genocide-myanmar-and-humanitarian>> accessed on 6 November 2019.

<sup>380</sup> Ibid.

<sup>381</sup> The IFFM Report noted that ‘[i]n relation to the recent events in Rakhine State, this [alleged perpetrators of crimes under international law] includes the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing, and Deputy Commander-in-Chief, Vice Senior-General Soe Win, Commander, Bureau of Special Operations-3, Lieutenant-General Aung Kyaw Zaw, Commander, Western Regional Military Command, Major-General Maung Maung Soe, Commander, 33rd Light Infantry Division, Brigadier-General Aung Aung, Commander, 99th Light Infantry Division, and Brigadier-General Than Oo.’ See, ‘Report of the independent international fact-finding mission on Myanmar’, Human Rights Council, thirty-ninth sessions, 10 - 28 September 2018, available at: <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_64.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf)> accessed on 6 November 2019. Please note that the IFFM determined that the perpetrators have committed the “crimes against humanity” against the Rohingya people and other ethnic minorities in Myanmar.



### 5.4.3 Rohingya Genocide: Responsibility of the State of Myanmar

**5.4.3.1** As “genocide” is considered as a “state crime”, it is unavoidable to attribute guilt of committing genocide to the Myanmar State. For this purpose, the jurisdiction of the ICJ must be explored which is the “principal judicial organ” of the UN, established under the *Charter of the United Nations* of 1945.<sup>382</sup> This Court functions pursuant to the provisions of the Statute of the ICJ (see Appendix VIII). The jurisdiction of the ICJ is twofold namely: (i) “jurisdiction in contentious cases”, and (ii) “advisory jurisdiction”.<sup>383</sup> The former type of jurisdiction gives scope to the ICJ to decide certain disputes of legal nature which is submitted by States to it, while the Court simply provides advisory opinion on some legal questions that is sought by the UN organs, or specialized agencies, or other authorized organizations.<sup>384</sup>

**5.4.3.2** As of 13 October 2019, there are a total of 149 Member States to the *Genocide Convention*.<sup>385</sup> Myanmar is one of the Member States to the *Genocide Convention* because it has signed this convention on 30 December 1949 and ratified the same on 14 March 1956.<sup>386</sup> Article VI of the *Genocide Convention* endorses that the individuals who are charged with genocide must be tried either by “Competent Tribunal” of the State where the offences occurred, or by “International Penal Tribunal” whose jurisdiction is accepted by the Contracting Parties. Myanmar has lodged reservation to this article in the following manner<sup>387</sup>:-

With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.<sup>388</sup> [emphasis added]

It is clear from Myanmar’s reservation that it does not renounce the responsibility to bring perpetrators of genocide under trial, rather specifies Myanmar’s intention to provide exclusive jurisdiction to deal with cases of genocide to its domestic Courts and Tribunals or international Courts and Tribunals of its own choice. Therefore, Myanmar may block to surrender any individual perpetrator to the ICC but it cannot avoid ICJ’s jurisdiction.

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<sup>382</sup> Please visit the website of the International Court of Justice, available at: <<https://www.icj-cij.org/en/court>> accessed on 20 October 2019; Please note that the *Charter of the United Nations* became effective on 24 October 1945 but was signed on 26 June 1945 in San Francisco at the end of the UN Conference on International Organization.

<sup>383</sup> Please visit the website of the International Court of Justice, available at:<<https://www.icj-cij.org/en/jurisdiction>> accessed on 29 November 2019.

<sup>384</sup> Ibid.

<sup>385</sup> ‘Report of the UN Office on Genocide Prevention and Responsibility to Protect’, available at: <[https://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet\\_final.pdf](https://www.un.org/en/genocideprevention/documents/Appeal-Ratification-Genocide-FactSheet_final.pdf)> accessed on 23 November 2019.

<sup>386</sup> Please visit the website named “United Nations Treaty Collections”, available at:<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en)> accessed on 28 November 2019.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid.

**5.4.3.3** Article VIII of this convention depicts that a Contracting Party may seek to take any appropriate measures to the competent organs of the UN with a view to preventing acts of genocide. Myanmar is the only country which has lodged reservation to Article VIII of the *Genocide Convention*. However, the legal effect of such reservation is ambiguous because it does not prevent other Member States of this convention from calling upon a competent organ of the UN to take action for preventing genocide in a concerned State. Here, Article IX of the *Genocide Convention* can be referred to because according to this provision any Member State of this convention may submit a dispute to the ICJ between that particular country and another Member State with respect to “interpretation”, “application” or “fulfilment” of the convention. Since Myanmar did not give reservation to Article IX while ratifying the convention, it would be pointless to consider that the reservation to Article VIII of the convention constitutes rejection of the ICJ’s jurisdiction. Thus, Myanmar’s reservation to Articles VI and VIII does not create any bar for ICJ to decide a dispute *vis-à-vis* Myanmar’s non-compliance with the obligations under the *Genocide Convention*.

**5.4.3.4** The basis of the ICJ’s jurisdiction to deal with a case filed against Myanmar raises one pertinent question such as who may bring such a case. In this regard, it should be mentioned that all the Member States of the *Genocide Convention* have a “common interest” to achieve the goals of this convention<sup>389</sup>; however, if a specific Member State can establish the presence of a dispute between it and Myanmar on the issue of genocide committed against the Rohingyas, such State would be eligible to bring a case against Myanmar before the ICJ. In the Case Concerning the Barcelona Traction, the ICJ put in that the obligation of preventing genocide flows towards “*the international community as a whole*”.<sup>390</sup> In some other cases, the ICJ dealt with the issue of admissibility of a case with flexibility taking into account the breach of obligations of the concerned conventions.<sup>391</sup> Hence, it can be argued that if a case is filed even by an unaffected country, there may not be question of admissibility in the ICJ only on this ground. It can also be argued that a concerned international organization which comes under the purview of “international community” may bring a case before the ICJ against Myanmar on the issue of Rohingya genocide.<sup>392</sup>

**5.4.3.5** Accordingly, the Republic of The Gambia with the support of the Organization for Islamic Cooperation (OIC)<sup>393</sup> filed a case at the ICJ on 11 November 2019 against Myanmar for contravening the obligations specified in the *Genocide Convention*.<sup>394</sup> The pertinent

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<sup>389</sup> See, Case Concerning Barcelona Traction, Light and Power Company, Limited, Judgment of 24 July 1964, page. 36, available at: <<https://www.icj-cij.org/files/case-related/50/050-19640724-JUD-01-00-EN.pdf>> accessed on 15 September 2019.

<sup>390</sup> Ibid.

<sup>391</sup> ‘Questions relating to the Obligation to Prosecute or Extradite’, Judgment of 20 July 2012, available at: <<https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>> accessed on 28 September 2019.

<sup>392</sup> Case Concerning Barcelona Traction, Light and Power Company, Limited (n 389).

<sup>393</sup> The OIC is the second largest inter-governmental organization after the UN and currently it has 57 Member-States.

<sup>394</sup> Stephanie van den Berg, ‘Gambia files Rohingya genocide case against Myanmar at World Court: Justice Minister’, Reuters, 11 November 2019, available at: <<https://www.reuters.com/article/us-myanmar-rohingya-world-court-idUSKBN1XL18S?fbclid=IwAR30YSrefdY5TrSHiN1dLZW8TB-8rWmk0q1jhWrg0euHYOKbdx5UYtbXog>> accessed on 25 November 2019.

obligations of this convention which have allegedly been violated by Myanmar include, (i) commission of genocide, (ii) failure to put a stop to genocide, (iii) failure to punish the perpetrators of genocide, and (iv) failure to create a national law to put into force the convention.<sup>395</sup> The obligations of the *Genocide Convention* are identified as “*erga omnes partes obligations*” which signifies that ‘they are owed by a state towards all the states parties to the Convention’.<sup>396</sup> Thus, although The Gambia has no material link with Myanmar in the issue of Rohingya genocide, it has filed the lawsuit on the basis of a “*common interest*” of fulfilling the “*object and purpose*” of the *Genocide Convention*.

**5.4.3.6** In the case of *The Gambia vs. Myanmar*,<sup>397</sup> the Court initially determined that under the purview of Article IX of the *Genocide Convention*, it has “*prima facie jurisdiction*” to consider the case.<sup>398</sup> The Court then assessed the request of The Gambia to take “provisional measures” by Myanmar for the prevention of “irreparable loss” of the Rohingya population taking into account the submissions made by both the parties and the 2018 reports of the “Independent International Fact Finding Mission on Myanmar (IIFFMM)”.<sup>399</sup> Referring to the reports of the IIFFMM, the Court noted that the Rohingya people have been suffering from different forms of persecution since October 2016 which are capable of challenging their existence in Myanmar.<sup>400</sup> Thus, the Court held that ‘[...] there is a real and imminent risk of irreparable prejudice to the rights invoked by The Gambia’.<sup>401</sup> The Court also issued an order on 23 January 2020 on the request to Myanmar for taking steps to prevent committing any genocidal acts against the Rohingyas by the military and other security forces.<sup>402</sup> However, the ICJ is yet to determine whether Myanmar committed genocide against the Rohingya people.

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<sup>395</sup> ‘Factsheet of the The Gambia v. Myanmar (Rohingya Genocide at The International Court of Justice)’, Global Justice Centre, November 2019, 1, 3, available at: <<https://reliefweb.int/sites/reliefweb.int/files/resources/Factsheet%2C%20November%202019%20-%20Q%26A%20-%20The%20Gambia%20v.%20Myanmar%20-%20Rohingya%20genocide%20at%20The%20International%20Court%20of%20Justice.pdf>> accessed on 26 November 2019.

<sup>396</sup> *Ibid.*

<sup>397</sup> *The Gambia vs. Myanmar*, available at: <<https://www.icj-cij.org/en/case/178>> accessed on 19 April 2020.

<sup>398</sup> The ICJ’s “Order” issued on 23 January 2020 in the “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), para. 37, page. 12, available at: <<https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> accessed on 19 April 2020.

<sup>399</sup> *Id* at para. 71, page. 21.

<sup>400</sup> *Ibid.*

<sup>401</sup> *Id* at para. 75, page. 22.

<sup>402</sup> *Id* at para. 80, page. 23.

## CHAPTER VI

### CONCLUSION

**6.1** Due to the commencement of mass-atrocities since 25<sup>th</sup> August 2017 on the Rohingyas, thousands of them fled to Bangladesh from Myanmar in different phases. The occurrences of persecution of the Rohingyas turned them into stateless population of the world and refugees in many countries including Bangladesh. On top of many matters involving the Rohingya crisis, the most vital issue is whether the Rohingya persecution constitutes the “genocide” or “ethnic cleansing” because there are still dynamics on the same. The crime of genocide is considered as the most serious international crime whereas ethnic cleansing is yet to be criminalized under the international law as an independent crime. This study examined the situation of the Rohingyas using Dr. Stanton’s 10-stage model of genocide as well as evaluated the patterns of crimes committed against them from legal viewpoints. The potential avenues towards justice for the Rohingya people are also highlighted with recent developments.

**6.2** This study, therefore, employed a qualitative research methodology and bridged both qualitative and quantitative data. The respondents were interviewed using FGDs while face-to-face method was adopted to interview the key informants. All the respondents of this study are Rohingya victims of persecution who are now living in the *Kutupalong refugee camp*, the largest refugee camps of the world. Besides, this study involved journalists, academics, activists, and researchers of diverse countries as key informants who are well-versed about the Rohingya crisis. This study interviewed a total of 96 Rohingyas, 81 of them came to Bangladesh on or after the occurrences of 25<sup>th</sup> August 2017, and the rest arrived before the said incident. Almost all the respondents originated from different villages across *Maungdaw*, *Buthidaung*, and *Rathedaung* townships of northern Rakhine State, Myanmar.

**6.3** This research used Dr. Stanton’s stages of genocide as a coherent method for unfolding the progression of Rohingya genocide that occurred in Myanmar. Each of its stages permitted to categorize the steps undertaken by the perpetrators of Myanmar and to comprehend their genocidal intent to destroy the Rohingya ethnic group. In fact, this study showed a clear picture of genocide committed against the Rohingyas because evidences of all the 10 stages of genocide are precisely found in it. Predominantly, Persecution makes up 100.00 percent while Organization accounts for 93.75 percent of the total respondents. These two stages demonstrate clear patterns of Myanmar military and other security forces’ active involvement in the entire process of Rohingya genocide. Afterward, Dehumanization accounts for 94.79 percent which mirrors the effect of actions undertaken in the Classification (80.21 percent), Symbolization (84.38 percent), and Discrimination (89.58 percent) stages. More specifically, it appears in these initial stages of Rohingya genocide that the Myanmar government and concerned authorities created a number of laws and policies to differentiate the Rohingyas, and the military and other security forces functioned as executors of the same with a greater magnitude of impunity. Polarization and Preparation account for 90.63 and 92.71 percent respectively, and both these stages fortify the fact of how methodically the Rohingyas were isolated from other communities of Myanmar and deported to other countries in the campaign

of ethnic cleansing, clearance operations, and counter-terrorism measures. Finally, a massive volume of events of Rohingya people's death, rape of women, burning of villages *etc.* and Myanmar's rejection of such facts clearly substantiate both Extermination (77.08 percent) and Denial (67.71 percent) stages of Rohingya genocide.

**6.4** Along with the above analysis, this study explored the distinct patterns of crimes committed against the Rohingyas in order to delineate the legal aspects of the concerned scenario. Each of the 96 respondents reported that they had either witnessed or become victims of different forms of persecution such as killing, rape and sexual violence, burning of villages and houses, arbitrary arrest, confinement, looting personal belongings, and forcible deportation. All the respondents (100 percent) of this particular study were forcibly deported from Myanmar to Bangladesh while quite a large number of respondents (71.88 percent) reported that their villages and/or houses were completely burned. More than half of the respondents (53.37 percent) testified witnessing killings of their family members, relatives, neighbours and villagers while nearly the same percentage of respondents (53.13 percent) reported that their personal belongings were looted by the perpetrators. Furthermore, an overwhelming number of respondents (42.71 percent) described the incidents of rape and other forms of sexual violence that they have experienced in Myanmar. In addition to this, there were multiple information of arbitrary arrest (48.96 percent) and unlawful confinement (44.79 percent) specified by the Rohingya respondents. The complete analysis of this study on the patterns of such crimes manifestly brings forth the circumstances that precisely reveal the "special intent" of the perpetrators of Myanmar to destroy the Rohingya community as a whole. Again, the origin and existence of the Rohingya people in Rakhine State of Myanmar, and the attitude of the perpetrators towards the Rohingya community meet the criteria, independently and simultaneously, to consider the Rohingya group as a national, religious, or ethnic group which is protected against genocide in the jurisprudence of international criminal law. This study also demonstrates that the perpetrators committed all the aforementioned criminal acts to destroy the survival of the entire Rohingya community in Myanmar which makes the situation of Rohingya persecution a case of special crime. Hence, the presence of the genocidal intent and genocidal acts in the Rohingya situation evidently establishes that the Rohingya persecution is genocide under Article 2 of the *Genocide Convention* and Article 6 of the *Rome Statute*.

**6.5** Since the Rohingya persecution is a clear case of genocide, Myanmar cannot avoid its obligations as a State and at the same time, the individual perpetrators need to be punished. At this moment, the ICJ is the only avenue within reach for making Myanmar accountable as a State for violating the obligations set out in the *Genocide Convention*. Since The Gambia has already filed a case against Myanmar which is currently pending in the ICJ, the other Member States of the Genocide Convention should join The Gambia by filing similar complaints in the ICJ in order to create a mass international condemnation aiming Myanmar for contravening the obligations of this convention. It should not be forgotten that it is the duty of all the Member States of this convention to prevent and punish genocide. The Myanmar officials and military who are now enjoying impunity should also be held accountable for committing genocide against the Rohingya people. For this purpose, the universal jurisdiction for genocide and/or the jurisdiction of the ICC for punishing the offenders of genocide should be invoked.



**6.6** Argentina has already initiated a legal action against the concerned perpetrators of Myanmar under the universal jurisdiction for genocide. Likewise, Bangladesh has every right to bring a legal action against the perpetrators of Myanmar for committing genocide against the Rohingya people under the same principle. Moreover, pursuant to Article 15 of the Rome Statute, the ICC has already authorized its Prosecutor, *Fatou Bensouda*, on 14 November 2019 to start an investigation of the crimes within its jurisdiction in Myanmar or Bangladesh in respect to the Rohingya persecutions. Although the ICC is the most appropriate forum to bring the individual perpetrators of genocide into trial, Bangladesh has a strong ground to file a case against the perpetrators on the basis of the ICC's ruling of 6 September 2018 which shed light on the point that the crime of deportation of the Rohingya population took place in Bangladesh. Therefore, Bangladesh has a well-defined scope to undertake initiatives either for exercising the universal jurisdiction as a sovereign State or for filing a case in the ICC being a Member State to the *Rome Statute*. On the face of it, Bangladesh may play an active role in ensuring justice to the Rohingya people and ending the unprecedented impunity granted to the perpetrators of Myanmar.

**6.7** However, we should not only be optimistic about the long-awaited justice for the Rohingya genocide but also perceive challenges of these exemplary justice initiatives at the international level. Therefore, an international alliance of the States needs to be established to take both collective and individual actions against Myanmar and the perpetrators of Rohingya genocide. For example, *Maung Zarni* proposed that 'Canada, Sweden, Ireland, Bangladesh, the Netherlands, the UK, certain Rohingya-concerned OIC member states (such as Bangladesh, Malaysia, Indonesia, Turkey, Kuwait etc.) and those from Latin and Central America with experience in atrocity crimes at home can form the core of [such an alliance]'.<sup>403</sup> Corresponding to his proposal, it should be suggested that these States should take a collective approach to ensure liability of the individual perpetrators and to protect the rights of the Rohingya victims of genocide. In addition, the States should take independent actions, for example, commercial boycott of Myanmar as called by the UN in August 2019 to let the world perceive their definite position against genocide.

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<sup>403</sup> Dr. Maung Zarni, 'Five concrete measures can end Rohingya genocide', Anadolu Agency (5 October 2018), available at: <<https://www.aa.com.tr/en/analysis-news/five-concrete-measures-can-end-rohingya-genocide/1273350>> accessed on 17 June 2020.



## APPENDIX - I

### SEMI-STRUCTURED FOCUS GROUP QUESTIONNAIRE

#### 1. General Information:

Name:

Age:

Educational Qualification:

Gender: [ ] Male/ [ ] Female/ [ ] Other

Marital Status:

Religion/Faith:

Place of Birth:

Address in Myanmar:

#### 2. Respondents' thoughts about themselves and their whereabouts:

##### 2.1 Tell us about your family background.

*How long you were living in Myanmar?*

*Did you have any relatives or ancestors in Bangladesh before coming here?*

##### 2.2 Tell us about your living place and surroundings in Burma/Myanmar.

##### 2.3 How was your relationship with the native people (other than Rohingyas) of Burma/Myanmar?

*If decent, why? If not, why?*

##### 2.4 How was your relationship with the people of other religions of Burma/Myanmar?

*Were they your neighbours or friends?*

##### 2.5 Tell us about your educational institutions.

*For example: Madrasa, School etc.*

##### 2.6 Tell us about the healthcare systems of your locality of Burma/Myanmar.

##### 2.7 Tell us about your religious places.

*For example: Mosque, Temple etc.*

##### 2.8 How did you celebrate *Eid-ul-Fitr*, *Eid-ul-Adha*, and other religious occasions?

##### 2.9 Tell us about your job(s)/works(s) of Burma/Myanmar.

*What were your job/work opportunities?*

Were there any restrictions on your employment? If yes, what and why?

##### 2.10 Tell us about the marriage system of your community.

Was inter-religious marriage permitted in your community? If no, why?

Were the widows of your community permitted to remarry? If no, why?

*Was there any kind of restriction regarding your marriage? If yes, what and why?*

##### 2.11 Tell us about any law that deals with the issue of new born children/number of children within your community.

##### 2.12 How were you treated by the local law enforcement agencies of Burma/Myanmar?

*For example: Police, Security Forces, Border Guards etc.*

- 2.13** What did the local *Maghs*, Police, Security Forces, Border Guards etc. used to call you except Rohingya or Bengali?
- 2.14** Can you tell us any incident when you felt that the local *Maghs*, Police, Security Forces, Border Guards etc. used to set you apart from other people of Burma/Myanmar and neglect you?
- 2.15** Did you ever feel that the members of your community were discriminated in different fields in Burma/Myanmar?  
*For example: Job, Education, Political Involvements etc.*
- 2.16** What were the procedures to sell your lands in Burma/Myanmar?
- 2.17** Did the Burma/Myanmar's government used to take your lands? If yes, why and how?
- 2.18** Tell us about your chances to be involved with politics of Burma/Myanmar.
- 2.19** Do you have any "Citizenship Card" or "Identity Card" issued by the government of Burma/Myanmar? Please tell us about the details of the card.
- 3. Attitude towards persecutions committed against the respondents:**
- 3.1** When did you arrive in Bangladesh?
- 3.2** With whom did you come to Bangladesh?  
*For example: Family Members, Neighbours, Friends etc.*
- 3.3** Did anyone of Myanmar help you to cross Bangladesh border?  
*If yes, who? Where is he/she now?*
- 3.4** Have you ever come to Bangladesh before?  
*If yes, when and why?*
- 3.5** Why did you leave your country (Myanmar) and come to Bangladesh?
- 3.6** Have you been a victim of massacre or attack in Myanmar?  
*If yes, please describe your experience.*  
*When did they attack you?*  
*Did they give you any warning/notice before attacking you?*  
*Who were the attackers?*  
*If local people, who were they?*  
*What was there religious identity?*  
*What types of weapons did they use during such attacks?*  
*If no, have you seen your neighbours or villagers to be a victim massacre or attack in Myanmar?*  
*If no, have you heard about your neighbours or villagers to be a victim massacre or attack in Myanmar?*
- 3.7** Do you remember any statements or words that the attackers made before or during attacks?
- 3.8** Did you try to defend you during the attacks?  
*If yes, how?*

### **3.9 Did you lose anyone/anything due to the attacks?**

*If yes, what? For example: Family Members, Neighbours, Relatives, Friends, Personal Belongings etc.*

### **3.10 Did you communicate with anyone who is staying in Myanmar now?**

*If yes, what did they inform you about the overall situation in Rakhine State, Myanmar?*

### **3.11 Did you face similar type of attack before?**

*If yes, please describe your experience.*

*When did they attack you?*

*Who were the attackers?*

*If local people, who were they?*

*What was their religious identity?*

*What types of weapons did they use during such attacks?*

*If no, have you seen your neighbours or villagers to be a victim massacre or attack in Myanmar?*

*If no, have you heard about your neighbours or villagers to be a victim massacre or attack in Myanmar?*

## **4. Interviewing the victims of sexual violence/rape:**

### **4.1 Basic Information about Occurrence(s):**

Date (If the respondent can remember): \_\_\_\_\_

Time (Day/Night): \_\_\_\_\_

Place (Own or Neighbour's House/Nearby Jungle/School): \_\_\_\_\_

### **4.2 Identity of the perpetrators:**

#### **4.2.1 Did you recognize the perpetrators?**

*If yes, please specify.*

*If no, how did they look like?*

*Did they wear any uniform or civil dress?*

*Did they carry any weapons during the incidents?*

### **4.3 Description of the incident(s):**

#### **4.3.1 How many of you were injured/violated during the occurrences?**

#### **4.3.2 Can you explain details of the incident(s)?**

*How did you manage to escape?*

*Did you get any medical treatment in Myanmar/Bangladesh?*

*If yes, when and where?*

*If no, why?*

*Was any woman like you killed in that incident?*

#### **4.3.3 Did you face this type of incident before?**

*If yes, when? Please describe the incident.*

## **5. Feedback:**

Are there any issues that have not been discussed that are important to you?

Do you have any questions or comments to us?

**APPENDIX - II**  
**KEY INFORMANT INTERVIEW QUESTIONNAIRE**

**1. General Information:**

Name:

Age:

Educational Qualification:

Gender:             Male/  Female/ Other

**2. Discussion with the Key Informant:**

**2.1 Tell us about your work involving the Rohingya community.**

*What types of activities have you been involved in?*

*What methods have you used that have been particularly effective in reaching the Rohingyas?*

*Who have you collaborated with?*

*Did you focus on the persecutions committed against the Rohingyas in your activities?*

*If yes, could you please give your opinion in this regard?*

**2.2 Based on your knowledge and experience, what are some of the factors that show the existence of persecutions committed against the Rohingyas in Myanmar since many years?**

*Are you aware of any discriminatory laws or policies of Myanmar?*

*Are you aware of the manners the Rohingyas were treated by the law enforcement agencies of Myanmar?*

*In your opinion, what are the incidents that led the Rohingyas to leave Myanmar?*

*In your opinion, who are the persons involved in persecuting the Rohingyas in Myanmar?*

**2.3 What is your attitude towards justice for the Rohingya people?**

*In your opinion, what are the roles the international community can play in this situation?*

*In your opinion, what are the challenges towards pathways of justice for the Rohingya people?*

**3. Feedback:**

Are there any issues that have not been discussed that are important to you?

Do you have any questions or comments to me?

## APPENDIX - III

### CONSENT FORM

I, \_\_\_\_\_, age \_\_\_\_\_ voluntarily agree to participate in the research project titled, ‘Rohingya Persecutions in Myanmar: Ethnic Cleansing or Genocide?’ [Funding agency: East West University Center for Research and Training (EWUCRT)].

- I have had the purpose and nature of the study explained to me orally and I have had the opportunity to ask questions about the study. I also understand that I will not benefit directly from participating in this research.
- I understand that I would be asked to answer questions by the interviewer during focus group discussion/key informant interview on the violence that we/the Rohingyas faced in Myanmar either from my personal/ surrounding/work experience. I further understand that I have the right to refuse to answer any question or may leave the interview at any stage.
- I understand my personal details which will reveal my identity to the public will be kept confidential. I further understand, in case these details need to be disclosed my prior permission should be ascertained.
- I understand that in any report on the results of this research my identity will not be revealed. However, if the research wants to use names of the respondents, my identity will still remain anonymous. This will be done by changing my name and disguising any details of my interview which may reveal my identity or the identity of people I speak about.
- I understand that disguised extracts from my interview may be quoted.
- I understand that I am free to contact any of the people involved in the research to seek further clarification and information.
- I have understood the information presented here, and I fully give my consent to participate in this investigation.

I agree to my interview being audio-recorded.

\_\_\_\_\_  
Signature of Participant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Researcher

\_\_\_\_\_  
Date

**APPENDIX - IV**  
**NON-DISCLOSURE AGREEMENT FORM**

**Name:**

**Current Occupation:**

**Mailing Address:**

**Contact Number:**

**Email Address:**

**Birth Certificate/National ID:**

I, \_\_\_\_\_, hereby declare that I am participating in the research team for collecting information through “Focus Group Discussions (FGDs)” for the research project titled, ‘Rohingya Persecutions in Myanmar: Ethnic Cleansing or Genocide?’ [Funding agency: East West University Center for Research and Training (EWUCRT)]. The FGDs are scheduled to be held from 21st to 26th February 2019 at the Kutupalong Refugee Camp, Cox’s Bazar, Bangladesh.

Henceforth, I am signing this Non-Disclosure Agreement Form accepting and obliging the followings conditions: -

- The information and observations of the research team will be kept confidential.
  
- I will be obliged to comply with the instructions in relation to the FGDs, given by the principal researcher of the research project. Any disobedience may result in being excluded from the research team.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_



## APPENDIX - V

### HISTORICAL BACKGROUND OF MYANMAR

#### 1. Preliminary Notes

- 1.1** The prehistory of Burma can be stretched across hundreds of periods to about 200 BC.<sup>404</sup> During 500 BC, “iron-working settlements” appeared in one of the places of south part of modern *Mandalay*.<sup>405</sup> Besides, some momentous evidences of civilization (e.g. plants were first cultivated and animals were tamed and kept as pets) in Burma can be traced back from 6000 BC.<sup>406</sup> According to many archaeologists, certain evidences of Burmese cultures date back to 11000 BC.<sup>407</sup> These evidences envisage that there were “ethnic groups” present in Burma as well as South-East Asia.<sup>408</sup> The Indian culture had influenced the South-East Asia where both Hinduism and Buddhism were prevalent.<sup>409</sup>
- 1.2** Two major ethnic tribes were namely, “*Mon*” whose members used to live in South, and “*Pyu*” whose members were the Northern occupiers.<sup>410</sup> Almost all the members of *Mon* tribe were followers of Buddhism, and they even had their own language.<sup>411</sup> They began establishing Buddhist cultures and supremacy in Burma by captivating powers of Pagan Kingdom.<sup>412</sup> The detailed historical background of Myanmar and the Rohingya community is discussed in the following dividing the same into different periods:-

#### 2. The Pre-Pagan Period

- 2.1** From the earliest history, it is figured out that Burma was an overland route between China and the West.<sup>413</sup> According to Burmese Buddhists, Indians came to “Lower Burma” through Sea.<sup>414</sup> The term “Lower Burma” came from “Rmen”, an ancient word

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<sup>404</sup> Ibrahim (n 26), 115.

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

<sup>408</sup> Ibid; *See also*, Dr. Abdul Karim, *The Rohingyas: A Short Account of Their History and Culture* (Bangladesh: Jatiya Sahitya Prakash, 1<sup>st</sup> edn, 2000) p. 143.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid; *See also*, Fazil Moradi, Ralph Buchenhorst and Maria Six-Hohenbalken (eds), *Memory and Genocide: On What Remain and the Possibility of Representation* (United Kingdom: Routledge, 1<sup>st</sup> edn, 2017) p. 26.

<sup>412</sup> Ibid.

<sup>413</sup> D.G.E. Hall, *A History of South-East Asia* (New York: St Martin's Press, 2<sup>nd</sup> edn, 1964) p. 132.

<sup>414</sup> G. H. Luce and Pe Maung Tin, ‘Burma Down to the Fall of Pagan’, [1939] 29(3) *Journal of the Burma Research Society* 264, 266.

of Mon language, which was referred to as “*Ramiiiiadesa*” (i.e. the Mon country) by the geographers of Arabs.<sup>415</sup> Many *Mon* scripts, similar to “*Pallava*” scripts, were discovered then which shows the range of impacts of Hindu-Buddhist cultures on Burma.<sup>416</sup>

**2.2** In this regard, a British historian, Daniel George Edward Hall, stated that ‘[s]o far as historical evidence is concerned, however, there is no trace of the penetration of Indian influence earlier than the fragments of the Pali canon found at Hmawza (Srikshestra or Old Prome) dating from c. A.D. 500’<sup>417</sup>. It should be mentioned that since the period was not precisely expressed, the dates are still indefinite.<sup>418</sup> Hall noted that the “Burmese Era” started from A.D. 638 which was mainly known as *Pyu* time.<sup>419</sup> However, there is no such information regarding how the administration was framed while it is evident that people from mixed religious backgrounds used to reside in Burma at that period.<sup>420</sup> Many stone figures of “*Vishnu*”, bronze statues of “*Avalokitesvara or Padmapani*” were found in that era as well.<sup>421</sup>

### **3. The Pagan Empire**

**3.1** *Anawrahta Minsaw* was the founder of the *Pagan* Empire who first participated in Burma politics and found the significance of “Agnostic”.<sup>422</sup> Being a glorious ruler, he had emerged as a chronicled personage in Burma.<sup>423</sup> His regime period was not identified but through his accomplishments and developments for his own nation, he has left a mark in the history.<sup>424</sup> He gave birth to “*Mon Nation*” by combining both the Northern Arakan and Lower Burman together.<sup>425</sup>

**3.2** However, after his conquest, Burma and the Mon Nation were engaged in increasing tension and war.<sup>426</sup> Consequently, thousands of Mons were eradicated from their nation during first half of the Nineteenth Century.<sup>427</sup> *Anawrahta* left his two sons namely, *Sawlu*

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<sup>415</sup> Ibid, 135.

<sup>416</sup> Ibid.

<sup>417</sup> Hall (n 406), 133.

<sup>418</sup> Ibid, 134.

<sup>419</sup> Ibid; See also, Maw Ba, *Breakthrough in Burma, Memoirs of a Revolution, 1939-46* (New Haven: Yale University Press, 1<sup>st</sup> edn, 1958) p. 201.

<sup>420</sup> *Id* at 135.

<sup>421</sup> Ibid.

<sup>422</sup> *Id* at 136.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid; See also, Arthur Phayre, ‘Account of Arakan’, [1841] 10 *Journal of the Asiatic Society* 629, 712.

<sup>426</sup> *Id* at 137.

<sup>427</sup> Ibid.

and *Kyanzittha*.<sup>428</sup> *Sawlu*'s era ended up due to a Mon rebellion but defeating the *Mons Kyanzittha* became the king.<sup>429</sup> Later on, *Alaugsthu*, grandson and the successor of *Kyanzittha*, ruled the nation who left behind certain inscriptions at "Myazedi Pagoda" situated in south of *Pegu*.<sup>430</sup>

**3.3** After subjugation of *Alaugsthu*, *Kublai Khan* started the "Mongol Period" and established a route between China and Burma.<sup>431</sup> In 1283, several conquests took place that caused invasion of Tartars in Burma-China route at *Kaungsin*, and removal of the central administration.<sup>432</sup> Afterwards, several battles occurred from 1374 to 1430 between Arakan and Burma rulers for captivating powers.<sup>433</sup> Thereby, Arakan came across a ray of freedom of their State in the year of 1430. In the middle of 14th century, the Mongol Dynasty created a route for the *Mings* by ceasing the Western pathway with China.<sup>434</sup>

**3.4** Since the developments that materialized from 10th to 13<sup>th</sup> ("Pagan Period") century know no bounds, this period is considered as the "Golden Era" of today's Burma.<sup>435</sup> The Buddhist architectures of Pagan period envisage the past showing the rich history of mathematics, geometry and engineering.<sup>436</sup> From 13<sup>th</sup> to 16<sup>th</sup> century, the *Mongols* ruled Burma for 300 years with no significant achievement like Pagan period.<sup>437</sup> After this period, *Pegu* was emerged as the new Burmese Kingdom situated in Yangon.<sup>438</sup> The jurisdiction was extended to Lower Burma and to *Shan States*.<sup>439</sup> Nevertheless, it only lasted for fifty years.<sup>440</sup> Later on, several Kingdoms rose within Burma in different times.<sup>441</sup>

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<sup>428</sup> Ibid.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Walker H.B., *Journey on the Ann Pass, Rangoon* (Myanmar: Rangoon Government Press, 1<sup>st</sup> edn, 1891) p. 14.

<sup>432</sup> Ibid.

<sup>433</sup> Ibid.

<sup>434</sup> S. W. Cocks, *A Short of Story of Burma* (United States: Cornell University Library, 1<sup>st</sup> edn, 1919) p. 164.

<sup>435</sup> Peter Church, *A Short History of South East Asia* (Singapore: John Wiley & Sons (Asia) Pte Ltd., 5<sup>th</sup> edn, 2009) p. 110.

<sup>436</sup> Ibid.

<sup>437</sup> Ibid.

<sup>438</sup> *Id* at 111.

<sup>439</sup> Ibid.

<sup>440</sup> *Id* at 115.

<sup>441</sup> Ibid.

#### 4. Emergence of the Muslim Rohingyas

- 4.1 The Rohingya Muslims were originally from Arakan.<sup>442</sup> During 9th century, Arab and Persian Muslims came to Burma for the purpose of trading and thereby, settled in Lower Burma and Arakan.<sup>443</sup> From 9<sup>th</sup> to 12<sup>th</sup> century, due to expansion of trade, the Arab Muslims gradually occupied South and South-East parts of Asia.<sup>444</sup> As a matter of fact, their presence grew stronger during aforesaid centuries when they started concentrating on trading in Burma and Northern Arakan.<sup>445</sup> Since Arakan State was isolated from the central Burma, their sociological aspects were quite different from each other.<sup>446</sup>
- 4.2 The Arakan State was an independent kingdom and separate from other Burmese kingdoms, Bengal, and Mughal empire in India due to its geographical location.<sup>447</sup> However, happening of some events led to merge the Arakan State with Burma.<sup>448</sup> *Meng Soamwun*, one of the Arakanese rulers, took refuge in Bengal in 1406 CE when *Sultan Ghiasuddin Azan Shah* was the ruler of Bengal.<sup>449</sup> With the support of Bengal's *Sultan Jalauddin Muhammad Shah*, *Soamwun Meng* regained his throne of the Arakan State in 1430 CE.<sup>450</sup> This incident brought the Arakan State and Bengal into a close relationship.<sup>451</sup>
- 4.3 Eventually, the Arakanese people started adopting Islam religion.<sup>452</sup> For illustration, as it is described:

On his [Arakanese king *Meng Soamwun*] homeward journey, he was accompanied by a host of Bengali adventurers, fortune-hunters and admirers. While the king moulded his court on Bengal's model, his Muslim followers built the Sandi-khan mosque at Mrohaung. The expatriate Bengalis found employment in the king's civil and military establishments.<sup>453</sup>

In a while, the Arakan kingdom annexed Chittagong in 1459 and ruled the same territory till 1666 before the arrivals of Mughals.<sup>454</sup> Meanwhile, *Mrauk-U* kingdom built a good

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<sup>442</sup> Kazi Fahmida Farzana, *Memories of Burmese Rohingya Refugees* (United Kingdom: Palgrave Macmillan, 1<sup>st</sup> edn, 2017) p. 42.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

<sup>452</sup> Ibid; *See also*, Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1<sup>st</sup> edn, 1979) p. 139.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid.

relationship with Bengal of India. From 15<sup>th</sup> to 17<sup>th</sup> centuries, such relationship grew stronger with the Muslims and thereby, the Burmese king *Bodawpaya* conquered the Arakan State and annexed with the kingdom of Ava in 1784.<sup>455</sup> From that time, the Arakan State became part of Burma.<sup>456</sup>

## 5. The Dutch and Burma

- 5.1** According to many evidences, the Portuguese mercenaries started entering in Burma during 15<sup>th</sup> century.<sup>457</sup> A Portuguese navigator and explorer, *Diogo Soarez de Mello*, had significant contributions in the wars of *Tabinshwehti* and *Bayinnaung* who gained the crown in 1551.<sup>458</sup> The Portuguese and Siamese took part in invasion of the Arakan State and Burma.<sup>459</sup> In the meantime, a *Feringi* leader named *Philip de Brito* established his rule over Lower Burma.<sup>460</sup> Later on, he tried to attack *Mrohaung*, the capital of Arakan, but failed.<sup>461</sup> The Portuguese initially created their base in *Dianga* which was close to Chittagong and expanded it to Arakan.<sup>462</sup> They were infamous for piracy because they used to pirate slaves to sell them to the king of Arakan.<sup>463</sup>
- 5.2** In 1634, the Dutch reopened a factory which was established by the Portuguese in Arakan.<sup>464</sup> For this purpose, the Dutch carried out their business transactions with Siamese. In 1643, the Arakan king lost his control over the factory due to health issues.<sup>465</sup> Afterwards, a Dutch frigate was ported in *Mrohaung* harbor while the goods were confiscated and the captain was imprisoned.<sup>466</sup> As a result, the factory remained padlocked for eight years.
- 5.3** In 1639, *Shah Shuja*, the second son of *Mughal Emperor Shah Jahan*, became the Viceroy of Bengal.<sup>467</sup> In 1653, the Dutch factory was reopened and continued to work until

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<sup>455</sup> Ibid; See also, Richard Allen, *A Short Introduction to the History and the Politics of Southeast Asia* (New York: Oxford University Press, 1<sup>st</sup> edn, 1970) p. 213.

<sup>456</sup> Ibid.

<sup>457</sup> Hall (n 406), 376.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> Ibid.

<sup>461</sup> Ibid.

<sup>462</sup> Ibid.

<sup>463</sup> Ibid; Shihabuddin Talish, 'The Frengei Pirates of Chatagaon', [1907] 3 *Journal Asiatic Society of Bengal* 419, 423.

<sup>464</sup> Ibid.

<sup>465</sup> Ibid.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

1665, when it was again closed on account of political reasons.<sup>468</sup> In 1658, *Aurangzeb* declared himself successor to the throne of *Shah Shuja*.<sup>469</sup> During that time, *Mir Jumla*, the general of *Aurangzeb*, raided the Arakan kingdom which created bad blood between Bengal and Arakan.<sup>470</sup> Later on, *Shayista Khan*, maternal uncle of *Aurangzeb*, became the Viceroy of Bengal who determined to eradicate the pirates with the assistance of Dutch.<sup>471</sup> At the same time, the Arakan king was preparing to raid Bengal and thus, he asked the Dutch for their ships.<sup>472</sup> In 1666, after conquering the city of *Dianga*, *Shayista Khan* expanded its territory to Chittagong along with the *Naaf River*.<sup>473</sup> Soon after this, the Arakan kingdom became administratively and regimentally weak.<sup>474</sup>

**5.4** In 1710, an Arakanese ruler, *Maha Danha Bo*, went to *Ramree* Island where his descendants used to live.<sup>475</sup> Subsequently, he became king of that area and since the Mughal Empire declined then he took advantage of attacking the *Sandwip* Island.<sup>476</sup> During 1731-85, many Arakan rulers and population fled into Chittagong district and this immigration process threatened the security of Bengal as a whole.<sup>477</sup> It was one of the reasons of the First Anglo-Burmese War of 1824-26.<sup>478</sup>

## **6. The Beginning of the Konbaung Dynasty in Burma**

**6.1** During 1752 to 1782, a *Moksobomyo* rebel leader gained his ladder by calling himself “*Aungzeya*” (“the victorious”) and he became the leader of a national movement.<sup>479</sup> After several raids and movements, he assumed the title “*Alaungpaya*” or “embryo Buddha” himself.<sup>480</sup> He made alliance everywhere he went and built a palace in *Moksobomyo*

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<sup>468</sup> *Ibid*; See also, Fred Van De Mehden, *Religion and Nationalism in Southeast Asia: Burma, Indonesia and the Philippines* (United Kingdom: University of Wisconsin Press, 1<sup>st</sup> edn, 1968) p. 211.

<sup>469</sup> *Ibid*.

<sup>470</sup> *Ibid*.

<sup>471</sup> *Ibid*.

<sup>472</sup> *Ibid*.

<sup>473</sup> Hall (n 406), 378.

<sup>474</sup> *Ibid*.

<sup>475</sup> *Ibid*.

<sup>476</sup> *Ibid*.

<sup>477</sup> *Ibid*; See also, Francis Buchanan, *Francis Buchanan in Southeast Bengal (1798): His Journey to Chittagong, the Chittagong Hill Tracts, Noakhali and Comilla* (Bangladesh: Dhaka University Press, 1<sup>st</sup> edn, 1992) p. 96.

<sup>478</sup> *Ibid*, 379-80.

<sup>479</sup> *Id* at 381; See also, V. B. Lieberman, ‘Ethnic Politics in Eighteenth-Century Burma’, [1978] 12(3) *Modern Asian Studies* 455, 459

<sup>480</sup> *Ibid*.



which was called the “town of the hunter chief”.<sup>481</sup> He had certain wars with the Mons who upheld the position of Upper Burma.<sup>482</sup> However, in early of 1755, he sieged the Pegu Kingdom.<sup>483</sup> After several months, he triumphed over the *Mons* and made a festival at the *Shwe Dagon* Pagoda.<sup>484</sup> He created a new city and named it Rangoon which means “the End of Strife”.<sup>485</sup>

## 7. The Reign of *Bodawpaya* and the First Anglo-Burmese War

**7.1** King *Bodawpaya*, third son of *Alaungpaya*, was the ruler of that regime who was known as “Lord of the Great Law”.<sup>486</sup> However, *Michael Symes*, representative of the then government of India, stated that he was a tyrant and madman.<sup>487</sup> King *Bodawpaya* had tremendous influence on Arakan as well as Burma.<sup>488</sup> Arakan’s land and naval way came under the regime of king *Bodawpaya*.<sup>489</sup> Later, Arakan became a province under the “viceroy of Burma” and through this, Anglo-Burmese relations began between British India and Burma.<sup>490</sup> King *Bodawpaya* made many establishments that required immense man-power and therefore, he made a policy under which thousands of Arakanese people were bound to work.<sup>491</sup> Consequently, this drained the Upper Burma and the *Mon country*.<sup>492</sup> It was affirmed that the framework of the whole society cracked down during this period and thereby, many people died of starvation due to lack of food and other amenities.<sup>493</sup>

**7.2** Accordingly, a revolution took place among the Arakan people due to such cruel policy.<sup>494</sup> The uprising broke out with the assistance of many Arakan people who used to live in Chittagong.<sup>495</sup> However, the revolt ended when Burma sent supports and consequently, many people took refuge to British territory.<sup>496</sup> Colonel *Erskine* went there to settle the matter but he gave this responsibility to three leaders of such refugees.<sup>497</sup>

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<sup>481</sup> Ibid.

<sup>482</sup> Id at 383.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Id at 556; See also, E. R. Leach, *Political Systems of Highland Burma* (United States: Beacon Press, 1<sup>st</sup> edn, 1954) p. 79.

<sup>487</sup> Ibid.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

<sup>490</sup> Ibid.

<sup>491</sup> Ibid.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> Id at 557.

<sup>495</sup> Ibid.

<sup>496</sup> Ibid.

<sup>497</sup> Ibid.

- 7.3** This incident caught the eyes of British government in India and so the government appointed Sir *John Shore* who was Governor-General.<sup>498</sup> The power was delegated to *Michael Symes* who went to Burma to settle the situation.<sup>499</sup> In addition, he was directed to oversee the trade and commerce in Burma.<sup>500</sup> While he was in Burma, he experienced both welcoming and rude behavior from the people.<sup>501</sup> When *Symes* went back to Calcutta, he carried a royal letter of the Burmese king in which the king informed his apprehension to the authorities of Calcutta about possibility of committing crimes in Burma by the Arakanese refugees who crossed the border and settled in Chittagong.<sup>502</sup> At that time, the permission to oversee the circumstances and mercantile affairs and to uphold the friendly environment was vested upon the East India Company.<sup>503</sup>
- 7.4** In 1796, Captain *Hiran Cox* went to Rangoon and he found in his investigation that, as the situation of Arakan was still unresolved, Burmese were prepared to invade Bengal and later on, attack in Assam.<sup>504</sup> Subsequently, in March 1800, an instruction was sent to Governor-General *Wellesley* to close further immigration process from Burmese territory.<sup>505</sup> A report was submitted in July 1801 to invoke a new method to unravel the Arakan-Burma situation.<sup>506</sup> The British government decided to make alliance with Burma in exchange of removing some Arakanese leaders.<sup>507</sup> Then, *Michael Symes* arrived at Burma with a proposition of creating an agreement and to explain the situation as to why the expulsion of all the refugees could not be possible.<sup>508</sup> Through this, peace came to the Arakan frontier but it was temporary.<sup>509</sup>
- 7.5** In the interim, king *Bodawpaya* became weak due to old age and thus, his grandson named *Bagidaw* took charge over the country.<sup>510</sup> However, *Bagyidaw's* accession to the throne deteriorated the overall situation of Arakan border.<sup>511</sup> The Burmese troops began entering into the *Ramu* region and attacking the East India Company's elephant troops.<sup>512</sup> Therefore, the British government strengthened the outpost.<sup>513</sup> Nevertheless,

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<sup>498</sup> *Id* at 559; *See also*, M. Aung-Thwin, 'The British "Pacification" of Burma: Order Without Meaning', [1985] 16(2) *Journal of Southeast Asian Studies* 245, 261.

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid.*

<sup>502</sup> *Id* at 561.

<sup>503</sup> *Ibid*; *See also*, M. P. Callahan, *Making Enemies: War and State Building in Burma* (United States: Cornell University Press, 1<sup>st</sup> edn, 2003) p. 31.

<sup>504</sup> *Ibid.*

<sup>505</sup> *Id* at 562.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Ibid.*

<sup>508</sup> *Id* at 563.

<sup>509</sup> *Ibid.*

<sup>510</sup> *Id* at 566.

<sup>511</sup> *Id* at 567.

<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*

the Burmese people initiated an operation in Arakan when Chittagong became the first victim of the same.<sup>514</sup> In 1824, the British government started counter attacks on Arakan and Chittagong which turned into wide-spread and large scale attacks.<sup>515</sup> The British government intended to wipe the Burmese troops away from the Indian Border so that they could attack Assam, Manipur as well as Arakan.<sup>516</sup> Finally, *Mraung*, the capital of Arakan, was captured in 1825.<sup>517</sup>

## 8. The Province of British Burma

- 8.1** After the war of 1824, the British government understood that they had to maintain peaceful relations with the annexed States.<sup>518</sup> It was also realized that they had to give back the conquered regions to the countries for avoiding further war.<sup>519</sup> Therefore, except Tenasserim which was provided to Arakan, the rest of the provinces were given to the Kingdom of Burma.<sup>520</sup> After the annexation of Arakan and Tenasserim in 1826, their administration method was changed by the British Government. Arakan was transferred through the Bengal administration and later on, it came under the supervision of the Commissioner of Chittagong in 1828.<sup>521</sup>
- 8.2** When Tenasserim and Arakan were annexed in 1826, economic condition of both the States was deprived.<sup>522</sup> Even though Arakan amplified rice trading during 17<sup>th</sup> century, its administration was not stable during 18<sup>th</sup> century.<sup>523</sup> As a result, Arakan faced slight economic crisis due to some restrictions on export of rice trading.<sup>524</sup> At that moment, the British government eased the export restriction, revived the rice trading in Arakan, and its administration headquarters became commercial centers.<sup>525</sup>

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<sup>514</sup> Ibid.

<sup>515</sup> Ibid.

<sup>516</sup> *Id* at 568.

<sup>517</sup> Ibid.

<sup>518</sup> *Id* at 571; *See also*, Imtiaz Ahmed, *The Plight of the Stateless Rohingyas: Responses of the State Society & the International Community* (Bangladesh: The University Press Limited, 1<sup>st</sup> edn, 2014) p. 76.

<sup>519</sup> Ibid 571.

<sup>520</sup> Ibid.

<sup>521</sup> *Id* at 585.

<sup>522</sup> *Id* at 586.

<sup>523</sup> Ibid.

<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

- 8.3** From 1860-62, the British government enhanced trade system in the entire region.<sup>526</sup> They wanted to trade cottons with China and the routes were discovered through Burma.<sup>527</sup> Additionally, the British government united Arakan, Pegu and Tenasserim, and thereafter, their trade flourished due to the growing demand of rice.<sup>528</sup> The Irrawaddy region was a free land surrounded by swamp and jungle.<sup>529</sup> The occupants used to cultivate rice for their own needs.<sup>530</sup> Sometimes surplus crops were not reaped and there was no demand.<sup>531</sup> The population of Irrawaddy started living in the Upper Burma after the second Anglo-Burmese War in 1852.<sup>532</sup>
- 8.4** At the outset of 20<sup>th</sup> century, Burma was occupied by the British government and the Indians commenced migrating to Burma.<sup>533</sup> In the beginning, the number was 0.25 million at a year and later it rose to 0.45 million during 1927.<sup>534</sup> The reason of migration was basically to cultivate seasonal crops and thus, after remaining one or two years, they returned to their homeland.<sup>535</sup> However, some stayed behind and due to the number of populations, it was not possible for the Indian government to maintain safeguard in Burma province.<sup>536</sup> During 1942-43, the British authorities tried to capture the Northern Arakan when the weather remained dry but they failed.<sup>537</sup> Meanwhile, a long route was resurrected between China and Burma via “*Myitkyina*” because of the Americans.<sup>538</sup> In addition, the Americans built “*Ledo Road*” for trade purposes which created a connection between India and China.<sup>539</sup>

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<sup>526</sup> *Id* at 590.

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*

<sup>529</sup> *Id* at 736.

<sup>530</sup> *Ibid.*

<sup>531</sup> *Ibid.*

<sup>532</sup> *Ibid.*

<sup>533</sup> *Id* at 737.

<sup>534</sup> *Ibid.*

<sup>535</sup> *Ibid.*

<sup>536</sup> *Ibid*; *See also*, D. I. Steinberg, *Burma: The State of Myanmar* (United States: Georgetown University Press, 1<sup>st</sup> edn, 2001) p. 201.

<sup>537</sup> *Id* at 776.

<sup>538</sup> *Ibid.*

<sup>539</sup> *Ibid.*

## 9. Japanese Occupation

**9.1** During 1930s, Burma was attracted by some lucrative slogans of the Japanese such as “Asia for Asia” and “Co-Prosperity Sphere”.<sup>540</sup> Thereby, the Japanese were welcomed in Burma. As a matter of fact, the Japanese achieved far greater popularity than that of British rule.<sup>541</sup> They introduced military training as well as promoted local administration.<sup>542</sup> Also, the indigenous language was encouraged in Burma which enhanced self-confidence among the people across the region.<sup>543</sup> However, when the World War II (WW II) broke out, Burma lost her confidence due to the threats of Japanese.<sup>544</sup> In order to free the people from the occupied countries and tackle the allied attacks, the government did everything which was possible.<sup>545</sup> Hence, creating an illusion of independence, they set up a “puppet regime”.<sup>546</sup>

**9.2** On 1<sup>st</sup> August 1943, Japan granted the newly created State of Burma nominal independence.<sup>547</sup> Dr. Ba Maw became its Head of the State and his rank was similar to that of a “*Furher*”.<sup>548</sup> Though the constitution of 1937 was not revived, the actual power was under Dr. *Gotara* Ogawa who was a former Cabinet Minister in Tokyo, Japan.<sup>549</sup> Soon after, he became “super advisor” to the Burmese Government.<sup>550</sup> At that period, a step was taken to form a command in South-East Asia at the Quebec Conference.<sup>551</sup> Supreme Leader of the command was *Louis Mounbatten* and Deputy Chief was *Joseph Warren Stillwell*. Meanwhile, the British took the command of Northern Arakan in 1944.<sup>552</sup>

## 10. Independence of Burma (Myanmar)

**10.1** The slogans of Japan did not match with the realities and subsequently, Burmese people found that the Japanese were similar to the British.<sup>553</sup> Their ruling was comparable and they both exploited Burma.<sup>554</sup> *Aung San* along with his fellow members of the “Thirty

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<sup>540</sup> Church (n 428), 115.

<sup>541</sup> Ibid.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

<sup>544</sup> Hall (n 406), 776.

<sup>545</sup> Ibid.

<sup>546</sup> Ibid.

<sup>547</sup> Ibid.

<sup>548</sup> Ibid; Please note that “*Furher*” is a German word that means “leader”.

<sup>549</sup> Ibid.

<sup>550</sup> Ibid.

<sup>551</sup> *Id* at 780.

<sup>552</sup> Ibid

<sup>553</sup> Ibrahim (n 26), 144.

<sup>554</sup> Ibid.

Comrades” group created the “Anti-Fascist People’s Freedom League”, Burmese Communist Party, in order to resist the Japanese occupation and achieve Burma’s independence.<sup>555</sup> Due to the activities of the Anti-Fascist People’s Freedom League, the war ended and they got freedom from Japan.<sup>556</sup>

**10.2** When Yangon was conquered again in 1945, the British announced the plan to give full independent government in Burma.<sup>557</sup> The British considered neither political nor psychological aspects of the people since they were occupied under the Japanese dominance and had no longer intention to come under the rule of British.<sup>558</sup> Thus, the Anti-Fascist People’s Freedom League and other ethnic based parties came forward together and commenced movement for the independence.<sup>559</sup> *Aung San*, leader of Anti-Fascist People’s Freedom League, negotiated with British in London for an election so that they could create a constitution through the “Constituent assembly” for the independence of Burma in 1947.<sup>560</sup> Accordingly, the first Constitution of Burma, adopted by the Constituent assembly, was enacted in 1947.<sup>561</sup>

**10.3** Even though the Anti-Fascist People’s Freedom League won the election, the political rivals assassinated *Aung San* as well as other Cabinet members in July 1947.<sup>562</sup> It was difficult to obtain independence for Burma; nevertheless, *U Nu* of the Anti-Fascist People’s Freedom League fought for independence of Burma.<sup>563</sup> Eventually, Burma became a federal State, consisted of several States, and it was considered as home of several ethnic minorities.<sup>564</sup> Due to the failure of federal system, Burma suffered instability till the year 1948.<sup>565</sup> Finally, Burma gained independence from British rule on 4th January 1948.<sup>566</sup>

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<sup>555</sup> Ibid.

<sup>556</sup> Ibid.

<sup>557</sup> Ibid.

<sup>558</sup> Ibid.

<sup>559</sup> Ibid.

<sup>560</sup> Ibid.

<sup>561</sup> Human Rights Watch, ‘Chronology of Burma’s Constitutional Process’, available at: <<https://www.hrw.org/sites/default/files/reports/burma0508chronology.pdf>> accessed on 20 April 2019.

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.

<sup>564</sup> Ibid; Ganesan and Hlaing (n 48), p. 33.

<sup>565</sup> Ibid.

<sup>566</sup> *Id* at 115.



## **APPENDIX - VI**

### **CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE**

Approved and proposed for signature and ratification or accession by General Assembly  
resolution 260 A (III) of 9 December 1948

Entry into force: 12 January 1951, in accordance with article XIII

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its  
resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law,  
contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international  
co-operation is required,

Hereby agree as hereinafter provided:

#### **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.

#### **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.

#### **Article III**

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

#### **Article IV**

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

#### **Article V**

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

#### **Article VI**

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

#### **Article VII**

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

#### **Article VIII**

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

#### **Article IX**

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

#### **Article X**

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

#### **Article XI**

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

## **Article XII**

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

## **Article XIII**

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

## **Article XIV**

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

## **Article XV**

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

## **Article XVI**

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

## **Article XVII**

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The date upon which the present Convention comes into force in accordance with article XIII;

- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

#### **Article XVIII**

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

#### **Article XIX**

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

## APPENDIX – VII

### ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1998

The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This version of the Statute incorporates changes made to it by the *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

#### PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

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,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,  
Have agreed as follows:

## **PART 1. ESTABLISHMENT OF THE COURT**

### **Article 1**

#### **The Court**

An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

### **Article 2**

#### **Relationship of the Court with the United Nations**

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

### **Article 3**

#### **Seat of the Court**

1. The seat of the Court shall be established at The Hague in the Netherlands (“the host State”).
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

### **Article 4**

#### **Legal status and powers of the Court**

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.



## **PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

### **Article 5**

#### **Crimes within the jurisdiction of the Court**

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
  - (a) The crime of genocide;
  - (b) Crimes against humanity;
  - (c) War crimes;
  - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

### **Article 6**

#### **Genocide**

For the purpose of this Statute, “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.

### **Article 7**

#### **Crimes against humanity**

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder;
  - (b) Extermination;

- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

**2.** For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
  - (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
  - (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
  - (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

## Article 11

### Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

## Article 12

### Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  - (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

## **Article 13**

### **Exercise of jurisdiction**

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

## **Article 14**

### **Referral of a situation by a State Party**

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

## **Article 15**

### **Prosecutor**

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

### **PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW**

#### **Article 22**

##### **Nullum crimen sine lege**

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

#### **Article 23**

##### **Nulla poena sine lege**

A person convicted by the Court may be punished only in accordance with this Statute.

#### **Article 24**

##### **Non-retroactivity ratione personae**

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

## **Article 25**

### **Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

## **Article 26**

### **Exclusion of jurisdiction over persons under eighteen**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

**Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

**Article 28**

**Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.



## **Article 29**

### **Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

## **Article 30**

### **Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

## **Article 31**

### **Grounds for excluding criminal responsibility**

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:
  - (a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
  - (b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
  - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
  - (i) Made by other persons; or
  - (ii) Constituted by other circumstances beyond that person's control.
- 2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
- 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

## **PART 7. PENALTIES**

### **Article 77**

#### **Applicable penalties**

- 1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
- 2. In addition to imprisonment, the Court may order:
  - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

### **Article 78**

#### **Determination of the sentence**

- 1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
- 2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

### **Article 79**

#### **Trust Fund**

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

### **Article 80**

#### **Non-prejudice to national application of penalties and national laws**

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

## **APPENDIX – VIII**

### **STATUTE OF THE INTERNATIONAL COURT OF JUSTICE**

#### **Article 1**

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

### **CHAPTER II**

#### **COMPETENCE OF THE COURT**

##### **Article 34**

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

##### **Article 35**

1. The Court shall be open to the states parties to the present Statute.
2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.
3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

##### **Article 36**

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
  - a. the interpretation of a treaty;
  - b. any question of international law;
  - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
  - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

### **Article 38**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

## APPENDIX – IX

### PARAGRAPHS ON THE RESPONSIBILITY TO PROTECT (R2P)

**Paragraph 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.

**Paragraph 139:** The international community, through the United Nations, also has the responsibility 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. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

**Paragraph 140:** We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

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