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Ankita Tandon
Ph.D. Scholar, University
Institute of Legal Studies,
Chandigarh University,
Punjab, India

The case of Rohingyas in Myanmar: The principle of burden sharing and responsibility to protect

Ankita Tandon

Abstract

This piece of writing discusses the plight of the Rohingya, an ethnic group in Myanmar who has been persecuted refugee groups in the world, having lived in a realm of statelessness for over six generations, and who are still doing so. This article addresses the Rohingya refugee crisis in Rakhine, argues that the Rohingya is facing a serious threat of genocide, ethnic cleansing and crimes against humanity, while the government of Myanmar has failed in its primary duty to protect them. Due to such failure, the responsibility to protect them falls on the international community to prevent the occurrence of mass atrocities under the principle of a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees. The objectives of this article are dual. First is to provide an understanding of the plight of the Rohingya and second is to analyse the application of responsibility to protect and burden sharing as a solution to the crisis. This paper attempts to give recommendations to the government of Myanmar, Association of South East Asian Nations (ASEAN) and the United Nations (UN) on the role to be played through the application of the principle of responsibility sharing and to protect in Rohingya crisis.

Keywords: Responsibility to share, responsibility to protect, Rohingyas, ASEAN, united nation

Introduction

Burma has one of the worst records of human rights since time immemorial. Since years this ethnic minority is facing survival crisis and in the year of 1978 'ethnic cleansing' propaganda targeted against the Rohingya community, Myanmar, has witnessed one of the most gruesome massive killing sectarian strife's in history. Albeit, political pressure, Myanmar, till today, maintains its ideological fancy in its inhumane treatment exhibited towards the Rohingya. The Rohingyas comprise of people of different status, vulnerabilities and needs who are on the verge of genocide, ethnic cleansing and crimes against humanity^[1]. As per the roots of responsibility sharing and the responsibility to protect the refuge and migrant situation in Myanmar is not a local, not even a regional challenge. It is a global challenge and crisis. And a global crisis demands a holistic and global response. It must be a global priority to find solutions. The series of violence on the Rohingya has been roundly condemned in statement, and many international government, regional bodies, human rights organizations and individuals, all call for immediate interference by the international community. In spite of the call, the government of Myanmar has persistently taken the issue of Rohingya as a communal strife between the Rohingya and Arakanese and urged the international community to stay away from its internal affairs.

This article focuses on the shift from state centric concept to combined efforts to address transnational problems where state mechanisms are absent or have failed which can be reflected in the recent notion of Sovereignty. The paper tries to critically analyze the role of R2P in the case of Rohingyas, explores the potential of the doctrine to avoid, prevent the direct and structural violence basing its origin on the very concept of sovereignty as responsibility and therefore the primary role of the state to protect its subjects within a state. The doctrine of Responsibility to protect was formally introduced to the international community in year 2001 through the efforts of the Canadian government by forming a commission called ICISS on the request of UN to strike a balance between sovereignty and human rights^[2].

Correspondence

Ankita Tandon
Ph.D. Scholar, University
Institute of Legal Studies,
Chandigarh University,
Punjab, India

¹ Ibrahim Azeem, *The Rohingyas inside Myanmar's hidden genocide*, speaking tiger press 2017 page 1-2

² Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," *Foreign Affairs* 81 (2002): 99.

Thus the paper discusses the essence of sovereignty, the dual responsibility of sovereignty which is the very bases of R2P. According to the original report of the commission R2P takes into account three elements: The responsibility to prevent, to react and finally to rebuild. As per the advocators of R2P the responsibility to prevent is the crucial element of the doctrine which look into the root causes of the conflict that leads the people to atrocities or any type of danger. The responsibility to react provide for taking measures to avoid human suffering even the humanitarian intervention and other coercive actions can be taken which makes it controversial but it provide so only after exhausting all possible means within the state and international level. Lastly, the responsibility to rebuild requires the international community to provide full assistance after the conflict to help states rebuild its capacity for its sustenance as well put in place the measures to avoid reoccurrence of any such conflict ^[3]. Most importantly the document provide for redefinition of sovereignty to realize human rights and to uplift the veil of so called sovereignty and stop the atrocities within the state. Acceptance of sovereignty as responsibility is necessary for proper implementation of R2P worldwide.

Evolution of responsibility to protect and burden sharing

Two cases in particular from the 1990s served as the impetus for a new debate on the legitimacy of intervention for humanitarian purposes. The late and half-hearted action by the international community during the genocide in Rwanda in 1994 led to much soul-searching on the part of international organizations and individual states about how to protect civilians in the future. Yet, the 1999 NATO bombing of Serbia, designed to prevent ethnic cleansing in Kosovo, occurred without Security Council authorization and created damaging divisions within the international community about the conditions under which force should be used. The challenge was taken by the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian Government, which at the end of 2001 issued a report entitled *The Responsibility to Protect* (ICISS 2001). The core of the Commission's argument was twofold. First, it posited that contemporary sovereignty is no longer merely about undisputed control over territory, but rather a conditional right dependent upon a state's respect for a minimum standard of human rights. For the Commission, it logically followed that intervention is permissible – and an integral part of sovereignty - if it is aimed at protecting civilians from mass violations of their human rights. Second, the Commissioners insisted that the R2P required a framework broader than crisis response. The international community also had a responsibility to prevent such crimes from occurring, and to rebuild societies emerging from conflict. In Paragraph 203 of the Report of the United Nations Secretary General on High-Level panel meeting on threats, challenges and change (HLP Report, 2004), R2P is referred as an 'emerging norm.' The most remarkable development of R2P happened in 2005, whereby R2P was unanimously endorsed by 191 Head of States in the World Summit 2005 (United Nations, 2005). Paragraph 138 of the World Summit Outcome Document 2005 states that individual State has the responsibility to protect its

populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and the international community should encourage and help States to exercise this responsibility. Paragraph 139 lays down 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 to 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.

The concept of international solidarity and burden-sharing in relation to refugees has been present since the inception of UNHCR. Its documented origins are found in Paragraph 4 of the Preamble of the 1951 Convention relating to the Status of Refugees, which expressly acknowledges that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation." The Executive Committee of the UNHCR Programme (ExCom) has elaborated several Conclusions, which either focus on, or draw attention to, the issue of burden-sharing. Amongst these, the ExCom Conclusion 22 (XXXII) of 1981 relating to the Protection of Asylum Seekers in Situations of Large-Scale Influx is particularly important, inasmuch as it explains the need for this concept and provides certain parameters for the implementation thereof. It notes the following rationale for burden-sharing:

- A mass influx may place unduly heavy burdens on certain countries, and a satisfactory solution could not be achieved without international cooperation.
- States should, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, states that have admitted a mass influx of refugees.

The atrocities in Myanmar

The word 'Rohingya' is a historical name for the Muslim Arakanese. There is still a Muslim village in Akayab (Sittwe) city by the name of Rohingya para. The old name for Rakhine State was Rohang from which the term Rohingya was derived. Today, this terminology (Rohingya) has become politically charged. Two strong blocs in Myanmar have emerged: pro and anti Rohingya. The pro bloc takes view that the Rohingyas settled in Burma in the ninth century, which, through the ages, have mixed with Bengalis, Persians, Moghuls, Turks and Pathans, in line with the historically pluralistic population of Arakan State. The latter takes the view that the Rohingyas are a modern construct, comprising, principally, of illegal Chittagonian Bengalis that arrived as a by-product of British colonial rule (Human Rights Watch 1996). The term Rohingya however lost its salience since the late 1960s due to the fact that the government uses the term 'Bengali', which implies immigrant status. The Rohingyas — Muslims and ethnically different from the rest ethnic groups in Myanmar — are not recognised as 'citizens' of Myanmar. They are considered as 'resident foreigners'. The 1982 Burma Citizenship Law divided citizens by three different categories: citizens,

³ Resolution adopted by the General Assembly on 16 September 2005 retrieved from www.un.org.

associate citizens, and naturalized citizens. Citizenship status comes with three colour coded citizenship scrutiny card (pink, blue and green respectively (Human Rights Watch, 2008; Ullah, 2011; 2014). They also suffer deprivation of the rights to education and health services, property and ownership and even the right to marry and procreate. In a series of attacks beginning on June 2012, villages where the Rohingya reside were targeted by the Arakanese mobs. Due to the violence, thousands of Rohingya have been fleeing to other countries, especially to Bangladesh, Thailand and Malaysia. As of end of April 2014, a total of 144,300 Myanmar refugees and asylum seekers have been registered with UNHCR in Malaysia, with 36,290 of them are Rohingya (UNHCR Malaysia, 2014). The government reported that 77 people were killed and 109 were injured (Ministry of Foreign Affairs, 2012). In term of the number of casualties, the Rohingya were more affected than the Arakanese. In the June and October 2012 series of violence, 134 Rohingya were reportedly died while 117 suffered injuries (Inquiry Commission, 2013). State of emergency was declared on 10 June 2012 and the Ministry of Foreign Affairs issued a statement that the violence was not one-sided, not a pogrom or genocide of Rohingya committed by the Arakanese. (Ministry of Foreign Affairs the Union of Myanmar, 2012); witnesses interviewed however said that the police officers were present in the vicinity of the area where the armed gangs massacred the unarmed Muslims and acted as mere. This statement suggested the involvement of State's agencies in the violence. The Human Rights Watch (HRW) released satellite images showing 35 acres area of destruction including hundreds of buildings and house-boats, all raged by fire showing the widespread attack targeting the areas with Rohingya population (HRW, 2012). The violence that occurred in October 2012, March and June 2013 respectively were more organised and directed towards Muslims in general, not only the Rohingya. The October attacks resulted in 88 deaths, while 129 people were injured including children. The violence that broke out in June 2013 was sparked by a murder of a Buddhist woman at a gas station in Lashio, where mobs gathered demanded the assailant to be handed over to them. Upon refusal, the gang attacked the Muslims in Lashio. In January 2014, the UN High Commissioner for Human Rights, Navi Pillay, received credible information of the killing of 48 Rohingya in two incidents on 9 and 13 January 2014 and demanded the government to investigate (UN News Centre, 2014). Earlier in 2012, Pillay expressed concerns over reports of human rights violations however produced briefing paper in which its findings are consistent with the reports by Associated Press, The Irrawady, Arakan Project, Fortify Rights and Medicins Sans Frontier (BROUK, 2014). The aid workers complained that there were wide spread animosity against them and the local aid workers were threatened with attack if they helped the Rohingya. In February 2014, the NGO, Doctors without Borders was banned from Myanmar, while in February 2014, Maltesar International was not allowed into Myanmar to resume aid operations. On 27 and 28 March 2014, the Arakanese mobs attacked Maltesar International office, which forced the police to fire warning shots and evacuated the organisation's staff after their private residences were attacked. Rakhine Inquiry Commission was established on August 2012 to violent incidents and released its report in July 2013

(Inquiry Commission on Sectarian Violence in Rakhine State, 2013). The HRW in its 2014 report expressed disappointment with the government's response to violence by the Buddhist extremists and the lack of initiative to bring the perpetrators to justice (HRW, 2014). The government of Myanmar holds responsibility to protect its population from the four crimes of mass atrocity but the government treatment for the Rohingya is far from meeting the international standard. Thus, the above evidences draw a conclusion that despite the government promise to control the crisis, violence and discrimination against the Rohingya still increase. This article argues that the government's efforts are insufficient to provide long-term solution to protect the Rohingya.

Application of R2p in Myanmar

United Nations endorsed R2P to prevent four types of humanitarian crisis: genocide, war crimes, ethnic cleansing and crimes against humanity and the government of Myanmar has manifestly failed or is unwilling to protect its population from such mass atrocities. As currently understood by Member States, R2P has three components or 'pillars': the protection responsibilities of individual States; the international community's role in assisting States to fulfill their responsibilities (capacity-building); and the international community's residual responsibility for timely and decisive response.

Genocide is defined in Article 2 (a) to (e) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948. Physicians for Human Rights (PHR) conducted a field research in March, April and May 2013 to analyse and assess the patterns of extreme violence from various sites in Myanmar and reported the government's failure to manage the Rohingya crisis. PHR also concluded that the dissemination of hate speech, impunity for most perpetrators and the government's inaction pose a serious threat of genocide.

In his January 2009 report, the Secretary General makes clear that renegotiation of R2P is not on offer, and that the provisions of the Outcome Document define the "authoritative framework within which the United Nations system and its partners can seek to give ... institutional life" to the principle. This decision to narrow the scope of the principle makes consensus more likely within the United Nations, and will persuade reluctant Member States to consider the package of measures Ban Ki-Moon has developed for each of R2P's three 'pillars'. He also insists that the structure of R2P "relies on the equal size, strength and viability" of each of these pillars, and that one form of response cannot be allowed to outstrip the others. The implementation package has four programmatic components:

1. **Capacity building:** Consistent with the responsibilities elaborated under 'Pillar 2' Ban Ki-Moon's report calls on the international community to help States meet their inherent responsibilities to protect their populations. The tools for doing so include confidential or public suasion, education and training, and other forms of material assistance. The institutions and agents identified as key to this assistance include:
 - The Office of the High Commissioner for Human Rights (which can assist in the creation of national constitutions and legislation that provides for and protects human rights);

- International and national development agencies (which can promote ‘good governance’ and human rights protection through their aid programmes);
 - The newly established Peace building Commission (which can help restore stability and economic development post-conflict, so as to prevent future atrocities);
 - Special Representatives of the Secretary-General (who can offer training and education on issues such as child protection and the prevention of genocide); and
 - A series of regional organizations (which can share best practices from other geographies on how to build institutions that can help to prevent or diminish the threat of the four crimes).
2. **Early warning and assessment:** The Secretary General’s report is heavily focused on prevention, which reflects his belief that the international community needs more options for its involvement beyond the use of military force. Developing this capacity for early warning within the UN is viewed as having three main requirements: the timely flow of accurate and relevant information about the preparation or commission of mass atrocities within a country; a strong capacity within the UN to assess that information and understand its implications; and easy access to the Secretary General and the Security Council so that the analysis and recommendations can be acted upon. Ban Ki-Moon’s report suggests that one way to strengthen this institutional capacity is to consolidate the analysis and sharing of information in a single office for the Prevention of Genocide and the Responsibility to Protect.
 3. **Timely and decisive response:** Where Pillars 1 and 2 prove insufficient to protect populations, and States are ‘manifestly failing’ in their responsibilities, the international community must respond in a timely and effective way. Ban Ki-Moon’s report indicates that this response should occur through the institutions of the UN (primarily the Security Council and General Assembly) and not through unilateral action outside of them. He also insists that the international community’s options are not limited to the use of violent means. Thus, the recommendations include improvements to the Secretary-General’s mediation capacity (his ‘good offices’ function), more systematic application of diplomatic and financial sanctions, and the use of UN missions to deliver strong messages to political leaders about their legal obligations and the possibility of prosecution under international criminal justice. With respect to the Security Council, the report calls for greater activism on the part of the Secretary-General in bringing matters to the Council’s attention, improving the transparency of the Council’s decisions, securing sufficient resources for military missions, and developing clearer mandates for the protection of civilians.
 4. **Collaboration with regional and sub-regional organisations:** Finally, the operationalization of R2P relies heavily on better collaboration between the United Nations and organizations at the regional and sub-regional level. Ban Ki-Moon’s report focuses on

ways in which the UN could help to build regional capacity, but also to learn from different regions’ experiences with measures to build state capacity and prevent conflict.

Thus UN must not act alone and should move with regional organisation (ASEAN) and the private actors within the UN system. It must be a tri-partite action involving the government of Myanmar, ASEAN and UN. According to the principle of R2P, the government of Myanmar carries the primary responsibility to provide security to each and everyone in the country, and disregard their creed, ethnicity or religion. Despite the government’s stern policy denying the Rohingya with the right of citizenship, they are living within territorial jurisdiction of Myanmar, thus entitles them for protection from mass atrocities. The government must uphold the rule of law and hold accountable those who incite and complicit in the violence. In the context of Myanmar, as a country moving towards democracy, it should embrace the rule of law as the most fundamental principle. The government must work on independent and properly functioning judiciary which is a prerequisite of rule of law. The United Nations’ Development Programme identified four keys areas crucial for the establishment of rule of law in crises-affected and fragile situations. They are: (i) dealing with a legacy of violence, (ii) increasing safety and security for all, (iii) building confidence through accessible and effective justice and security institutions, and (iv) improving the delivery of justice and security for women (United Nations Development Programme, 2014). The government must embrace the multiethnic character of the country and should seriously develop plan of reforms towards national reconciliation and democracy. The most pivotal step is for the government to review some provisions in the Citizenship Act 1982, which are discriminatory against the Rohingya and contrary to the standard of international human rights law. The Rohingya has a significant historical and legal nexus with the country and should be accorded with rights due to them - the most important of all is the right of citizenship. Smith deliberates the advantages of the working of regional mechanism as it involves fewer States, thus the political consensus is easier to be achieved. Besides, States in the same region are relatively close with respect to tradition and culture. ASEAN is in the perfect position to act critically on Myanmar; however, it has so far failed to take a strong political stand in the Rohingya crisis. The newly formed ASEAN Intergovernmental Commission on Human Rights (AICHR) provides a regional forum through which ASEAN can increase pressure on the government of Myanmar and it is expected to provide tangible steps for the resolution of cases of human rights violations in Myanmar. However, AICHR does not have any significant effect in upholding human rights because it does not have a means of support for human rights and the power to punish violators of human rights in ASEAN. Myanmar has continuously undermined ASEAN’s credibility and competency as a dynamic regional body, and unless ASEAN acknowledges its responsibility, Myanmar will continue to drag down its ability to work for regional security and prosperity. ASEAN must draw international attention to the issue of Rohingya and strongly condemn the blocking of humanitarian aids and the rampant violations of human rights committed by the police, army, security forces, monks and the laymen.

It can be concluded that in South East Asia, there are norms that may be considered as having linked with R2P, which has not been accepted as language by ASEAN. ASEAN already has mechanisms promoting the protection of human rights which should be effectively utilised to promote R2P. Rather than expressing concern and appeal for the government of Myanmar to take necessary measures to handle the conflict, ASEAN must take one bold step forward, i.e., to bring the issue to the UN General Assembly. Reference to R2P made at international level will increase pressure on the government to become more responsive to international concern. At the same time, ASEAN members must discuss the issue openly at ASEAN forum since the effect of Rohingya issue has spilled out to other neighbouring countries, which is a strong indication that the case is not solely a domestic affair of Myanmar. It is crucial that there must be partnership between UN and ASEAN human right machinery to work with the government to build-up the State capacity and provide humanitarian assistance. In conflict prevention, UN and ASEAN must find avenue to open up opportunities for interfaith and inter communal dialogues. The most critical and challenging task is to promote tolerance and respect in this most ethnically diverse country. ASEAN and UN must collaborate with the NGOs and private institutions within Myanmar to build state capacity, manage resentments among the public and establish the rule of law.

Conclusion

The Rohingya have suffered egregious violation of human rights and are in dire need of immediate attention and assistance by the international community. Despite the government's persistent denial of threats of genocide, ethnic cleansing and crimes against humanity, evidences available strongly indicate that the prospect of atrocity is high and the government has failed in its duty to protect the population, a duty it has acknowledged and accepted in the World Summit 2005 and in the General Assembly Interactive Dialogue in 2009. Due to the government's failure and lack of capacity, the responsibility to protect the Rohingya falls on the international community to assist the government to fulfil such duty to prevent the escalation of conflict into mass atrocity on the lines of burden sharing. Thus, it is crucial that ASEAN reacts on the issue and it has in some occasions in the past interfered with other members' internal affairs. The effects of the Rohingya crisis transcend beyond borders and have caused problems to other countries; hence, it requires the involvement of ASEAN more than ever. It is time for the government to seriously treat its population in accordance with the standard of international human rights law and prove its commitment to move forward for better Myanmar. A long-term resolution of the Rohingya crisis can be achieved with the combined efforts of the government of Myanmar, ASEAN and the UN.

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