

# Myanmar and Yemen: Two Human Crisis in one Era



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## Abstract

Human rights situation in Myanmar and in Yemen is worrying and undesirable, and their civilians are being deprived from their very primary rights, such as right to life. Human rights in Myanmar under its military regime have long been regarded as among the worst in the world. Besides, The Saudi Arabia-led coalition's aerial and ground campaign against Houthi forces and forces loyal to former President Ali Abdullah Saleh began on March 26, 2015, in support of the government of President Abdu Rabu Mansour Hadi and has been supported by the United States and the United Kingdom. According to reports of human rights bodies and NGOs, there are serious evidence for violation of human rights including crime of genocide and war crimes in Myanmar and Yemen by military regime and the Saudi-led campaign, respectively. Although, these crimes are in the jurisdiction of International Criminal Court (ICC), but neither Myanmar nor Yemen are parties to the statute of ICC. This is not the end of the story though, because the Rome statute also reserves a role for the United Nations Security Council. The Council can refer situations in which one or more such crimes appears to have been committed in any state, regardless of whether it has ratified the Statute of the Court, under Chapter VII of the Charter of the United Nations. The international community expects Security Council to engage, as it has primary responsibility for the maintenance of international peace and security, even through Responsibility to Protect. However, there is a possibility that any decision in Security Council may, unfortunately, face negative vote of permanent members, in that case General Assembly or other competent specialized agencies could request for an Advisory Opinion from International Court of Justice.

## Key Words:

Myanmar, Yemen, Human Rights, International Criminal Court, Responsibility to Protect, International Court of Justice

## 1) Myanmar Crisis

The Rohingya crisis is a human rights crisis with serious humanitarian consequences. In Myanmar/Burma, the Rohingya have very limited access to basic services and viable livelihood opportunities due to strict movement restrictions. The legal status and the discrimination that these stateless people face must be addressed. The crisis has a wider regional dimension, with record numbers of Rohingya fleeing to



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neighbouring countries on precarious boat journeys. According to the UNHCR some 94,000 people (many of which Rohingya) departed irregularly from the Bangladesh-Myanmar border over the course of 2014 and 2015 (ECHO factsheet, The rohingya crisis, p.1).

A: Minorities and Human Rights  
Myanmar's security forces have been carrying out "clearance operations" in Rakhine State since 25 August, after an armed group calling itself the Arakan Rohingya Salvation Army (ARSA) attacked police posts and an army base. Since that

date there have been widespread reports of the security forces imposing collective punishment upon the ethnic Rohingya community, including the unlawful killing of civilians, mass displacement, rape, and the burning of at least 288 villages. ([www.globalr2p.org/regions/myanmar\\_burma](http://www.globalr2p.org/regions/myanmar_burma))

Muslim minorities in Burma, in particular the 1.2 million ethnic Rohingya, continue to face rampant and systemic human rights violations. The security operations led to numerous reports of serious abuses by government security forces against Rohingya villagers, including summary killings, rape and other sexual violence, torture and ill-treatment, arbitrary arrests, and arson ([www.hrw.org/world-report/2017/country-chapters/burma](http://www.hrw.org/world-report/2017/country-chapters/burma)).

The UN Special Rapporteur on the situation of human rights in Myanmar made two official visits to the country. While her access improved, she reported ongoing surveillance and harassment of civil society members she met. She also reported finding a recording device placed by a government official during a community meeting in Rakhine State.

In March, the UN Human Rights Council adopted the outcome of the UN Universal Periodic Review (UPR) process on Myanmar. Although Myanmar accepted over half of the recommendations, it rejected key recommendations on the rights to freedom of expression, of association and of peaceful assembly, and the situation of the Rohingya. In July, the UN Committee on the Elimination of Discrimination against Women raised concerns about discriminatory laws, barriers to justice for women and girls, and their under-representation in the peace process ([www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar](http://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar)).

The effective denial of citizenship for the Rohingya—who are not recognized on the official list of 135 ethnic groups eligible for full citizenship under the 1982 Citizenship Law—has facilitated enduring rights abuses, including restrictions on movement; limitations on access to health care, livelihood, shelter, and education; arbitrary arrests and detention; and forced labor. Travel is severely constrained by authorization requirements, security checkpoints, curfews, and strict control of IDP camp access. Such barriers compound the health crisis caused by poor living conditions, severe overcrowding, and limited health facilities ([www.hrw.org/world-](http://www.hrw.org/world-)

report/2017/country-chapters/burma).

### **B: Responsibility to Protect**

The responsibility to protect (R2P) is a notion agreed to by world leaders in 2005, that holds States responsible for shielding their own populations from genocide, war crimes, ethnic cleansing, and related crimes against humanity, requiring the international community to step in if this obligation is not met.(Bricmont, 2009, 1) There are situations that could justify foreign intervention, despite the sovereignty claim. These cases are grave breaches of human rights, such as genocide, war crimes, crimes against humanity, cases of ethnic cleansing etc. Perpetrators of such crimes should no longer be able to hide behind the shield of state sovereignty.(Gagro, 2014, 63)

Although the Responsibility to Protect has not yet emerged as binding international law, it is well grounded in existing international law and shaping international discourse on sovereignty, atrocity prevention, and international intervention.

However, the pursuit of the responsibility to protect in Darfur has not achieved its goal,<sup>1</sup> but it was successful in Libya. The Security Council passed resolution 1973 in

2011, sanctioning the imposition of a no-fly zone over Libya. On 19 March, military action against Libya began and by October Colonel Gaddafi was dead and his regime destroyed. Many lauded this intervention as evidence of R2P's influence.

Already in Resolution 1970 of 26 February 2011, the Council recalled “the Libyan authorities’ responsibility to protect its population”. In his press statement on this resolution, the permanent representative of France to the UN insisted on the

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concomitant subsidiary obligation of the international community: “If a government is not able to protect its own population, it means that the international community has the right and the duty to step in”, Ambassador Araud said.(Peters, 2011, 1)

### **¶) Yemen and Saudi-led Coalition**

Human rights violations and abuses continue unabated in Yemen, along with unrelenting violations of international humanitarian law, with civilians suffering deeply the consequences of an “entirely man-made catastrophe”, according to a UN human rights report. The report, mandated by the UN Human Rights Council, records violations and abuses of human rights and international humanitarian law over three years, since September 2014. Between March 2015, when the UN Human Rights Office began reporting on civilian casualties, and 30 August, at

least 5,144 civilians have been documented as killed and more than 8,749 injured. Children accounted for 1,184 of those who were killed and 1,592 of those injured. Coalition airstrikes continued to be the leading cause of child casualties as well as overall civilian casualties. Some 3,233 of the civilians killed were reportedly killed by Coalition forces ([www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22025&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22025&LangID=E)).

#### **A: Questions and Justifications**

The Saudi justification for the attack rested on the claim that it was coming to the aid of a neighbor in need after a specific request from its governing authority – which is legal under international law. But, having overstayed his term in office, resigned once and even fled the country, Hadi's legitimacy as ruler is shaky, legal experts say, placing the Saudi military action in murky legal territory. But having overstayed his term in office, resigned once and even fled the country, Hadi's legitimacy as ruler is shaky, legal experts say, placing the Saudi military action in murky legal territory ([www.irinnews.org/analysis/2015/04/03/saudi-war-yemen-legal](http://www.irinnews.org/analysis/2015/04/03/saudi-war-yemen-legal)).

Hadi himself wrote a letter to the Security Council in which he asked the Security Council to authorize a military intervention to "deter Houthi aggression" and stated that he had asked members of the Gulf Cooperation Council and the Arab League to intervene militarily. He also invoked Article 51 of the Charter. This is odd, because Article 51 would only be relevant if Yemen (or the Saudi coalition) were asserting that Yemen was responding to an external armed attack. Assuming that the Saudi coalition is acting on Hadi's consent to avoid any Article 2(4) problems, we might wonder about the strength of that consent, given that Hadi effectively has been forced out of Yemen. ([www.lawfareblog.com/international-legal-justification-yemen-intervention-blink-and-miss-it](http://www.lawfareblog.com/international-legal-justification-yemen-intervention-blink-and-miss-it)).

Pursuant to article 20 of Draft Articles on Responsibility of States (2001), the consent by a state should be "Valid". A State that seeks to justify an internationally wrongful act on the basis of consent must demonstrate that such consent emanates from competent authorities of the injured State. Such a State must show that a person or organ in authority gave the consent on behalf of the injured State and that the latter cannot validly refute such authority. (Abass, 2004, 215)

#### **B: A significant instance for International Court of Justice**

Requesting for an advisory opinion from International Court of Justice may be a right solution as to legality of coalition. Advisory proceedings before the Court are open solely to five organs of the United Nations and to 16 specialized agencies of the United Nations family or affiliated organizations. The United Nations General Assembly and Security Council may request advisory opinions on "any legal question". Although the Yemen crisis is a matter of international peace and security, but intervening a mostly political organ such as Security Council in a case, which is occurring in the most controversial region, is highly dependent on other states' policies. Whereas any action through UNSC will face a Veto vote by a permanent member,<sup>2</sup> it will be on General Assembly to ask for an advisory opinion.

If it happens, the court will face two kind of questions. The first and most important

question is about competency of Hadi as to asking other countries for assistance. There are serious doubts about the legitimacy of his request, as he resigned and left the country. The court will examine the facts, especially the Yemen constitution, and will render an advisory opinion.

The second Question will be on legal nature and consequences of Saudi-led coalition. This question is highly relevant to the first one. If Hadi had not competency to ask for assistance by other states, then there are an act of aggression against a state, which is definitely prohibited under article 2(4) of United Nations Charter and international customary law. In addition, many serious violations of human rights have been occurred by the coalition, which may considered crimes against humanity and war crimes.

This will be the fourth advisory opinion requested from ICJ as to “legal consequences” of an event. The first one was about legal consequences for states of South Africa’s continued presence in Namibia. The Court was of opinion that the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory. In addition, states members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration (ICJ Reports, 1971, 58). There may be slight but important similarities between the case in 1971 and the one that might take place in 2018.

The second advisory opinion was the controversial case of “Wall” in 2004, and the third one, which was requested on 23rd June 2017 and is not rendered yet, is about legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.

As the human rights situation in Yemen is worsening every day and outbreak of contagious disease like Cholera is threatening civilian lives, The World Health Organization (WHO) will be entitled too, as to requesting an advisory opinion about legal consequences of coalition acts on Yemeni people health. The WHO has proved that it had the capacity of requesting an advisory opinion on a subject, which is precisely in its scope of activity.<sup>3</sup>

#### **¶) International Criminal Court and Two Possible Situations**

As discussed above, serious breaches of human rights obligations, namely crimes against humanity in Myanmar and war crimes in Yemen, are threatening international peace and security. Notwithstanding neither Myanmar nor Yemen or the coalition states (except Jordan) are parties to Rome Statute, the UN Security Council's power to refer potential prosecutions to the International Criminal Court (ICC) in situations outside the Court's treaty-based territorial and nationality jurisdiction helps deter the perpetration of genocide, war crimes and crimes against humanity everywhere in the world.(Moss, 2012, 3)

Article 13 (b) of the Rome Statute provides that the Court may exercise jurisdiction

over statutory crimes if “[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”.

Where the ICC obtains jurisdiction over a case by virtue of such a Security Council referral, its jurisdiction is considered much stronger and truly universal, rendering irrelevant the consent of the state where the crime occurred.(Heyder, 2006, 653)

The historic referral of the situation in Darfur in March 2003 was widely welcomed as an important step in the fight against impunity as was the Security Council’s later, and more controversial, referral of Libya in February 2011.(Arbour, 2014, 195)<sup>4</sup>

It is noteworthy that even where a Security Council referral has been made, there is still a role for the ICC Prosecutor in determining whether an investigation should actually proceed. Under Article 53 of the Rome Statute, the Prosecutor should not initiate an investigation if s/he determines there is “no reasonable basis to proceed” or “an investigation would not serve the interest of justice”.<sup>5</sup>

If Security Council hesitate to decide on these two situations for a referral to International Criminal Court, there may happen another atrocity like Srebrenica or Rwanda in 21st century. <sup>6</sup>

### Conclusion

Besides there are serious doubts about compliance with international human rights obligations within the countries composing Saudi-led coalition,<sup>7</sup> the acts and omissions of coalition in Yemen is endangering the very fundamental rights of civilians. Indiscriminate attacks and preventing the access of protected people to international humanitarian aids are making Yemeni peaceful settlements impossible. According to Yemen constitution, it seems the resigned president had not the authority to call for assistance from his allies, so the Coalition intervention in another state is completely contrary to article 2(3) and 2(4) of UN charter, the principle of Non-Intervention, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states(Resolution 26/25(XXV)).

Approximately five thousands kilometers far from Yemen, another state is committing serious breaches of international obligations embodied in ICC statute and in general international law. Developing human rights concepts have truly narrow and modify the scope of sovereignty, and thus, states are responsible for their acts toward civilians. Myanmar government is either “unable” or “unwilling” to protect civilians from massacre, and hence, the burden of saving Myanmar minorities is on international community as a whole.

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<sup>1</sup> . For more information see: Alex De Waal, "Darfur and the failure of the responsibility to protect", International Affairs 83: 6 (2007) 1039–1054.

<sup>2</sup> . There is just one advisory opinion requested by UNSC. On 29 July 1970 in resolution 284, it asked for an advisory opinion on the legal consequences for states of South Africa's continued presence in Namibia.

<sup>3</sup> . In 1993, World Health Organization requested for an advisory opinion from International Court of Justice about legality of the use by a state of nuclear weapons. However, this request was not accepted by the court, approval a resolution in the assembly of the world health organization as to a subject which is really controversial, shows the potential and capacity of specialized agencies in asking legal questions from the Court.

<sup>4</sup> . For an analyze of advantages and disadvantages of UNSC under article 13(b) of Rome statute see, Louise Arbour (2014) The Relationship Between the ICC and the UN Security Council, Global Governance: A Review of Multilateralism and International Organizations: April-June 2014, Vol. 20, No. 2, pp. 195-201.

<sup>5</sup> . However, Darfur and Libya were not the only conflict situations outside of the ICC's jurisdiction that the UN Security Council could have referred to the ICC. Israel's Operation Cast Lead in the Gaza Strip in 2009 and the government-led final offensive in the Sri Lankan civil war are select examples of situations where atrocity crimes may have been committed, but where the ICC did not have jurisdiction and the Security Council did not (but could have) used its powers to refer cases to the ICC.

<sup>6</sup> . 'Never again' we said after the Holocaust. And after the Cambodian genocide in the 1970s. And then again after the Rwanda genocide in 1994. And then, just a year later, after the Srebrenica massacre in Bosnia. And now we're asking ourselves, in the face of more mass killing and dying in Darfur, whether we really are capable, as an international community, of stopping nation-states murdering their own people. How many more times will we look back wondering, with varying degrees of incomprehension, horror, anger and shame, how we could have let it all happen? (Garreth Evans, 2004)

<sup>7</sup> . For reviewing the human rights situation in Saudi Arabia and its compliance to international obligations see, The Accountability Levels of Saudi Arabia towards United Nations Mechanisms (2009-2016), Farzaneh Mostofi-far & others, International Journal of Political Relations, Vol. 7, No.1, spring 2017, 1-9.