ROHINGYA AS *HOMINES SACRI*: THE STATELESSNESS CONUNDRUM

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Abstract. Since the outburst of the Rohingya crisis in Myanmar, the people of the latter have widely and quite light-heartedly been depicted as refugees and it is no coincidence that such depictions often result in simply calling for Myanmar's responsibility to protect (R2P). At a closer look though, the sole status of refugees is debatable and there appears to be much more than the mere R2P (ICISS 2001). Actually, what is happening at the Bangladesh-Burmese border is the recurrence of Hannah Arendt's 1943 scenario, in which it was not possible to be simply a refugee. In Agamben's words, a refugee's temporary state of exception has to be resolved through either nationalization or repatriation. But how come that a WWII's allegedly resolved situation still haunts us, notwithstanding even the most thorough legislative attempts to tackle the issue? Has the Universal Declaration of Human Rights really brought any improvement of the matter and what might be its drawbacks? Is it a void tautology? This paper aims at some responses also by examining whether the state of exception is actually the possibility of each and every sovereignty (Derrida 2009).

Keywords: Rohingya, Myanmar, homo sacer, statelessness, sovereignty, human rights

INTRODUCTION

It is difficult to trace the origin of the Rohingya crisis without running the risk of privatising the absolute knowledge of the affair. As a rule, some sort of a nation-building curse always accompanies national pride and an endeavour aimed at disentangling not only the affair but what paradoxically comes first, the knowledge of it or the knowledge of the knowledge of it, would arguably amount to doing away with referentiality by inevitably referring to its always-already plural cause: namely, the search for an origin at the origin. On the

contrary, what is needed is an all-around and comprehensive approach as possible that remains also open rather than only ended and closed to revision and any further discussion.

In this sense, to seriously face the long-lasting calamity rather translates into taking a look at different aspects of the present-day crisis: not only is the sole engagement with social dimensions thereof counter-productive, but at the end of the day, by means of a veiled reasoning, it boils down to demanding a genuine politico-legal solution. It is this tension between the two so far outlined dimensions, if homogeneous at all, if only two at all, that has to be explored. As will be shown, current reductive requests range from the restoration of the citizenship status of the Rohingya to the call for the application of the perfectly legal responsibility to protect (R2P).

As a matter of consequence, the main difficulty stemming from these light-hearted assumptions is that nowhere the intersection between social, political and legal aspects is actually even mentioned. This is why a *different* approach is needed for the debate on these conceivably blurring facets to be fruitful, where different does not mean immune without standing for the autoimmune as well, for the dynamic and perfectible.

In an attempt to compensate for the widespread shortcoming in coping with this thorny case study, the first part of this contribution unpretentiously addresses precisely a general background on which there seems to be some kind of agreement. Needless to say, such a historical approach is to be considered as merely provisional and by no means exhaustive, if any history is such at all. Rather, its exclusive function should be that of pointing out at the specificity of the Rohingya crisis so as to fully appreciate the potential conundra at the intersection of the often neglected fragile borders between the political, the legal and the societal realms. The second part engages with the legal ramifications of the current situation at the Naf river border, whereas the fundamental importance of statelessness and its nexus with refugeehood are discussed in the last part.

A Background Proposal: The Distinctiveness of the Exodus

Since the Second World War, Burma has arguably been home to the highest number of rebel groups opposing the central government. Even the recent Nationwide Ceasefire Agreement, dated October 15, 2015, counted only eight out of sixteen ethnic armed groups which accepted the truce: the ongoing tensions between the government and a number of ethnicities that followed, as well as the occasional internal frictions within both, eventually resulted into some groups' exclusion. Far from the fact that such an agreement was a precedent and a landmark event in Myanmar's troubled history, what really compounds this first framework in which the once colonial struggle was shaped is that the country's ethnic groups are often themselves divided. This fertile ground has been exploited not only by the central government: even the National League for Democracy (NLD) made use of it whenever it was deemed useful for the purpose of contrasting the military's rule and their 2008 Constitution (Ganesan 2015, 273-4).

It is within such a context of a fragmented and extremely implosive society that even an ancillary historical background of the Rohingya should be analysed. In spite of the sudden rise of yet another armed group, the Arakan Rohingya Salvation Army (ARSA), formerly called "Faith Movement" (Harakah al-Yakin), it would still be somehow reductive to treat the Rohingya issue as a mere matter of a recent, inter-community, radicalization (Saikia 2017). And the same is probably true for other ethnic groups in Myanmar. Instead, by looking back to a variety of historical sources, it could be said that the Rohingya minority has notably enjoyed a period in which full-fledged citizenship status was uncontestedly and automatically assigned under the previous 1948 Citizenship Act (Zarni & Cowley 2014, 699). It was only in 1982, twenty years after the army's coup d'état, that a new citizenship bill was adopted. Namely, in the aftermath of the Operation Nagamin in 1978, which drove one of the first waves of the Rohingya minority out of

Myanmar, those who remained were all of a sudden placed beyond the national legal framework in force and thus deprived of the privileges they had enjoyed until then, not appearing anymore among the newly-established 135 national races ("*taingyintha*"). Furthermore, by inserting a discretionary clause, the State Council reserved itself the power to decide upon whether and when an ethnic group is national or not. Such measures were apparently preceded by the information that many "Bengalis", a common name for the Rohingya in contemporary Burma, the other, more offensive, being "Kalar", benefited from the almost absent border control along the Naf river between Bangladesh and Myanmar and freely moved from one State to the other, eventually populating the secluded Rakhine State (Jones 2017, 52). In an attempt to curb what soon became perceived as illegal immigration albeit dating back to the colonial era, the Rohingya have ever since faced increasing discrimination and gradually become the "world's most persecuted" (Kingston 2015, 1163-75). It is in this way that the following recurrent waves of violence, the major of which took place in 1992, 2001, 2009, 2012 (Zawacki 2013, 20) and, most recently, 2017 became the notorious milestones of the majority's discriminatory practices.

However, from both an ostensibly historical and contemporary perspective, thinking of the Rohingya issue as a bipolar clash between two fundamentally different religious identities could easily reveal to be excessively simplifying. Contrary to the tendency of the signifier Rohingya to invisibly homogenise this particular Muslim group on account of the idea that Rohang means Rakhine, whereas *-ga* or *-gya* point out at an origin and stand for "from" (Albert 2018), it may be proved that the two groups are not as compact as they may appear. The Rohingya are not even the only Muslim group populating Rakhine State, the Kaman being another one, itself theoretically eligible for citizenship as one of the *taingyintha*. In pretty much the same way, its antagonistic community is often taken as homogeneous as well. Yet, arguably, on both tendentiously

monolithic sides, critical nodes of disunity have long been there and are rather inflammatory. If "Arakan […] looks back to a largely autonomous history in Burma's periphery" (Leider 2008, 412), then the tendency to blend both Muslim and Rakhine Buddhist population must be acknowledged. This is particularly true if one does include the central government in the equation, without necessarily or, at least, *not* unconditionally fusing it with the Buddhist residents of Rakhine State. Through such lenses, rather than there being a uniform religious rush to expel barbarians, what seems to be at stake is actually the law of the lesser evil whereby an extremely unstable *ad hoc* coalition is convened to achieve a common good in the short term.

On the one hand, one of the difficulties with which the Advisory Commission on Rakhine State (ACRS), wanted by Aung San Suu Kyi and chaired by Kofi Annan, was faced is precisely that of having to investigate the predicament of a portion of the population not to be designated directly by any means. To compound the matters, the particular identity of the aforementioned Kaman Muslims populating themselves the contested Rakhine State had to be preserved. By using the general cognomen qua "Muslims" and "the Muslim community in Rakhine", the Commission eventually managed to engage with the security concerns and diffused violence, for which it had been established in 2016 (ACRS 2016, 12). It ended its mandate in August 2017, concomitantly with the attacks which occurred on 25 August of the same year. The underlying security situation in the peripheral Arakan that the latter worsened could be proved as specific without much difficulty. For some, wider regional disturbances were already at work a long time ago, being precisely at the root of the Anglo-Burmese War in 1824 (James 2006, 120). Added to that is the datum stating that the Muslim population already present in the area could probably be traced back to at least the 15th century (Leider 2013, 70). Allegedly, it used to live peacefully and side by side with other inhabitants of the region adjacent to the Naf river until recently. In this sense, the contemporary hostilities

are actually grafted upon the long-lasting multicultural history characteristic of and somehow intrinsic to this Burmese territory. The latter has always been *both in and out* with regard to the core provinces of Myanmar. Recognising this already in the 19th century, the British rule constantly exploited Arakan's vulnerability by obliging the residents to incessantly move. This tragic episode within a broader evolution of Rakhine's communal reality became eventually epitomised in a single year, 1823 A.D., as enshrined in the aforementioned 1982 Citizenship Law. From then on, only those who could prove their presence prior to 1823 and the British colonial interference were (re)granted "first-class" citizenship.

On the other hand, even the often blamed Buddhist majority appears as an undermined union, especially in today's Rakhine (BBC 2018). In line with the analysed existence of many state-repelling groups, the reasons may be, once again, historical. Similarly to the absence of a single and unified Muslim community par excellence in Burma, even on the portrayed majority side the local factor is of paramount importance and has been shaping the regional dynamics for a long time now. For instance, Buddha's teaching, also known as *sasana*, the Mahamuni statue and the status of Mrauk U in northern Rakhine State have compounded the process of unification between Rakhine Buddhists and the Bamar since Burma's independence in 1948 (Leider 2008, 413-9).

Having said that, the uncontested diacritical sign of the most recent exodus remains, however, the *statelessness* status to which the Rohingya minority has been compelled since 1982. Its implications will be further elaborated upon, especially in relation to the hitherto advanced initiatives on how to tackle the crisis. The following bottom line will then hopefully emerge: the tendency to take statelessness as simply wrong and for granted, to see it as a Danaian gift to be refused without even being inspected and to ignore it as precisely one of the products of the solutions which will soon be illustrated.

Legal Aporias: The Imperviousness of Solutions

The latest wave of violence which followed ARSA's August 25, 2017 attacks against border posts with Bangladesh engendered a mass departure of at least 624,000 people (ICG 2017) from Myanmar. They headed mainly towards the preexisting Kutupalong camp in the proximity of Cox's Bazar but did not completely disregard other options, such as Thailand. No matter where they escaped, by the existing international legal framework they could have by no means become refugees without the hosting governments' consent. As their main destination, Bangladesh, is not a party to the 1951 Refugee Convention, nor to its 1967 Protocol, it is *de facto* governments' *bona fide* attitude towards UN Refugee Agency (UNHCR) a condition *sine qua non* for a successful management of this kind of calamities. Indeed, notwithstanding even the reach of art. 31 of Bangladesh's Constitution and the fundamental rights thereby indiscriminately guaranteed, the particularity of the region, as a veritable black hole of international law, easily comes to the fore. Today, this can be noted from a recent agreement between Bangladesh and UNHCR on the *voluntary* repatriation plan, namely Memorandum of Understanding (MoU), to be implemented as soon as conditions in Myanmar allow so (UNHCR 2018a). At almost two months from the failure of the previous Bangladeshi-Burmese "private" deal (The Independent 2018), it can be seen a step forward, but it simultaneously shows how delicate the dialogue must be and how fragile the solutions are. For the sake of clarity, the previous bilateral attempt failed in January precisely on account of the absence of satisfying conditions in Myanmar. But, why are there few alternatives to that and why is the underlying message still the same today, after so many failures? Namely, the impression is that repatriation could be voluntary or involuntary, but it *must* occur. For this reason, Myanmar's key stance on the issue was fortunately not left out as UNHCR and UNDP drafted a separate MoU with Nay Pyi Taw shortly after Bangladesh signed its own (UNHCR 2018b).

Obviously, the first proposal of these lines is *not* to superfluously outline the difference between the institutionalized and improvised consent of a government to a convention and a memorandum, respectively between a fully integrated human rights-based country and those who are more recalcitrant towards pooled sovereignty, and not even to criticise by envisaging a perfectly workable *pharmakon* in the background. Rather, the aim is precisely to go beyond and cope with the development of the institution of the refugee status which brought us to this tortuous case study. In other words, the problem tackled here is not a specific *modus operandi*, but the very necessity of any *modus operandi* in presence of refugeehood whereby it forcefully becomes an interim safety net.

However, a vehicular pattern of behaviour will not be omitted and it can be effortlessly observed: even the previous solutions to Rohingya's exoduses followed the above and current model with some minor differences. These eventually affected the group's voluntariness, especially once the return in 1978 did not really change the apparently conciliatory attitude of the Tatmadaw. In 1978, UNHCR assisted the process of voluntary return *without* Dhaka's approval (Leider 2013, 71), whereas in 1992 the operation was carried out in direct coordination with the government of Bangladesh (Parnini 2012, 287-8). Even by just scratching the surface, it can finally be appreciated how deeply embedded is the idea that the arguably human figure by itself, the refugee is to be monitored through what has calcified and stratified as a transition, a void, an unpleasant situation or moment and as a nightmare. Moving towards a detailed analysis thus requires us to discern the common element of all international community's responses so far. Far from the latter being voluntarily malevolent, it must be said that the *temporariness* of the refugee status qua *de facto* avoidance of and a disregard for nude humanity has long been unaddressed. A refugee is *not* simply

> any person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group

> or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, *not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*

but also, quite conceivably, he who, being caught in an *exceptional* situation, has to be either *repatriated* or nationalised so as to (continue to) fully enjoy their *human* rights. The Rohingya undoubtedly fall within the last part of the above definition just by means of an *ad hoc* expression of tenuous political will, namely Bangladesh's cooperative stance. Therefore, the sense of the underlying and tempting statement that no Rohingya is *merely* a refugee is not anyhow intended to deny them humanitarian relief. Quite on the contrary, it recognises something *unheimlich* and uncanny in them being refugees without being *proper* refugees. Hence, a Rohingya is both a refugee and the negation of *pure* refugeehood, even before taking for granted their former status and guiding them towards the Eden of citizenship.

To sum up, national politico-legal systems and, as it will be shown, the ostensibly supplementary and disciplinary international institutionalism simply leave no room for the refugee in the capacity of the human as such (Agamben 2008, 90-5). As Arendt put it: "We actually live in a world where human beings as such have ceased to exist for a while" (Arendt 1978, 65). It can now be claimed that nowhere does this Second World War scenario appear with more clarity than in our contemporary world, even though it has so far been largely neglected on account of its alleged resolution with the arrival of the age of rights. For instance, through the 1948 Universal Declaration of Human Rights (UDHR), which it is high time to examine *differently*.

STATELESSNESS, RUFUGEEHOOD AND HUMAN RIGHTS

If it can be assumed that a stateless person shall be the first and immediate personification of article 1 of UDHR, since "all people

are born free and equal in dignity and rights [...]", an important aporia arises with the birth of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, the former of which states as follows: "[…] the term 'stateless person' means a person who is not considered as a national by any state under the operation of its law". For, in the first of the two legal documents, it is the basic act of factual birth which entitles to freedom, decent and rightful life, whereas with the second it becomes clear that a further step is needed: the birth within a specific national legal context, which, most importantly, accepts to recognise, attest and certify the apparently self-sufficient factual events. The latter Convention even pledges to *reduce* and eventually *end* statelessness. What is more, on the basis of the previous analysis of the Rohingya exodus, the UDHR appears contradictory by itself: namely, articles 1 and 15 arguably clash in that no human being is actually a bearer of "first-class" rights *unless* a citizen of a State. If being born entitles to a set of rights which, in turn, entitled to the right to citizenship, then this stratification of rights cannot anymore be taken for granted without exploring its fundamental drawbacks, its *raison d'être*. In other words, the "constitutional dilemma" (Zucca 2008, 20), that which cannot be pinned down here and now, is that one is either a holder of a set of rights by the act of mere physical birth independently of all circumstances or one has such entitlement as long as they possess a citizenship, the so-called "right to have rights":

> Citizenship *is* man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf (Perez v. Brownell 356 U.S. 44).

Even in this statement, as is clear, little effort is made towards thinking statelessness in terms of bare humanness: rather, a stateless person is "disgraced and degraded in the eyes of his countrymen", as though their personhood lacked something essential on account of the sole absence of an identification document. Without

anarchical claims, as should be apparent so far, and with respect towards the above pragmatic way of reasoning, the most impactful and simple way of expressing such a paradox is probably the following: at the end of the day, the subject of full-fledged *human* rights may turn out to be the figure of a *citizen*.

Yet, reflecting upon what has been said so far, a scenario of systematic deprivation of rights in Myanmar has been possible not because there was a *formal Ausnahmezustand*, *i. e.* "state of exception" (Agamben 2005, 4), but because State order always-already relies on a state of exception. It is so even when a State merely decides (lat. *de-caedere*), that is, even when, in Schmittean terms, the State does not necessarily decide on the exception in a conscious manner (Schmitt 2005, 5). As a matter of consequence, an intrinsically rogue State a priori undermines the supplementarity of any constitutional act which would be superfluously vehicular and unnecessary in relation to an allegedly accomplished sense - *the* rogue*ness* in this case. Rather, the supreme law of a State *qua* Constitution is itself more of a tool to manage uncertainty, the fugitive degrees of uncertainty, to bet and offer a "constitution of risk" (Vermeule 2013, 1-51). Hence, there does not even need to be a state of emergency to generate a state of exception, the ultimate message being that a law is by itself a state of exception which appears as normality and simultaneously by no means as justice:

> Law (*droit*) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule (Derrida 1992, 16).

By being placed outside of the legal order by a rule, a law, an everyday legislative procedure, the Rohingya immediately turned into *homines sacri* (sacred men), "[...] who *may be killed and yet not sacrificed* [...] included in the judicial order [*ordinamento*] solely in the form of [...] exclusion (that is, of its capacity to be killed)" (Agamben

1995, 8). It is important to remark that to be *sacer* translates into being both sacred and holy as well as cursed and doomed. Hence, a homo sacer becomes or can become an outlaw *through* the law, a subjectivity deprived of *zoe*, the latter standing for political or community life. Its existence is always declined as half-done, suspended but not unviable, hindered but not unfree, rather than something which simply *is*.

Rancière comes up with yet another hermeneutical possibility: we have so far seen that human rights can be intended as the rights of a citizen as well as the almost useless rights of those with no rights. What is at the basis of this bipolarisation of the discourse according to him is precisely a way of thinking intended to surgically separate the private from the public realm and conceptualise politics even though it is precisely that which indefinitely escapes all definite conceptualisation. For, politics is exactly the infinitely finite, the incalculable part of those with no part at all, who, paradoxically, exercise the rights they do not have. Similarly, there are the unpredictable difficulties of those with a part, namely citizens, who, in turn, do not exercise the rights they have (Rancière 2010, 70). As a matter of fact, the sense of recognition espouses before all the idea that the recognised is always already a matter of debate and barely anything in itself: there is no signified which is not spoilt by a signifier and the other way around, there is no signified which is not a signifier, which cannot help but open up the question of the border. Human rights as rights of the citizen *and* the rights of the stateless are not then necessary to be seen as mutually exclusive, quite on the contrary. In this way, the previously hermetic categories become rather dynamic and the boundaries between them eternally blurred: human rights sign a great development, but not without the risk of being simultaneously completely void. This triggering paradox and empowering aporia engenders the *demos* for Rancière, the ameboid organ which stands silently at the basis of politics as a never-ending process rather than an accomplished state of affairs. Seen against this background, UDHR protects both the stateless and

the first-class, full and accomplished citizens, but *not* necessarily by placing them at two different levels.

This can probably be most properly observed with yet another instrument of the international community which appears to be impotent towards these challenges, namely, the responsibility to protect (R2P). Envisaged in the new millennium as a legal successor of the intrusive and controversially illegal *humanitarian* intervention (ICISS 2001), the same aporia within it was immediately and unconsciously reproduced. As a matter of fact, it is not clear at all whether a State and, jointly or alternatively, the international community have the responsibility to protect *citizens* or *populations* (ICISS 2001, VIII, XI, 13, 15, 16, 19, 39, 40, 49, 75; Bellamy 2009, 76; SG/SM/8125 2002; A/61/677 2009, 8). Certainly, the first two conclusions are self-sufficient: indeed, it is either about citizens or about populations. But, in a strange fashion, what is easily not accounted for is precisely the *demos* as the *people*, *both* an allegedly empowered political body and potentially a mass of those deprived of their rights. Consequently, the *demos*, the *people*, actually fuse the two apparently irreconcilable concepts of *citizens* and *populations*. The responsibility to protect belongs thus to those who claim the right and the entitlement to it on the basis of a set of initially void and unenforceable rights, *especially* when they have no legal entitlement to claim so. It is this oblivion and excess, supplement and surplus which is at the basis of the age of rights, which makes rights enactable rather than enacted, which signs the beginning of the age of rights before its solemn beginning.

In conclusion, one practical, biopolitical warning of the above apparently negligible divide remains a blatant illustration of politics as a process. Consider article 348 of Myanmar's 2008 Constitution: "The Union shall not discriminate any *citizen* of [...] Myanmar, based on race, birth, religion, official position, status, sex and wealth". For, the Rohingya having been stateless since 1982, this would imply no particular Burmese responsibility at all towards a *population* rendered stateless in a scarce human rights enforcement era. Or, at least,

hardly any major responsibility of any other State turning, out of personal goodwill, to those caught in the vacuum constitutive of any order itself.

Conclusion

To sum up, it can now be fully appreciated how unstable and challengeable our international provisions are. They are so to the extent that thinking of other instantly actionable, precise, clear-cut and shorter rules and norms would be for nothing if the idea of transcending the hitherto known (inter)national legal order were not itself transcended. In this sense, no rule will ever be justice, which is precisely why the *unpretentious* rethinking of the existing rules is always a good start. They will always draw their *spiritus movens* from the Otherness, which is nothing more than the haunting hint of the inherent fragility of any rule as such.

It is in this sense that the somehow necessary post-WWII empowerment of the human in a certain sense brought us full circle to where it all began. In a homoeopathic manner, the proposed solution is nothing more than the diluted cause starting from which the whole Hobbesian political order was engendered, namely, how is *homo* different from the contemporary figure of the human? Answering to this question would hardly solve the following leitmotif: the empowerment of the human is not simply the progress of sovereignty without being the landmark of the imperfection of the concept of sovereignty itself (Derrida, 2005, 87-8).

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