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The Rohingya Crisis: An International Law Perspective

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To the Rohingya community

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Introduction

The Rohingya are a Muslim ethnic community living in Rakhine State, situated along the north-west coast of Myanmar.¹ As a minority group within Myanmar, they have long faced institutionalised discrimination and harassment on account of their religion and ethnicity,² in what has been described “[...] a process of marginalisation, exclusion and ‘othering’”.³ At the core of such discriminatory practice is the lack of legal status of the Rohingya at the national level:⁴ during the Ne Win dictatorship, Myanmar’s legislative body passed the 1982 Burma Citizenship law which, together with its subsequent application by the national authorities,⁵ deprived the Rohingya of citizenship, thus rendering them stateless.⁶ The persecution faced by the Rohingya, coupled with their lack of rights under national law, brought about a consistent pattern of migration by members of the group from Myanmar to neighbouring Bangladesh in the decades following the Citizenship law.⁷ However, the oppression of the Rohingya peaked in 2016 and again August 2017, reaching the intolerable levels of a full-fledged humanitarian crisis in the ensuing months.⁸ This thesis will therefore limit its analysis to the events which occurred within the abovementioned timeframe.

On October 9, 2016, the Arakan Rohingya Salvation Army (hereon in, the “ARSA”), a resistance organisation set up in 2012 in response to the increasing violence against the Rohingya minority in Rakhine State, launched an attack against three border guard police garrisons in the northern part of

¹ See Elliot Higgins, “Transitional Justice for the Persecution of the Rohingya.” *Fordham International Law Journal* 42, no. 1 (2018): 105.

² Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (18 September 2018) para. 458 (“IIFFM 2018 Report”).

³ *Ibid.*, para. 622. See also *ibid.*, 458.

⁴ *Ibid.*, para. 459 ss; Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (16 September 2019) para. 60-65 (IIFFM 2019 Report); Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, HRC, 39th session (10 – 28 September 2018) UN Doc. A/HRC/39/64 (12 September 2018) para. 21 (“HRC Report”). See also Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15, No. ICC-01/19-7, July, 4, 2019, para. 45 (“Request for Authorisation of Investigation”).

⁵ Nyi Nyi Kyaw, “Unpacking the Presumed Statelessness of Rohingyas.” *Journal of Immigrant & Refugee Studies* 15, no. 3 (2017): 276-282.

⁶ See Chapter 2 of the Burma Citizenship Law, 1982, <http://eudo-citizenship.eu/NationalDB/docs/1982%20Myanmar%20Citizenship%20Law%20%5BENGLISH%5D.pdf>. According to the IIFFM 2018 Report, para. 478 ss, the Citizenship Law per se does not altogether deprive Rohingyas of citizenship: under the conditions laid down in Chapter II of the Law, the ethnic group could still qualify for “associate” or “naturalised” citizenship. State practice nonetheless applied the law in such a way as to render the Rohingyas not eligible for citizenship. See Chapter I, paragraph 3 of this thesis for a detailed analysis of the de facto statelessness of the Rohingya community.

⁷ Michal Saliternik, “Myanmar’s Rohingya Crisis and the Need for a Regional Response to Statelessness in Southeast Asia” *EJIL: Talk!* (blog), October 30, 2017. See also IIFFM 2019 Report, para.202-205 for a historical background of the migration and subsequent repatriation patterns of the Rohingya.

⁸ Higgins, “Transitional Justice”, 101-2; Rajika L. Shah, “Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis.” *Loyola of Los Angeles International & Comparative Law Review* 41, no. 2 (2018): 182; Archana Parashar and Jobair Alam, “The National Laws of Myanmar: Making of Statelessness for the Rohingya.” *International Migration* 57, no. 1 (2019): 94-108.

the region.⁹ The offensive resulted in death of nine police officers and the theft of arms by the ARSA militants.¹⁰ In answer to the offensive, the Myanmar security forces, under the command of the Tatmadaw army, undertook a large-scale military campaign against the Rohingya civilians in the form of what are commonly referred to as the “clearance operations”.¹¹ The reaction of the armed forces was of such magnitude that 87,000 Rohingya were forced to flee into neighbouring Bangladesh.¹² A similar pattern of events took place the following year. On August 25, 2017, the ARSA newly attacked thirty security force stations as well as an army base located in Rakhine State,¹³ thereby causing the death of twelve members of the security forces.¹⁴ The Tatmadaw once again retaliated with a violent military campaign against the civilian population in the period covering August to at least October 2017,¹⁵ leading the Rohingya to embark on an exodus of unprecedented proportions from Myanmar to Bangladesh.¹⁶

The brutality of the “clearance operations” undertaken in response to the ARSA attacks, and the crimes perpetrated in the context of such operations against the Rohingya civilians, are described in detail in the 2018 and 2019 Reports issued by the Independent International Fact-Finding Mission on Myanmar (hereon in, the “IIFFM” or the “Mission”), a body of experts instituted by the Human Rights Council in March 2017 for the purpose of investigating into the human rights abuses committed within the State.¹⁷ According to the Mission, the so-called “clearance operations” included mass and individual killings of members of the Rohingya living in Rakhine State, as well as their mutilation, rape, arson, arbitrary detention and looting.¹⁸ These acts, perpetrated by the Tatmadaw forces in conjunction with other police and security forces and certain ethnic Rakhine civilians, have been described by the Mission and other reliable sources as integrating international crimes.¹⁹ Particularly relevant is the Mission’s finding that the crime of genocide had been perpetrated against

⁹ HRC Report, para. 44.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ IIFFM 2018 Report, para. 750. For a description of the 2017 ARSA attack and of the Tatmadaw’s ensuing “clearance operations”, see Anthony Ware and Costas Laoutides, *Myanmar’s ‘Rohingya’ Conflict*, New York, NY: Oxford University Press, 2019 (published online in June 2019), 44-66.

¹⁴ IIFFM 2018 Report, para. 750.

¹⁵ Ibid, para. 751. See also “Crimes Against Humanity Go Unpunished” *Amnesty International* online, no date. <https://www.amnestyusa.org/our-work/government-relations/advocacy/crimes-against-humanity-in-myanmar/>.

¹⁶ HRC Report, para. 33.

¹⁷ IIFFM 2018 Report; IIFFM 2019 Report.

¹⁸ Shah, “Assessing the Atrocities”, 182.

¹⁹ IIFFM 2018 Report, para. 351 ss; HRC Report para. 83-89; “Myanmar, Crimes Against Rohingya Go Unpunished” *Human Rights Watch* online, August 22, 2019, <https://www.hrw.org/news/2019/08/22/myanmar-crimes-against-rohingya-go-unpunished>. See also “Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report” Office of the High Commissioner for Human Rights, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22221&LangID=E>.

the Rohingya community: according to the 2018 Report, “[p]erpetrators have killed Rohingya, caused serious bodily and mental harm to Rohingya, deliberately inflicted conditions of life calculated to bring about the physical destruction of Rohingya, and imposed measures intended to prevent births of Rohingya”,²⁰ thus rendering themselves responsible for said underlying genocidal acts. The IIFFM also noted that the ruthless attack carried out in 2017 pushed an estimated 725,000 members of the minority to flee to neighbouring Bangladesh;²¹ the identified correlation between the crimes perpetrated against the ethnic group and its migration across an international border into another State integrates an essential element of the crime against humanity of deportation.²²

The intensity and scale of the onslaught was further condemned by international figures, who hypothesised the opening of proceedings on the crimes presumably perpetrated against the Rohingya before the International Criminal Court.²³ As a result, on April 9, 2018 the Prosecutor of the International Criminal Court Fatou Bensouda filed a request with the President of the Pre-Trial Division as to whether the ICC could exercise its jurisdiction pursuant to Article 12(2)(a) of the Rome Statute over the alleged deportation of the Rohingya from Myanmar to Bangladesh;²⁴ the issue was accordingly assigned to Pre-Trial Chamber I (also referred to as “PTC I”).²⁵ In answer to the Prosecutor’s request, on September 6, 2018 PTC I issued a decision (hereinafter, the “Decision on Jurisdiction” or the “2018 Decision”) in which it clarified that the ICC had jurisdiction over the crime of deportation seemingly perpetrated in Myanmar being that, although the deportation had commenced in the territory of a State not a party to the Rome Statute, its transboundary nature was such that an essential element of the crime had also taken place in the territory of Bangladesh, which was a party to the Statute.²⁶ The Chamber went yet further, affirming that, were the Prosecutor to

²⁰ IIFFM 2018 Report, para. 1392.

²¹ Ibid., para. 751: Situation in Bangladesh/Myanmar, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, No. ICC-RoC46(3)-01/18-1, April 9, 2018, para. 2 (“Prosecutor’s Request on Jurisdiction”).

²² IIFFM 2018 Report, para. 1489-1491. See also Prosecutor’s Request on Jurisdiction, para. 16 ss.

²³ HRC Report, 98-99, 105. See also Katherine Southwick, “Straining to Prevent the Rohingya Genocide: A Sociology of Law Perspective,” *Genocide Studies and Prevention* 12, no. 3 (2018): 125-127.

²⁴ Prosecutor’s Request on Jurisdiction.

²⁵ Situation in Bangladesh/Myanmar, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, No. ICC-RoC46(3)-01/18, September 6, 2018, para. 2 (“PTC I Ruling on Jurisdiction”).

²⁶ Ibid., para. 73. See also para. 71: “[...] the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court’s jurisdiction when one element of this crime or part of it is committed on the territory of a State Party”. See also Kip Hale and Melinda Rankin, “Extending the ‘System’ of International Criminal Law? The ICC’s Decision on Jurisdiction Over Alleged Deportations of Rohingya People,” *Australian Journal of International Affairs* 73, no. 1 (2019): 23-24.

meet the required criteria for the opening of proceedings under Article 12(2)(a),²⁷ the ICC could also entertain proceedings for crimes other than deportation.²⁸

The Prosecutor consequently initiated a preliminary examination of the violations allegedly committed in Myanmar²⁹ and, based on the collected evidence, presented the Court with a request for authorisation to commence an investigation into the Bangladesh/ Myanmar situation on July 4, 2019.³⁰ The authorisation (henceforth, the “Authorisation of Investigation” or the “2019 Decision”) was granted on November that year in relation to the crimes of deportation and persecution;³¹ neither the Pre-Trial Chamber, nor the Prosecutor mentioned the possibility that the jurisdiction of the Court over the situation on Myanmar also cover the crime of genocide. For its part, the Burmese government has openly criticised the ICC’s Decision on Jurisdiction, invoking the international law of treaties to affirm that the State of Myanmar is not bound by the provisions of the Rome Statute, nor can the Court entertain proceedings regarding crimes alleged to have occurred on its territory, on account of its not being a party to the Statute.³²

Around the same time as the Authorisation of Investigation, the non-governmental organisation Brouk filed a lawsuit against Myanmar’s top officials, Aung San Suu Kyi among them, before an Argentinian domestic court, accusing them of being responsible for the crime of genocide and crimes against humanity entirely committed on the territory of Myanmar.³³ Argentina’s jurisdiction over such crimes is grounded on the principle of “universal jurisdiction” which enables States to prosecute

²⁷ Article 12(2)(a) of the Rome Statute of the International Criminal Court, July 17th, 1998, 2187 UNTS 90 (entered into force on July 1st, 2002) (“Rome Statute”) provides that: “[i]n 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: [...] (b) The State of which the person accused of the crime is a national.”

PTC I’s reference to the Article implies that the ICC will be able to exercise its jurisdiction also on other crimes described in the Statute, provided that it is proved that an essential element of such crime took place on the territory of a State Party.

²⁸ *Ibid.*, para. 74: “The Chamber considers it appropriate to emphasise that the rationale of its determination as to the Court’s jurisdiction in relation to the crime of deportation may apply to other crimes within the jurisdiction of the Court as well. If it is established that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute. [...]”

²⁹ Request for Authorisation of Investigation, para. 3.

³⁰ Request for Authorisation of Investigation.

³¹ Situation in Bangladesh/Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19-27, November 14, 2019, para. 92, 108, 110, 126 (“Authorisation of Investigation”).

³² Republic of the Union of Myanmar Office of the President Press Release, 7 September 2018, <http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/09/07/id-8986>. See also *ibid.*, 2: “The over-extended application of jurisdiction challenges the fundamental principle of legal certainty and is contrary to accepted principles of public international law. It has created a dangerous precedent and erodes the moral authority of the Court.”

³³ Brouk, Complainant Files a Criminal Complaint Of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar – Universal Jurisdiction (Certified Translation), November 13, 2019 (hereinafter, the “Complaint”). The certified translation of the complaint is available at: <https://burmacampaign.org.uk/reports/genocide-case-against-the-military-and-government-in-burma-filed-in-argentina/>

individuals allegedly liable for international crimes with which they bear no connection on account of the gravity of the crimes in question.³⁴ The intention underlying the lawsuit was that of instituting proceedings that would run parallel to those pending before the International Criminal Court, on account of the limits imposed on the Court's jurisdiction.³⁵ However, Brouk's activation of the Argentinian court may impact on the admissibility under Article 17 of the Rome Statute of potential future cases brought before the ICC by the Prosecutor,³⁶ especially considering that the Court itself left open the possibility that the Prosecutor extend the scope of the proceedings to other crimes proscribed in the Statute.³⁷

Whereas the International Criminal Court can only judge individuals charged with the commission of international crimes, judicial action has also been taken against the State of Myanmar for the conduct of the Tatmadaw military perpetrated against the Rohingya in the context of the so-called "clearance operations". On November 11, 2019, the Republic of Gambia instituted proceedings against Myanmar before the International Court of Justice (hereinafter, the "Application"), alleging the Respondent State's responsibility under international law for having breached the Convention on the Prevention and Punishment of the Crime of Genocide (hereon in, the "Genocide Convention") through the perpetration of "[...] acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group."³⁸ According to The Gambia, the 2016 and 2017 "clearance operations" undertaken by the Tatmadaw military against members of the minority feature the crime of genocide, being as the criminally relevant actions perpetrated throughout the operations were specifically directed at bringing about the group's destruction.³⁹ The State's involvement in the military's actions, which took place against the backdrop of the Rohingya's consistent marginalisation by the Burmese authorities⁴⁰, was recalled by The Gambia as reason to impute the genocidal acts to the State;⁴¹ the Applicant therefore requested that the Court declare Myanmar

³⁴ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge [etc.]: Cambridge University press, 84-85.

³⁵ *Ibid.*, 3.

³⁶ Article 17 of the Rome Statute sets for the conditions for a case to be admissible before the ICC. One of the conditions for admissibility is that the case is not being investigated or prosecuted by those States with jurisdiction over the corresponding crimes, being that the Court's complementary jurisdiction entails that it can only entertain proceedings if said States are "unwilling or unable genuinely to carry out an investigation or prosecution".

³⁷ Authorisation of Investigation, para. 126.

³⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures, November 11, 2019, para. 2 ("The Gambia Application"); International Court of Justice, "The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures" Press Release No. 2019/47 (unofficial) (11 November 2019), 1 ("ICJ Proceedings Press Release").

³⁹ The Gambia Application, para. 2, 98, 116-117.

⁴⁰ *Ibid.*, para. 30-32.

⁴¹ *Ibid.*, para. 2.

responsible for the violation of its obligations under the Genocide Convention, with specific reference to Article I,⁴² III(a), III (b), III (c), III (d), III(e),⁴³ IV,⁴⁴ V⁴⁵ and VI.⁴⁶⁴⁷ It further called for the application of provisional measures aimed at preventing the aggravation of the situation.⁴⁸ In answer to the latter request, on January 23, 2020 the ICJ issued an order mandating Myanmar to adopt certain provisional measures, thus recognising the *prima facie* plausibility of The Gambia's Application⁴⁹ and the requested measures' appropriateness for the purpose of protecting the Rohingya's rights.⁵⁰ The Maldives have recently decided to intervene in the proceedings in support of The Gambia on the same bases as those described in the latter State's Application.⁵¹

Running parallel to these judicial developments are the arrangements concluded between Myanmar and Bangladesh aiming at the repatriation of the Rohingya refugees. On November 23, 2017 Myanmar's Union Minister U Kyaw Tint Swe and Bangladesh's Foreign Minister Abul Hassan Mahmood Ali signed the Arrangement on Return of Displaced Persons from Rakhine State in an attempt to coordinate the return of the Rohingya to Myanmar.⁵² A Joint Working Group between the two States was set up for this purpose.⁵³ Myanmar concurrently concluded a Memorandum of Understanding with the United Nations Development Programme and the United Nations High Commissioner for Refugees for the establishment of a framework within which to carry out the

⁴² Art. 1 of the Genocide Convention provides that, "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."

⁴³ Pursuant to Art. III of the Genocide Convention, "[t]he 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".

⁴⁴ Art. 4 of the Genocide Convention provides that, "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."

⁴⁵ Under Art. 5 of the Genocide Convention, "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.

⁴⁶ Art. 6 of the Genocide Convention provides that, "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."

⁴⁷ The Gambia Application, para. 111-112.

⁴⁸ *Ibid.*, para. 132.

⁴⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Request for the Indication of Provisional Measures, Order No. 178, January 23, 2020, para. 60.

⁵⁰ *Ibid.*, para. 61.

⁵¹ "Maldives hires Amal Clooney to join fight for Rohingya at UN Court" *The Telegraph*, February 26, 2020, <https://www.telegraph.co.uk/news/2020/02/26/maldives-hires-amal-clooney-join-fight-rohingya-un-court/>.

⁵² "The Republic of the Union of Myanmar and the People's Republic of Bangladesh signed the Arrangement on Return of Displaced Persons from Rakhine State" Republic of the Union of Myanmar Office of the President Press Release, no date, <https://www.president-office.gov.mm/en/?q=issues/rakhine-state-affairs/id-8028>. See also IIFFM 2019 Report, para. 206. See also Higgins, "Transitional Justice", 18; Faisal Mahmud, "Bangladesh, Myanmar Form Joint Working Group on Rohingya Repatriation; Experts Sceptical" *The Wire*, October 15, 2018.

⁵³ "UNHCR and UNDP agree on text of MoU with Myanmar to support the creation of conditions for the return of Rohingya refugees" *UNHCR* Press Release, May 31, 2018, <https://www.unhcr.org/news/press/2018/5/5b0fff7b4/unhcr-undp-agree-text-mou-myanmar-support-creation-conditions-return-rohingya.html>.

repatriation process.⁵⁴ These and later attempts to repatriate the displaced Rohingya currently located in Bangladesh have failed to reach their purported aim due to the suspicion and lack of willingness to return of the Rohingya.⁵⁵ However, they raise the question of their legality under international law in light of the ongoing persecution faced by the Rohingya and the lack of the “voluntariness” requirement for repatriation to take place.⁵⁶

This thesis seeks to examine both individual criminal liability and the international responsibility of States against the backdrop of the domestic and international judicial proceedings for the crimes allegedly committed against the Rohingya in Myanmar. With regards to the ICC, the aim is that of assessing whether the Court’s jurisdiction, established with regards to deportation, can be extended to other international crimes, particularly the crime of genocide. The Application filed by the Gambia against Myanmar and the subsequent Provisional Measures Order issued by the ICJ will instead serve to understand whether Myanmar can be considered responsible for genocide on the international plane, and the conditions that need to subsist in order for such responsibility to cover the State’s *commission* of genocide. A final assessment that will be made concerns the conformity with international law of the repatriation agreements signed by Bangladesh and Myanmar, particularly in light of the serious risk of persecution the Rohingya would face upon returning to the latter State.

In order to carry out these appraisals, the first Chapter will first describe the status of the Rohingya under international law, and the rights accorded ethnic minorities at the international level. Attention will then be given to how the statelessness of the Rohingya impacts on their rights under both national and international law: Paragraph 2 will therefore examine the way in which the 1982 Burma Citizenship Law and the its subsequent enforcement by national authorities effectively deprived the Rohingya of their Myanmar citizenship. The Rohingya’s statelessness will be put in relation with the international instruments regulating the condition of stateless persons, and the prohibition of the arbitrary withdrawal of nationality set forth therein, with a view to understanding the extent to which such a rule has been disregarded by the State of Myanmar. The analysis will then turn to the applicable norms of international refugee law with a view to evaluating whether, as a result of the consistent pattern of persecution faced in Myanmar, the Rohingya qualify as refugees under international law.

⁵⁴ See Request for Authorisation of Investigation, para. 71.

⁵⁵ IFFM 2019 Report, para. 207.

⁵⁶ Christopher Faulkner and Samuel Schiffer, “Unwelcomed? The Effects of Statelessness on Involuntary Refugee Repatriation in Bangladesh and Myanmar.” *The Round Table* 108, no. 2 (2019): 151-2, 154. See also “Rohingya Repatriation: What Happens Next?” *Amnesty International* online, 28 November 2018, [https://www.amnesty.org.au/rohingya-repatriation-what-happens-next/..](https://www.amnesty.org.au/rohingya-repatriation-what-happens-next/)

Drawing from the findings of the IIFFM, Chapter II of this thesis will focus on the crime of genocide and its core elements, for the purpose of evaluating whether the crime's constitutive elements can be said to have materialised in relation to the actions perpetrated against the Rohingya minority. To this end, the Chapter will examine the various prohibited acts described in the 1948 Genocide Convention along with the correlated forms of individual liability for genocide; these norms, and their application by the International Criminal Tribunals and the ICC, will serve to identify the conditions that have to be met in order for individuals to be held accountable for genocidal acts. The Chapter will then consider the constitutive traits of the crime of deportation and its inherently transboundary nature; the definition of the crime of deportation contained in the Rome Statute will thus be duly taken into account. With these criteria in mind, the ending Paragraph will look at how the subsistence of both crimes was affirmed by the IIFFM in its 2018 Report.

On the basis of the Mission's findings, Chapter III will examine the possible grounds for the ICC's jurisdiction over the crimes perpetrated in Myanmar. To this end, it will first consider the Government of Myanmar's condemnation of the Court's involvement as being incompatible with the international law principle according to which treaties do not bind third States: the description of the Vienna Convention on the Law of Treaties will provide a starting point for an evaluation of the plausibility of such an argument under the considered circumstances. The Chapter will then analyse the arguments put forth by the ICC Prosecutor in her request on jurisdiction against the backdrop of Article 12(2)(b), which limits the Court's jurisdiction to those crimes that bear a connection with a State party to the Rome Statute, either referred to the territory on which they were committed, or in connection with the nationality of the perpetrator. The Prosecutor's interpretation of Article 12, and the emphasis placed on the transborder element of the crime of deportation, will allow for an assessment as to whether the ICC can be said to have jurisdiction in those cases where part of the crime took place in the territory of a State party to the Statute. The Pre-Trial Chamber's 2018 Decision and the Authorisation of Investigation issued a year later will serve to conclude that, given the peculiarities of the crime of deportation, the occurrence of an essential element of the crime in a ratifying State, such as in the Rohingya case, is enough to establish the ICC's jurisdiction. The analysis will then turn to the possibility that such jurisdiction be extended to the crime of genocide allegedly perpetrated against the Rohingya, being that the criminal acts performed with genocidal intent directly caused the mass exodus of the Rohingya into neighbouring Bangladesh. Significantly, this possibility can only be inferred by the Pre-Trial Chamber's Decision on Jurisdiction, being that the Chamber did not mention the crime of genocide among the possible crimes within its jurisdiction, referring only to the crime of persecution and inhuman acts.

Having addressed the possible bases for the Court's jurisdiction over the genocidal acts alleged to have been perpetrated against the Rohingya, the final Paragraph will turn examine whether the future cases which the Prosecutor will possibly bring before the Court as a result of the authorised investigation may be considered admissible in light of the principle of complementarity set forth in Article 17 of the Rome Statute. In order to so, the Paragraph will consider the investigative and prosecutorial initiatives under way in Myanmar, and whether or not they reveal a genuine willingness to hold the perpetrators of crimes against the Rohingya accountable; it will then take into account the proceedings instituted by the non-governmental organisation Brouk before an Argentinian court in application of the principle of universal jurisdiction. It will be observed that the lawsuit is intended to complement the proceedings under way before the ICC, and is therefore limited to the crime of genocide. However, it will also be noted that the activation of the Argentinian court is premised on the assumption that the crime of genocide was and/or is being perpetrated against the Rohingya exclusively on the territory of Myanmar, thus accounting for the lack of the Court's jurisdiction; an interpretation of the crime of genocide as having even partially occurred on Bangladeshi soil would contradict this assumption, with the consequence that the lawsuit may have the potential of rendering a future case for genocide inadmissible before the Court. The issue, which is merely theoretical at this stage, may instead become of practical relevance if the Prosecutor were to extend the scope of her investigation, and therefore of the proceedings themselves, to the crime of genocide.

The fourth Chapter will instead contemplate whether Myanmar can be held responsible for the genocide allegedly perpetrated against the Rohingya, based on the international norms on State responsibility. It will therefore consider the constitutive elements of State responsibility, and the consequences, in terms of reparation of damage and cessation of the wrongdoing, that ensue from the commission of an internationally wrongful act. The aggravated responsibility arising from the breach of the Genocide Convention's obligations will then be illustrated, with a view to understanding whether Myanmar can be said to have incurred in such a form of responsibility for the conduct carried out by the national authorities against the Rohingya. The *erga omnes* nature of the obligations binding on States parties to the Genocide Convention, and the *jus cogens* standing of the prohibition of genocide set forth therein, will represent the backbone to this analysis. The Chapter will then turn to address the question of whether States can commit genocide, in light of the ICJ's jurisprudence on the matter. The described normative framework will be put in relation both with the IIFFM's findings on Myanmar's responsibility, and with the Application filed by the Gambia against Myanmar in November 2019; both will serve to verify if the criminally relevant conduct materially carried out by the Tatmadaw military and other Government officials within Myanmar can be imputed to the

respondent State, thus giving rise to its international responsibility for the breach of the Genocide Convention's terms. Whether or not Myanmar can be said to have *committed* genocide will also be taken into account with due reference to the international jurisprudence on the issue. These appraisals will revolve around the ICJ's Provisional Measures Order issued in January 2020, being that the Order was based on the *prima facie* credibility of The Gambia's claims; the reasoning espoused by the Court will therefore make clarity as to the elements accounting for Myanmar's possible international responsibility.

The closing Chapter will assess the conformity of the recent repatriation agreements concluded between Myanmar and Bangladesh with the relevant norms of international refugee law. The principle of *non-refoulement* contained in the 1951 Geneva Convention on Refugees, and the correlated caselaw of both domestic and regional courts, will aid in this analysis, as will the principles of voluntary and safe return around which the UNHCR's mandate revolves. Particular attention will be given to the peremptory nature of the prohibition of *refoulement* in all those cases where the expelled, rejected, or otherwise removed individual would face a risk of torture, international crimes, or other conduct contrary to *jus cogens* norms of international law; it will be emphasised that the rule in question directly impacts on the legality, and correlated validity, of the agreements to repatriate the Rohingya refugees signed by Bangladesh and Myanmar, on account of the serious risk of genocide and other severe violations of their human rights faced by the minority upon return. With regards to the agreements' execution, the conclusion that will be reached is that, the situation in Myanmar not being such as to guarantee the safety from persecution of the Rohingya, the repatriation of the Rohingya refugees currently in Bangladesh cannot occur without the individual consent of members of the group, as it would otherwise contravene the prohibition of *refoulement*. The refugees' current reluctance, if not strenuous opposition, to repatriation raises serious doubts as to the conformity with international law of any concrete execution of the current repatriation plans.

A final clarification is necessary. Whereas the Reports of the IIFFM consider not only genocide, but also crimes against humanity and war crimes as having been committed in Myanmar, and whereas both of the ICC's competent Pre-Trial Chambers expressly contemplated the possibility that crimes against humanity other than deportation allegedly committed in Myanmar fall under its jurisdiction, this thesis will only appraise the ICC's jurisdiction over the crimes of deportation and genocide. With regards to the crime of deportation, the analysis is warranted, given that the ICC has already affirmed its jurisdiction over such a crime and authorised the Prosecutor's investigation thereon. The assessment of the extension of the ICC's jurisdiction over crime of genocide is in turn required both due to the controversy surrounding the issue, and on account of the specific intention to destroy a

particular group that underlies this particular crime. The other crimes against humanity mentioned by the Pre-Trial Chamber will instead not be examined, for the reason that they are not directed against a specific group but against the civilian population as a whole.

Chapter I: The Status of the Rohingya People under National and International Law

1. Ethnic Minorities Under International Law

The Rohingya have been defined by various sources as a minority group within Myanmar.¹ From a numerical standpoint, this is certainly so, being that they are estimated to represent only 4% of the country's population.² However, the classification of Rohingyas as an ethnic minority from a legal perspective has significant repercussions on the rights conferred upon them under international law. It is therefore necessary to examine the international definition of "minorities" and the protection accorded them by international instruments, to understand the extent to which such protection has been denied them by the Republic of Myanmar.

To date, no binding international legal instrument provides a definition of the term "minority".³ The definition therefore has vague contours and is subject to differing interpretations. One of the earliest attempts at describing minorities came from the Permanent Court of International Justice (hereinafter, the "PCIJ"); in its 1930 *Greco-Bulgarian Communities* Advisory Opinion, regarding the application of the 1919 Greco-Bulgarian Convention concerning emigration, stated as follows:

"By tradition, which plays so important a part in Eastern countries, the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other".⁴

Although the PCIJ dealt with the concept of "community" as expressed in the Convention under scrutiny, the term is used as a synonym for "minority", as can be inferred by the fact that the

¹ See, for example, Mohammad Shahabuddin, "Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar." *Asian Journal of International Law* 9, no. 2 (2019): 334-358; Dussich, John P. J. "The Ongoing Genocidal Crisis of the Rohingya Minority in Myanmar." *Journal of Victimology and Victim Justice* 1, no. 1: 4-24.

² "World Directory of Minorities and Indigenous Peoples - Myanmar/Burma: Muslims and Rohingya." Minority Rights Group International, October 2017, <https://www.refworld.org/docid/49749cdcc.html>.

³ See Marc Weller, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford [etc.]: Oxford University press, 57: "[...] no legally binding international instrument contains a definition of 'minority' [...]."

⁴ *Greco-Bulgarian Communities*, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17 (July 31), para. 30.

Convention was only applicable to the minorities located in either one of the two contracting States.⁵ Thus, according to the PCIJ, minorities are identified based on two principal elements: distinct race, religion, language and traditions, and the sense of solidarity between members of the group aimed at the preservation of the group's identity.

Endeavours to grant minorities an international framework of protection led to the inclusion, in the 1966 International Covenant on Civil and Political Rights (hereinafter, the "1966 Covenant"), of Article 27, which provides that members of an ethnic, linguistic or religious minority should be guaranteed the right "[...] to enjoy their own culture, to profess and practise their own religion or to use their own language"⁶ in relation with other members of the same group.⁷

Whereas Myanmar is not a party to the 1966 Covenant,⁸ Article 27 provides a useful starting point for the analysis of both the definition of "minority" and the protection of minorities under international law. The 1966 Covenant effectively sets down the rights of minorities in a legally binding instrument, but it nonetheless fails to provide a general definition of the term. The omission was compensated for in 1979 when, referring to Article 27 of the 1966 Covenant, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Francesco Capotorti defined minorities as "[...] [a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".⁹

Although the numerical requirement was included as a constitutive factor of minorities, its importance should be downplayed, seeing as "[...] those groups numbering in the thousands generally would cross the numerical threshold."¹⁰ Capotorti further specified in the report that, "[...] in countries in which ethnic, religious or linguistic groups of roughly equal numerical size coexist, article 27 is applicable to them all."¹¹

⁵ Ibid, para. 20. See also Weller, *Universal Minority Rights*, 56: "[...] The Court equated 'communities' with minorities [...]".

⁶ Article 27 of the International Covenant on Civil and Political Rights, December 16, 1966, 999 UNTS 171 (entered into force March 23, 1976) ("ICCPR").

⁷ Ibid.

⁸ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en for a list of States Parties to the ICCPR.

⁹ Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities F. Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979) ("Capotorti Study") para. 568.

¹⁰ Thomas W. Simon, "Minorities in International Law." *Journal of Law and Jurisprudence* 10, no. 2 (1997): 513.

¹¹ Capotorti Study, para. 566.

More relevant is the feature of the non-dominant position of the group within a particular State, both in terms of political power and in relation to the more general socio-economic standing.¹² The factor must be read in conjunction with the distinguishing features which serve to differentiate the group from the predominant one:¹³ according to the 1979 definition, members of the minority share ethnic, linguistic or religious traits which distinguish them from the residual population.¹⁴ The “ethnic” “religious” or “linguistic” properties thus described are such that the group is “[...] not only distinct from the rest of the population (or majority), but also meant to be preserved as distinct.”¹⁵

The objective differentiation from the predominant population is accompanied by the subjective element of solidarity between members pertaining to a minority group: from this perspective, persons belonging to a particular minority are conscious that they represent a distinct group in a particular nation,¹⁶ and share the desire to preserve their own specific identity.¹⁷

Based on the definition illustrated above, it is possible to affirm that the Rohingya people are a minority not only from the numerical standpoint, but also within the meaning of the term commonly applied under international law. The group possesses both the ethnic and the religious features by which minorities have been identified, and is certainly in a non-dominant position in Myanmar, particularly considering their consistent marginalisation. Whether or not they share a feeling of common solidarity is debatable, but the positive solution may be assumed from their refusal to register as Bengalis¹⁸ and the fact that most have made repatriation to Myanmar conditional upon their being recognised as citizens of the State.¹⁹

The qualification of an individual as member of a “minority”, within the meaning described above, entails granting that individual a series of rights under international law. Article 27 of the ICCPR itself addresses those rights, providing that “[...] persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁰

¹² Jelena Pejić, “Minority Rights in International Law,” *Human Rights Quarterly* 19, no. 3 (1997): 671.

¹³ Simon, “Minorities in International Law,” 513. See also Fatemeh Mihandoost and Bahman Babajanian. “The Rights of Minorities in International Law.” *Journal of Politics and Law* 9, no. 6 (2016): 16.

¹⁴ Capotorti Study, para. 568.

¹⁵ Mohammad Shahabuddin, “Ethnicity in the International Law of Minority Protection: The Post-Cold War Context in Perspective.” *Leiden Journal of International Law* 25, no. 4 (2012): 896.

¹⁶ Commission on Human Rights, Definition and Classification of Minorities: Memorandum Submitted by the Secretary-General, E/CN.4/Sub.2/85, 27 December 1949, para. 39.

¹⁷ Capotorti Study, para. 567. For a different opinion, see Simon, “Minorities in International Law”, 516: “Self-definition should not qualify as a condition for minority status.”

¹⁸ See Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (18 September 2018) (“IIFFM 2018 Report”), para. 484.

¹⁹ “Rohingya Crisis: Bangladesh and Myanmar Agree Repatriation Timeframe”, *BBC*, January 16, 2018. Accessed October 6, 2019, <https://www.bbc.com/news/world-asia-42699602>.

²⁰ Article 27 of the ICCPR.

A preliminary issue concerning Article 27 is whether it confers individual or collective rights. Some argue that minority rights constitute individual rights to enjoy in relation with the other group members, rather than collective rights attributed to the minority as such.²¹ However, the words “in community with the other members of their group”²² have also been understood to refer to the collective entity.²³ Another preliminary question, of particular importance with regards to the Rohingya case, is whether Article 27 could apply to stateless persons. In its General Comment on the 1966 Covenant, the Human Rights Committee made clear that the individuals afforded protection under the Convention’s terms “need not be citizens of the State party”,²⁴ and that States must grant all individuals subject to their jurisdiction the rights set forth in the Convention, except where these are expressly reserved to citizens.²⁵ Whether or not a person is a citizen of a State is therefore irrelevant for the protection of that person under the Convention.

Of pertinence to the Rohingya case is the right to existence that has been derived from Article 27. In its General Comment to the 1966 Covenant, the Human Rights Committee underlined that, “[t]he protection of these rights is directed to ensure the *survival* and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.”²⁶ The term “survival” has been interpreted as indicating that minorities have a right to physical existence, with the inevitable consequence that “among the corpus of international standards that are relevant to the protection of minorities is the right to be protected against genocide.”²⁷ As will be discussed in Chapter 2 of this thesis, Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (hereon in, the “Genocide Convention”), describes a series of acts which amount to genocide provided that they are carried out “with the *intent to destroy* in whole or in part, a national, ethnical, racial or religious group, as such”.²⁸ Article 27 therefore arguably grants minorities the same protection against genocide as that accorded individuals in general by the Genocide Convention. The inference is especially important when one considers that Myanmar is a

²¹ Macklem, “Minority Rights in International Law” *International Journal of Constitutional Law*, 6, nos. 3-4, July-October 2008, page 535.

²² Article 27 of the ICCPR.

²³ Pejic, “Minority Rights in International Law”, 670. See also Weller, *Universal Minority Rights*, 28.

²⁴ Human Rights Committee, General Comment No. 23(50) (art. 27), Addendum to the General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Doc. No. CCPR/C/21/Rev.1/Add.5, 26 April 1994, para. 5.1 (“General Comment”). See also *Acquisition of Polish Nationality*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15), para. 30.

²⁵ General Comment, para. 5.1.

²⁶ *Ibid.*, para. 9 (emphasis added).

²⁷ Tina Kempin Reuter, “Dealing with Claims of Ethnic Minorities in International Law.” *Connecticut Journal of International Law* 24, no. 2 (2009): 206.

²⁸ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Art. 2 (“Genocide Convention”) (emphasis added).

State party to the Genocide Convention, and is therefore specifically bound by its terms.²⁹ The overlap between minorities' and individuals' right to existence is further confirmed by the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 1 of which provides that States undertake to safeguard the existence of the minorities situated within their territories and to adopt laws and other measures directed at the furtherance of the groups' identity.³⁰ The necessary consequence is that a failure by a State to guarantee and safeguard the existence of a minority group within its territory may, if correlated with the conditions set out in the Genocide Convention, give rise to the State's responsibility for the breach of its obligations under the latter Convention.³¹

This reasoning could easily be applied to Myanmar; in its 2018 Report, the Independent International Fact-Finding Mission for Myanmar (hereinafter, the "IIFFM" or the "Mission")³² specifically found that the Tatmadaw forces actively engaged in the killing and maiming of civilians pertaining to the Rohingya ethnic group and underlined that, "the deaths were a direct or indirect result of the severe and systematic oppressive measures imposed on the Rohingya and the 'clearance operations' in 2016 and 2017 in which they culminated."³³ Such conduct is at once at variance with the protection of minorities' existence as set out in Article 27 of the 1966 Covenant, and a determining factor in the possible responsibility of Myanmar for genocide.

It is in these terms that on November 11, 2019 the Republic of the Gambia (hereinafter, "The Gambia") instituted proceedings against Myanmar before the International Court of Justice for the breach of the Genocide Convention,³⁴ alleging the Respondent State's responsibility both for the commission of, and the failure to prevent, the Rohingya genocide.³⁵ The Applicant expressly condemned Myanmar's longstanding, institutionalised persecution of the Rohingya³⁶ in the form of legislative measures and other State policies aimed at discriminating against the members of the minority group.³⁷ What is significant is that these forms of marginalisation, and the 2016 and 2017 violence in which they escalated, are described in The Gambia's Application as having been

²⁹ The Genocide Convention and its implications in the Myanmar case will be examined thoroughly in Chapter 2 of this work.

³⁰ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, res. 47/135, UN Doc. A/RES/47/135, February 3, 1992, Article 1.

³¹ Reuter, "Dealing with Claims", 209.

³² See the Introduction of this thesis for more information on the IIFFM's institution and findings.

³³ IIFFM 2018 Report, para. 1394.

³⁴ *Application Instituting Proceedings and Request for Provisional Measures (Republic of the Gambia v. Republic of the Union of Myanmar)* International Court of Justice, November 11, 2019, para.2 ("The Gambia Application").

³⁵ *Ibid.*, para. 111.

³⁶ *Ibid.*, para. 29.

³⁷ *Ibid.*, para. 33-46.

committed “solely on the basis of [the Rohingya’s] ethnical, racial, or religious origin [...]”³⁸ and as being aimed at their removal from Myanmar.³⁹ The Genocide Convention’s relevance derives from the fact that the contravention of the Respondent State’s duty to ensure the survival of the Rohingya minority is asserted in relation to the national authorities’ willingness to erase the Rohingya’s presence from national territory on account of their ethnicity. The Gambia’s Application will be analysed in more depth in Chapter 2 of this thesis.

The broader right to cultural identity contained in Article 27 of the 1966 Covenant – inclusive of the right of minorities to practise their cultural and religious traditions and use their language – is also replicated in international instruments binding on Myanmar, such as Article 30 of the Convention on the Rights of the Child.⁴⁰

The wording of the Convention mirrors that contained in the 1966 Covenant exactly, thus imposing on the State of Myanmar the same obligation to ensure the preservation of the group’s identity and customs with reference to the children of that minority group. The fact that Myanmar is not a party to the 1966 Covenant therefore does not take away from its duty to protect members of the Rohingya community under international law.

The right of minorities to preserve their distinct identity within a particular State interacts with the prohibition of discrimination of those minorities at the national level. Put in other words, States must guarantee that the rights set forth under national law are exercised by the members of a particular minority on an equal footing with all other individuals situated in the country.⁴¹ To this end, Art. 2 of the 1966 Covenant provides that States must ensure that all persons subject to their jurisdiction enjoy the rights upheld in the Covenant without distinction,⁴² a principle reiterated in Article 26 with reference to the right to equal protection before a State’s national law.⁴³ These stipulations clearly establish a prohibition of discrimination based on the grounds mentioned therein.

Whereas the 1966 Covenant only refers to a general prohibition of discrimination against individuals, without expressly extending the correlated protection to minorities, the Human Rights

³⁸ *Ibid.*, para. 114.

³⁹ *Ibid.*, para. 99.

⁴⁰ Article 30 of the Convention on the Rights of the Child provides that “[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”, Convention on the Rights of the Child, November 20, 1989, 1577 UNTS 3 (entered into force September 2, 1990).

⁴¹ Pejic, “Minority Rights in International Law”, 675.

⁴² ICCPR, Art. 2.

⁴³ *Ibid.*, Art. 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Committee has established that the prohibition of discrimination contained in the illustrated Articles also covers individuals belonging to minorities.⁴⁴ What is more, the Committee broadened the scope of the protection accorded individuals and minorities alike under Articles 2 and 26 of the 1966 Covenant so as to embrace even those rights that are not specifically mentioned in the 1966 Covenant.⁴⁵

An analogous prohibition is set out in the International Convention for the Elimination of Racial Discrimination (from hereon in, the “CERD”).⁴⁶ Whereas the CERD has not been ratified by Myanmar, its principles have acquired the standing of customary international law norms;⁴⁷ the Committee on the Elimination of Racial Discrimination made clear that “the prohibition of racial discrimination [is] a peremptory norm of international law from which no derogation is permitted.”⁴⁸ The principle is therefore binding even on those States, such as Myanmar, which have not ratified the CERD.

As has been noted,⁴⁹ the CERD does not specifically mention minority rights. However, the term “groups of persons” can be intended to encompass even minorities, especially if read in conjunction with the object of the prohibition set forth in Article 1, being that racial discrimination is by definition addressed at members of a racial (as in, “ethnic”) group.⁵⁰ The broad definition contained in Article 2 is such that it encompasses both national and ethnic groups;⁵¹ the CERD can hence certainly be considered applicable to the Rohingya to the extent that they are considered an *ethnic* minority within Myanmar.

⁴⁴ General Comment, para. 4. See also Weller, *Universal Minority Rights*, 80.

⁴⁵ General Comment, para. 4.

⁴⁶ Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, March 7, 1966 (entered into force January 4, 1969) (“CERD”), provides: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”

⁴⁷ Patrick Thornberry, “Confronting Racial Discrimination: A CERD Perspective”, *Human Rights Law Review* 5, no. 2 (2005): 240.

⁴⁸ Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 57th sess., U.N. Doc. A/57/18, Suppl. No. 18 at Ch. XI (C)(4) (2002).

⁴⁹ Pejic, “Minority Rights Under International Law”, 676.

⁵⁰ Weller, *Universal Minority Rights*, 81: “[...] [t]he prohibition of racial discrimination, which is being furthered by CERD, is particularly relevant for minorities because of its broad interpretation of racial discrimination and thus also of ‘race’.”

⁵¹ Claudia Tavani, “The Protection of the Cultural Identity of Minorities in International Law: Individual Versus Collective Rights,” *European Yearbook of Minority Issues Online* 9, no. 1 (2012): 61.

Of particular interest, in consideration of the Myanmar authorities' attitude towards the Rohingya, are letters (a) and (c) of Article 2 CERD: the State policy of steady marginalisation of the Rohingya community, coupled with the enforcement of State laws on citizenship in such a way as to deprive members of the ethnic group of their nationality, are in clear contrast with the obligations to refrain from acts or practices of racial discrimination and invalidate those laws having an equivalent effect.

Article 5 of the of the CERD further lays down a broad catalogue of fundamental human rights which States should guarantee to “everyone, without distinction as to race, colour, or national or ethnic origin”.⁵² In much the same way as Article 1, the provision can be considered to apply even to members of ethnic minorities, which are therefore entitled to rights such as political rights,⁵³ the right to nationality,⁵⁴ and the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.⁵⁵ It is again apparent that the Myanmar authorities have disregarded these obligations towards the Rohingya community, at once depriving its members of nationality and directly engaging in violent conduct against them.

From the analysis carried out above it is possible to infer that Myanmar has fallen short of its obligation to guarantee the Rohingya the protection that the group is entitled to under the international law norms on minorities. Not only have the Rohingya people not been granted specific measures aimed at safeguarding their particular identity, they have also been the victims of direct discrimination by State authorities, at the expense of their cultural, and even physical, existence. This conclusion makes it possible to now examine a specific aspect of the oppression faced by the ethnic minority within Myanmar, represented by the denial of their citizenship within the State.

2. The 1982 Burma Citizenship Law

In order to understand the consequences of the 1982 Burma Citizenship Law on the status of the Rohingya, a brief overview of the preceding national norms on Myanmar citizenship is necessary. The relevant provisions are contained in both the 1947 Myanmar Constitution⁵⁶ and in the 1948 Union Citizenship Act.⁵⁷ Read together, these legal instruments accorded citizenship either on the grounds

⁵² Article 5 of the CERD.

⁵³ *Ibid*, 5(c).

⁵⁴ *Ibid* 5(d)(iii).

⁵⁵ *Ibid*, 5(b).

⁵⁶ For the 1947 Constitution, see <http://www.myanmar-law-library.org/law-library/laws-and-regulations/constitutions/1947-constitution.html>.

⁵⁷ For the 1948 Union Citizenship act, see <https://it.scribd.com/document/117952531/The-Union-Citizenship-Act-1948>.

of membership of any of the referred to indigenous ethnic groups,⁵⁸ or upon satisfaction of alternative criteria, the principal of which being descent from ancestors who for at least two generations had resided in the territories of the Union, provided that the individual's parents and the individual were also born in said territories.⁵⁹

With regards to citizenship based on indigenous membership, the Union Citizenship Act specified that “[...] the expression "any of the indigenous races of Burma" shall mean the *Arakanese*, Burmese, Chin, Kachin, Karen, (Kayah,) Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A.D. (1185 B.E).”⁶⁰ Individuals could therefore be accorded citizenship if they belonged to one of the indicated racial groups considered indigenous to Myanmar.

Section 7 of the Union Citizenship Act further granted aliens the possibility of being naturalised Myanmar citizens by the Minister – a Union Government member appointed specifically for that purpose – subject to certain age, residency and moral requirements.⁶¹ Whereas scholars disagree as to whether Rohingyas were eligible for citizenship based on the membership of an indigenous group requirement,⁶² the other two criteria are considered applicable to them;⁶³ members of the Rohingya community could therefore qualify for full citizenship under the preceding legal framework, subject to the descent or residency conditions set out therein.⁶⁴

⁵⁸ Section 11(i) of the 1947 Constitution provides that, “[e]very person, both of whose parents belong or belonged to any of the indigenous races of Burma [...] shall be citizen of the Union.” Section 3.1 of the 1948 Union Citizenship Act clarifies that, “[f]or the purposes of section 11 of the Constitution the expression "any of the indigenous races of Burma" shall mean the Arakanese, Burmese, Chin, Kachin, Karen, (Kayah,) Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A.D. (1185 B.E).”

⁵⁹ Section 4.2 of the 1948 Union Citizenship Act provides that, “[a]ny person descended from ancestors who for two generations at least have all made any of the territories included within the Union their permanent home and whose parents and himself were born in any of such territories shall be deemed to be a citizen of the Union.” See Section 11 of the 1947 Constitution for the individual criteria by which citizenship could be acquired in Myanmar. See also IIFFM 2018 Report, para. 472.

⁶⁰ Section 3.1 of the 1948 Union Citizenship Act (emphasis added).

⁶¹ Section 7.1 of the 1948 Union Citizenship Act provides that, “[t]he Minister may grant a certificate of naturalization to an alien who makes an application setting out and satisfies the Minister: (a) that he has completed the age of eighteen years; (b) that for not less than five years before the application he had resided continuously in the Union and subject to its jurisdiction; (c) that he is of good character and can speak [any indigenous language]; and (d) that he intends if a certificate is granted, either to reside in the Union or to enter or continue in the service of the Union or any constituent State thereof or in an undertaking of a religious, charitable or commercial character established in the Union. Provided that he has, within a period not less than one year and not more than five years before making the application, given notice in writing of his intention to apply for naturalization in the form prescribed by Rules under this Act.”

⁶² Parashar and Alam, for example, argue that, “[the Rohingya] are not citizen[s] of Myanmar if ss 11(i), (ii) and (iii) of the constitution are interpreted in the light of the first condition of s 3 (1) of the UCA 1948. For ‘indigenous races’ as specified by this law includes only seven races and the Rohingya are not included within this list”, in Archana Parashar and Jobair Alam, “The National Laws of Myanmar: Making of Statelessness for the Rohingya.” *International Migration* 57, no. 1 (2019): 98. For a different opinion, see Md Mahbulul Haque, “Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma.” *Journal of Muslim Minority Affairs* 37, no. 4 (2017): 460.

⁶³ Parashar and Alam, “The National Laws of Myanmar”, 98.

⁶⁴ IIFFM 2018 Report, para. 472-473.

The 1982 Burma Citizenship Law is at variance with the described system. The Law was passed under the Ne Win government (1962-1988), a military regime established in Myanmar after the armed *coup* which took place in 1962.⁶⁵ The Law distinguishes between three categories of citizenship: full, associate, and naturalised citizenship.⁶⁶ Full citizenship is accorded on an ethnic basis; Chapter II.3 of the Law provides that “[n]ationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, *Rakhine* or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period prior to 1185 B.E., 1823 A.D. are Burma citizens.”⁶⁷

The Rohingya are not among the ethnic groups described in the Citizenship Law. They are thus automatically excluded from full citizenship in Myanmar.⁶⁸ Particularly relevant in this regard is the distinction between the term “Arakanese” used in the 1948 Union Citizenship Act, and the term “Rakhine” with which it is replaced in the 1982 Burma Citizenship Law. Whereas the former term can be said to refer to geographic provenance from the Arakan region of Myanmar, thus encompassing both the ethnic Rakhine and the ethnic Rohingya groups, the term “Rakhine” refers to only one of the two ethnicities residing in that region, with the consequent exclusion of the Rohingya from the list of ethnic groups allowed full citizenship.⁶⁹

The second category of citizens described by the 1982 Citizenship Law is “associate citizenship”. Chapter III.23 of the Law provides that “[a]pplicants for citizenship under the Union Citizenship Act, 1948 conforming to the stipulations and qualifications may be determined as associate citizens by the Central Body”.⁷⁰ Associate citizenship is therefore limited to those who had applied for citizenship under the Union Citizenship Act and whose application procedure was still pending at the time the Burma Citizenship Law entered into force.⁷¹ Whereas the Rohingya could technically fit into this category, in practice the condition of the pending application was rarely met: as has been stated, “[f]ew Rohingya could gain citizenship under the [Citizenship Law], as they could not meet the two requirements that they were both eligible for citizenship under the 1948 Act and had applied for

⁶⁵ Nyi Nyi Kyaw, "Unpacking the Presumed Statelessness of Rohingyas." *Journal of Immigrant & Refugee Studies* 15, no. 3 (2017): 273; Elliot Higgins, "Transitional Justice for the Persecution of the Rohingya," *Fordham International Law Journal* 42, no. 1 (2018): 104.

⁶⁶ See the 1982 Burma Citizenship Law. For the full text of the law, see: <https://www.refworld.org/docid/3ae6b4f71b.html>.

⁶⁷ *Ibid.*, Chapter II.3 (emphasis added).

⁶⁸ Christopher Faulkner and Samuel Schiffer, "Unwelcomed? The Effects of Statelessness on Involuntary Refugee Repatriation in Bangladesh and Myanmar." *The Round Table* 108, no. 2 (2019): 149.

⁶⁹ As Haque argues, “[t]he Union Citizenship Act, 1948 clearly stated that the Arakanese were one of the indigenous races in Burma. That law did not refer to the “Rakhine” or “Rohingya” which explains why before the 1982 Citizenship Law, the Rohingya did not face an identity crisis in Burma. [...] However, the 1982 law used the word “Rakhine” instead of Arakanese. Rohingya leaders and rights activists argued that this was intended by the Buddhist Rakhines to exclude the Rohingya Muslims from the Burmese state framework. [...]”, Haque, "Rohingya Ethnic Muslim Minority", 460.

⁷⁰ Chapter III.23 of the 1982 Burma Citizenship Law.

⁷¹ Haque, "Rohingya Ethnic Muslim Minority", 457. See also Parashar and Alam, "The National Laws of Myanmar", 101.

citizenship under that Act.”⁷² Further, the wording “may be determined as associate citizens by the Central Body” implies a certain liberty of the competent authority in determining whether or not to accord the applicant associate citizenship.

The third category of citizenship contemplated by the 1982 Citizenship Law is “naturalised citizenship”. Pursuant to Chapter IV of the Law, “[p]ersons who have entered and resided in the State prior to 4th January, 1948, and their children born within the state may, if they have not yet applied under the Union Citizenship Act, 1948, apply for naturalized citizenship to the central Body, furnishing conclusive evidence”.⁷³ Other conditions for applying are mainly based on marriage with or descent from a person belonging to one of the three categories of citizenship described in the Law.⁷⁴ Scholars are divided as to whether the Rohingya could apply for this class of citizenship, but the affirmative answer seems preferable.⁷⁵ It must be considered, however, that the application does not warrant the conferral of naturalised citizenship: the Chapter must be read in light of Articles 68 and 71 of the Citizenship Law which, on the one hand, recognise the power of the Central Body in deciding upon citizenship matters; on the other, make clear that such authority is of a discretionary nature.⁷⁶ To this end, Article 71 unambiguously provides that the bodies in charge of the implementation of the Citizenship Law are under no obligation to provide justifications for their decisions concerning the conferral of citizenship.⁷⁷

Although the 1982 Citizenship Law does not altogether bar Rohingya members from the possibility of acquiring Myanmar citizenship at the described conditions,⁷⁸ it must be read in light of the subsequent State practice: from this angle, it becomes clear that the Rohingya have effectively become stateless under international law.⁷⁹

According to the IIFFM, with the seizure of power of the State Peace and Development Council (SLORC) in 1988, authorities ordered that the National Registration Cards (“NRC”) distributed to citizens under the 1948 Citizenship Act be turned in and substituted with Citizenship Scrutiny Cards (CSC). Upon handing in the NRCs, the Rohingya were denied CSCs, and were given Temporary Registration Cards (or “white cards”) instead.⁸⁰ Under national laws, these cards constituted

⁷² Parashar and Alam, “The National Laws of Myanmar”, 101.

⁷³ Chapter IV.42 of the 1982 Burma Citizenship Law.

⁷⁴ Chapter IV.43-45 of the 1982 Burma Citizenship Law. See also IIFFM 2018 Report.

⁷⁵ See para. 478 of the IIFFM 2018 Report.

⁷⁶ Haque, “Rohingya Ethnic Muslim Minority”, 457; Parashar and Alam, “The National Laws of Myanmar”, 102.

⁷⁷ Chapter VIII.72 of the 1982 Citizenship Law.

⁷⁸ Nick Cheesman, “Problems with Facts about Rohingya Statelessness” *E-International Relations*, December 8, 2015.

⁷⁹ *Ibid.* See also IIFFM 2018 Report, para. 479.

⁸⁰ IIFFM 2018 Report, para. 479; Kyaw, “Unpacking the Presumed Statelessness”, 279.

temporary documentation for the purposes of identification, rather than representing an alternative solution for those residents who had not been accorded Myanmar citizenship.⁸¹

The white cards were then made to expire on 31st March 2015 by decision of President Thein Sein, who ordered that they be handed back by the end of May 2015.⁸² They were in turn replaced with “Identity Cards for National Verification” which were mere identification cards issued by the Government for the purpose of assessing whether the applicant met the requirements for citizenship of Myanmar.⁸³ Significantly, “Rohingya applicants were required to indicate ‘Bengali’ ethnicity on the application form, and the rights associated with the card were unclear [...]”.⁸⁴ The verification process stalled shortly thereafter,⁸⁵ leaving the Rohingya in a situation of statelessness.⁸⁶

This brief analysis of Myanmar’s provisions on citizenship and their application by government authorities suffices to affirm that the Rohingya can in all respects be defined “stateless” under international law. This condition has important implications both as a facilitating factor for the ensuing perpetration of crimes against members of the ethnic group, and as integrating an example of the persecution faced by the Rohingya, thereby contributing to the definition of members of the group as “refugees”. The affirmation that the Rohingya are stateless must therefore be weighed against the existing international law norms of statelessness; this analysis will be carried out in the following Paragraph.

3. Statelessness under International Law

In the *Nottebohm* case, the International Court of Justice defined the concept of “nationality” as, “[...] a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁸⁷ Nationality therefore presupposes a connection with a particular State, and “gives rise to rights and duties on the part of

⁸¹ Cheesman, “Problems with Facts”.

⁸² IIFFM 2018, Report, para. 484. See also Kyaw, “Unpacking the Presumed Statelessness”, 280.

⁸³ IIFFM 2018 Report, para. 484.

⁸⁴ Ibid; Kyaw, “Unpacking the Presumed Statelessness”, 282.

⁸⁵ See IIFFM 2018 Report, para. 484-485.

⁸⁶ The situation of the Rohingya has often been defined one of *de facto* statelessness. However, the term is improperly used: as the UNHCR makes clear in its Guidelines on the definition of statelessness, “the term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons [...]. Care must be taken that those who qualify as ‘stateless persons’ under Article 1(1) of the 1954 Convention are recognised as such and not mistakenly referred to as *de facto* stateless persons as otherwise they may fail to receive the protection guaranteed under the 1954 Convention.”, in UNHCR, Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons, 15, U.N. Doc. HCR/GS/12/01 (February 20, 2012). See also Betsy L. Fisher, “‘The Operation of Law’ in Statelessness: Determinations Under the 1954 Statelessness Convention.” *Wisconsin International Law Journal* 33, no. 2 (2015): 276-278.

⁸⁷ *Nottebohm Case (Liechtenstein v. Guatemala) (second phase)*, International Court of Justice, 6 April 1955, I.C. J. Reports 1955, p. 4 at 23.

the state, as well as on the part of the citizen/national.”⁸⁸ Among the most important rights that derive from nationality is the right to retain nationality, which protects the individual against the unjustified removal of the legal connection with the State. As has been noted by the United Nations Secretary General, “[t]he right to a nationality implies the right of each individual to acquire, change and retain a nationality. The right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality.”⁸⁹

A person who is deprived, loses, or is born without nationality can be considered stateless under international law. Article 1 of the 1954 UN Convention Relating to the Status of Stateless Persons (“Convention on Statelessness”) defines statelessness as the condition of “[...] a person who is not considered as a national by any State under the operation of its law.”⁹⁰ The International Law Commission has clarified that this definition replicates customary international law.⁹¹ The analysis of whether or not a person is considered a national by “any State” is limited to those States with which the individual enjoys relevant ties.⁹²

The part of the definition that is of interest for the purpose of assessing whether the Rohingya are, in fact, stateless at the international level is the diction “under the operation of its law”. As has been noted in Paragraph 2 of this Chapter, the 1982 Burma Citizenship Law does not in itself deprive the Rohingya of Myanmar citizenship. It is rather the subsequent application of the Law by the competent State authorities that has placed the ethnic group in such a condition. In order to understand whether statelessness can derive from State practice, it is necessary to consider whether the wording “under the operation of its law” can encompass not only national legal norms on nationality, but also the way in which such norms are applied by the authorities of that particular State. In answer to this query, UN Guidelines on the Definition of Statelessness clarify that assessing whether an individual is a citizen of a particular State entails ascertaining that the State actually applies its citizenship laws to that individual. When this is not the case, the individual will be stateless despite the existence of those

⁸⁸ Alice Edwards and Laura van Waas, *Nationality and Statelessness Under International Law*. Cambridge [etc.] Cambridge University press, 2014, 12.

⁸⁹ Secretary-General to the General Assembly, ‘Human rights and arbitrary deprivation of nationality’, Report of the Secretary-General to the General Assembly, A/HRC/13/34, 14 December 2009, para. 21.

⁹⁰ Convention Relating to the Status of Stateless Persons, September 28, 1954, 360 UNTS 117 (entered into force on June 6th, 1960) Article 1 (“Statelessness Convention”).

⁹¹ UNHCR, Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons, 15, U.N. Doc. HCR/GS/12/01 (February 20, 2012) (“Guidelines on Statelessness”) para. 2. See also Article 8 of the International Law Commission, Draft Articles on Diplomatic Protection with commentaries, in Yearbook of the International Law Commission, Vol. II, Part II, U.N. Doc. A/61/10, 2006, at 24: in its commentary to Article 8, the Commission has clarified that “Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in article 1 of the Convention relating to the Status of Stateless persons [...]. This definition can no doubt be considered as having acquired a customary nature. [...]”.

⁹² Guidelines on Statelessness, para. 11.

laws: “[t]he reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.”⁹³

In light of this broad definition of statelessness, individuals are to be considered stateless even in those situations where a State’s laws accord them nationality, when the application of such laws by national authorities is such that the individual is nonetheless denied citizenship of that State.⁹⁴ The Rohingya clearly fall under this category, and therefore qualify as stateless under international law.

Once it is established that members of the Rohingya ethnic group are stateless according to international standards, it is necessary to briefly consider how the issue of statelessness is addressed by international legal instruments. Whereas the Convention on Statelessness recognises stateless persons a plethora of rights, ranging from employment⁹⁵ and property rights,⁹⁶ to religious rights⁹⁷ and the right to non-discrimination,⁹⁸ this Paragraph will only examine the right to nationality and its implications with regards to stateless persons. The analysis will serve to understand the extent to which the corresponding State obligations bind the State of Myanmar.

It is clear from a study of the international provisions regarding statelessness that a preventive approach to statelessness is adopted at the international level. For example, Article 15 of the 1948 UN Declaration of Human Rights (“UDHR”) provides that “[e]veryone has the right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”.⁹⁹

The provision specifically considers the right of nationals of a particular State not to be deprived of their nationality on an arbitrary basis, with the underlying aim of avoiding statelessness altogether. Although the UDHR is a non-binding instrument, the principles contained therein are generally considered as pertaining to customary international law.¹⁰⁰ Furthermore, the provisions safeguarding nationality are replicated in a series of binding international instruments which have entered into force

⁹³ Ibid., para. 16-17. See also *ibid.*, para. 15: “The reference to “law” in Article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.”

⁹⁴ Betsy L. Fisher, “The Operation of Law’ in Statelessness: Determinations Under the 1954 Statelessness Convention.” *Wisconsin International Law Journal* 33, no. 2 (2015): 267: “The 1954 Statelessness Convention requires adjudicators to broaden their consideration from just the law as written to include how the law operates. An adjudicator who is properly considering a case should, as appropriate, consider state practice and principles of law beyond the state's nationality law.” See also Edwards and Van Waas, *Nationality and Statelessness Under International Law*, 21, 81.

⁹⁵ Article 17 of the Statelessness Convention.

⁹⁶ *Ibid.*, Article 13.

⁹⁷ *Ibid.*, Article 4.

⁹⁸ *Ibid.*, Article 3.

⁹⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd sess, 183rd plen mtg, U.N. Doc. A/810, 10 December 1948, Article 15 (“UDHR”).

¹⁰⁰ Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” *Georgia Journal of International and Comparative Law* 25, no. 287: 322-323.

in subsequent years. For example, Article 1 of the 1961 Convention on the Reduction of Statelessness mandates States to accord their nationality to persons born within their territory where those individuals would otherwise be rendered stateless.¹⁰¹ Article 8 in turn proscribes States from depriving a person of their nationality if this would result in the individual's statelessness.¹⁰² The prohibition of an unjustified withdrawal of nationality therefore represents a central form of protection against the risk of statelessness. As has been specified, arbitrary deprivation of nationality occurs whenever "[...] the withdrawal by the state of a citizen's nationality [...] does not serve a legitimate purpose, comply with the principle of proportionality and [when it] is otherwise incompatible with international law."¹⁰³

In keeping with the preventive approach to statelessness, Article 9 of the Convention on the Reduction of Statelessness also provides that States parties to the Convention may not withdraw nationality on "racial, ethnic, religious or political grounds."¹⁰⁴ The provision elaborates on the prohibition of arbitrary deprivation of nationality contemplated in the preceding Article so as to include even the event of discriminatory laws or State practice which would result in the withdrawal of a person's nationality on the abovementioned grounds.

The fact that Myanmar is not a party to the Convention does not exempt it from the obligations laid down in these two Articles, being that – as with the UDHR – they have been said to crystallise general norms of international law,¹⁰⁵ and are thus binding even on non-party States. What is more, analogous provisions are contained in the Convention on the Elimination of All Forms of Discrimination Against Women (Article 9)¹⁰⁶ and the Convention on the Rights of the Child (Article 7),¹⁰⁷ both of which have been ratified by, and are therefore binding on, Myanmar.

The above analysis leads to the obligated observation that the conduct of the Myanmar authorities, consisting of the arbitrary denial of citizenship to members of the Rohingya community, is in clear contravention of the obligation to desist from the arbitrary deprivation of the ethnic group's nationality. The promulgation of the 1982 Citizenship Law which in itself downgraded the status of

¹⁰¹ Convention on the Reduction of Statelessness, 989 UNTS 175, December 13, 1975 (entered into force on December 13th, 1975) Article 1 ("Reduction of Statelessness Convention").

¹⁰² *Ibid.*, Article 8.

¹⁰³ Edwards and Van Waas, *Nationality and Statelessness Under International Law*, 26.

¹⁰⁴ Reduction of Statelessness Convention, Article 9.

¹⁰⁵ Michelle Foster and Hélène Lambert, "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come" *International Journal of Refugee Law* 28, no. 4 (2016): 578; Edwards and Van Waas, *Nationality and Statelessness Under International Law*, 25. See also UNHCR, Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General, UN Doc. A/HRC/13/34, December 14, 2009, para. 21-22.

¹⁰⁶ Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 12, December 18, 1979 (entered into force September 3, 1981), Article 9.

¹⁰⁷ Convention on the Rights of the Child, November 20, 1989, 1577 UNTS 3 (entered into force September 2, 1990), Article 7.

the Rohingya under the national legal system, was principally based on ethnic grounds and the distinction between indigenous and non-indigenous races. What is more, the consequent policy of substituting citizenship cards with other temporary forms of identification was clearly dictated by discriminatory motives aimed at the progressive marginalisation of the “distinct” ethnic group. Proof of this underlying intent can be found in the hate speech directed against the Rohingya and the conviction that they did not belong to Myanmar.¹⁰⁸

Having analysed the status of the Rohingya from a national and international perspective, Paragraph 4 will now turn to examine the international law on refugees, in order to establish whether the Rohingya can be considered refugees at the international level. This appraisal is necessary to then assess the legality of the repatriation efforts undertaken by Myanmar and Bangladesh from 2017 onwards in Chapter IV of this work.

4. The Applicability of International Refugee Law in the Rohingya Case

The definition of refugees under international law is set forth in the 1951 Convention Relating to the Status of Refugees (from hereon in, “Geneva Convention”) which is held to set down “[...] the primary standard of refugee status [...]”.¹⁰⁹ Article 1(A) of the Geneva Convention provides the following:

“For the purposes of the present Convention, the term "refugee" shall apply to 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”.¹¹⁰¹¹¹

¹⁰⁸ See IIFFM 2018 Report, para. 320-344, 1423.

¹⁰⁹ James C. Hathaway, “The Development of the Refugee Definition in International Law, The Law of Refugee Status” in, Karen Musalo, Jennifer Moore, and Richard A. Boswell. *Refugee Law and Policy: A Comparative and International Approach*. 4th ed. Durham (N.C.): Carolina Academic press, 2011, 34.

¹¹⁰ Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137 (entered into force April 22, 1954) Art. 1 (A) (“Geneva Convention”); James C. Hathaway, “The Development of the Refugee Definition”, 36. The temporal limitation contained in paragraph (2) of Article 1 of the Geneva Convention has been removed by the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267 (entered into force October 4, 1967) (“1967 Protocol”): Article 1(2) of the Protocol provides that, “2. For the purpose of the present Protocol, the term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and...’ and the words ‘...as a result of such events’, in article 1 A (2) were omitted.”

¹¹¹ Geographical limitations set down in Art. 1(B) of the Geneva Convention and confining its application to the Europe have also been done away with. Article 1(B) of the Geneva Convention provided that, “B. (1) For the purposes of this Convention, the words ‘events occurring before 1 January 1951’ in article 1, section A, shall be understood to mean either (a) ‘events occurring in Europe before 1 January 1951’; or (b) ‘events occurring in Europe or elsewhere before 1 January 1951’; [...]” Article 1(3) of the 1967 Protocol removes this limitation, establishing that “[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by

As has been noted,¹¹² the definition of refugees thus comprises four distinct factors: refugees are located outside their countries of origin; they have a well-founded fear of being persecuted; the persecution feared hinges on their race, religion, nationality, membership of a particular social group or political opinion; by reason of such fear of persecution, they are unwilling or unable to avail themselves of that country's protection. In order to determine whether the Rohingya qualify as refugees under international law, it is therefore necessary to verify whether they possess all four of the distinguishing traits which make up the definition of refugees.

The first of such constitutive elements is the fact that refugees are located outside their country of origin.¹¹³ It is therefore required that the person have crossed an international border in order for the condition to apply; this factor serves to distinguish refugees from internally displaced persons.¹¹⁴ With respect to the diction "outside the country of his nationality", it is important to note that the Geneva Convention extends the definition of refugees also to those individuals who do not have the nationality of any one State, when they are located "outside the country of [their] former habitual residence [...]".¹¹⁵ As has been recounted in the Introduction to this thesis, the Rohingya have undergone patterns of migration from Myanmar into neighbouring countries in the decades following the entry into force of the 1982 Burma Citizenship Law. The dramatic events that took place from August 2017 onwards further caused approximately 725,000 Rohingya to flee to Bangladesh,¹¹⁶ where they are currently staying in a situation of legal uncertainty. The fact that they have crossed an international border means that those Rohingya who have fled Myanmar fulfil the first condition set down in Article 1(B) of the Geneva Convention for them to qualify as refugees.

Secondly, it is necessary to establish whether the Rohingya's location outside their country of origin derives from a well-founded fear of being persecuted. As is explained in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee (hereinafter, the "UNHCR Handbook"), "[...] a threat to life or freedom on account of race, religion, nationality, political opinion or membership

States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol."

¹¹² Guy S. Goodwin-Gill and Guy S. Goodwin Gill, *The Refugee in International Law*. 2th ed. Oxford: Clarendon Press, 1998, 19-20.

¹¹³ Article 1(A) of the Geneva Convention.

¹¹⁴ See Eva Nilsson, Smahällsvetenskapliga fakulteten, Umeå Universiteit, and Institutionen för social arbete, "The 'Refugee' and the 'Nexus' Requirement. The Relation between Subject and Persecution in the United Nations Refugee Convention." *Women's Studies International Forum* 46, no. C (2014): 126.

¹¹⁵ Article 1(B) of the Geneva Convention. See also Michelle Foster and H el ene Lambert, *International Refugee Law and the Protection of Stateless Persons*. First ed. Oxford: Oxford University Press, 2019 (online): 92.

¹¹⁶ IIFFM 2018 Report, para. 1489.

of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution”.¹¹⁷ However, persecution can also take place via measures of minor gravity;¹¹⁸ the term therefore has a variable content, and whether or not a certain conduct constitutes persecution must be ascertained in light of the particular circumstances of the applicant’s case.¹¹⁹

What is more, in order for the person to be defined a refugee under international law, it is not required that the persecution already have taken place.¹²⁰ Where the fear of persecution has not yet materialised, there must be a concrete possibility of it occurring in future.¹²¹ In this regard, the Convention specifies that the fear of persecution must be “well-founded”.¹²² According to the Ad Hoc Committee on Statelessness and Related Problems, this condition is met when the person has either actually suffered persecution, or can give valid reasons for fearing persecution.¹²³ The term well-founded therefore refers to the fact that the fear must be rational in light of the given circumstances.¹²⁴ As clarified by the Canadian Supreme Court in the *Ward* case, “[t]he test as to whether a state is unable to protect a national is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense”¹²⁵ meaning that “[t]he claimant need not literally approach the state unless it is objectively unreasonable for him or her not to have sought the protection of the home authorities”.¹²⁶

Whether the Rohingya have a well-founded fear of persecution has been addressed in depth in the IIFFM’s 2018 Report (hereinafter, the “2018 Report”). According to the 2018 Report, the Rohingya have been subjected to a multiplicity of discriminatory measures, including, but not limited to,¹²⁷

¹¹⁷UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee, U.N. Doc. HCR/IP/4/Eng/REV.3 (1979) reissued in 2011, para. 51 (“Handbook on Refugees”). See also Guy Goodwin Gill, “The Refugee in International Law” in Musalo et al, *Refugee Law and Policy*, 242.

¹¹⁸ Goodwin-Gill and Goodwin Gill, *The Refugee in International Law*, 68.

¹¹⁹ UNHCR, Handbook on Refugees, para. 52.

¹²⁰ Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, Vol. 1, Oxford: Oxford University press, 2014 (published online in August 2014), 38.

¹²¹ *Ibid.*

¹²² Eva Nilsson et al., “The ‘Refugee’ and the ‘Nexus’ Requirement.”, 126.

¹²³ Ad Hoc Committee on Refugees and Stateless Persons, “Comments of the Committee on the Draft Convention Relating to the Status of Refugees” Annex II of the “Report of the Ad Hoc Committee on Statelessness and Related Problems” UN Doc. E/1618 Annex II (17 February 1950), 36 (“Refugee Convention Commentary”).

¹²⁴ Austin T. Fragomen Jr., “The Refugee: A Problem of Definition” *Case Western Reserve Journal of International Law* 3, no. 1 (1970): 53. See also UNHCR Handbook on Refugees, para. 38: “[...] it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. [...]”

¹²⁵ Canada (Attorney General) v. Ward [1993] 2 SCR 689.

¹²⁶ *Ibid.*

¹²⁷ See Section V (B) of the IIFFM 2018 Report.

denial of citizenship and legal status in general,¹²⁸ restrictions on freedom of movement,¹²⁹ restriction on access to food, healthcare and education,¹³⁰ restrictions on humanitarian access¹³¹ and arbitrary arrest and detention.¹³² The abovementioned examples of discrimination of the Rohingya led the Mission to conclude that, “[...] this severe, systemic and institutionalised oppression, from birth to death, amounts to persecution.”¹³³ Analogous observations are outlined in the Mission’s 2019 Report.¹³⁴ The fact that they have actually suffered such repressive measures makes it reasonable to infer that those Rohingya who have fled to neighbouring countries have a “well-founded fear” of being subject to similar forms of persecution should they go back to Myanmar.

The causal link between the persecution of the Rohingya and their migration across national borders is at the heart of the ICC Prosecutor’s 2019 request for an investigation into the situation in Myanmar with a view to verifying the subsistence of the crime of deportation. The Prosecutor recognised that the forcible displacement of the Rohingya members into Bangladesh was a direct result of the coercive acts undertaken against them at the national level and did not stem from a voluntary choice of those fleeing Myanmar.¹³⁵ The same reasons were indicated as a primary impediment to the Rohingya’s repatriation, being that the ongoing violence and oppression against the minority deprives its members of the safe conditions necessary for them to return to Myanmar.¹³⁶ These factors are further indication of the “well-founded” nature of the Rohingya’s fear of persecution.

The third constitutive element of the definition of refugees is the cause of the persecution. Under this condition, for the Rohingya to qualify as a refugees, it is necessary that the persecution is suffered or feared by them on account of their race, religion, nationality, membership of a particular social group, or political opinion. A definition of these underlying factors is set down in the UNCHR Handbook. With regards to race, the Handbook provides that the term “race” is inclusive of those

¹²⁸ *Ibid.*, 110-119.

¹²⁹ *Ibid.*, 119-127.

¹³⁰ *Ibid.*, 127-136.

¹³¹ *Ibid.*, 136.

¹³² *Ibid.*, 143.

¹³³ *Ibid.*, para. 622.

¹³⁴ “The Mission concludes on reasonable grounds that the restrictions, deprivations and denials contribute to the Government’s continued persecution of the Rohingya people and result in serious or great inhumane suffering, both of which are crimes against humanity. [...]”, in Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (16 September 2019) para. 176 (“IIFFM 2019 Report”).

¹³⁵ Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15, No. ICC-01/19-7, July, 4, 2019, para. 112, 115 (“Request for Investigation”).

¹³⁶ *Ibid.*, para. 142. See the Introduction and Chapter 3.1.2. of this thesis for a description of the ICC Prosecutor’s Request for Investigation.

ethnic groups that are commonly referred to as races, as well as any “[...] specific social group of common descent forming a minority within a larger population.”¹³⁷

Read as “ethnic group”, the term “race” could certainly apply to the Rohingya for the purposes of the Convention. As has been observed, the Rohingya are an ethnically distinct group within Myanmar, in that “[...] they speak Bengali and are not ethnically Rakhine”.¹³⁸ They could, however, also be considered in terms of their religious identity or national identity, or be classified as a social group. The term “religion” gives rise to no interpretative difficulty; in relation to the Rohingya, it serves to denote the fact that they are of Muslim faith, as opposed to the prevalently Buddhist population residing in Myanmar. “Nationality” is defined in the UNCHR Handbook as not merely referring to citizenship, but more broadly “to membership of an ethnic or linguistic group [...]”,¹³⁹ and is therefore a partly overlapping notion to that of “race”.¹⁴⁰ Lastly, “a particular social group” includes individuals who share a particular standing or history, or a set of common customs:¹⁴¹ the latter definitions can therefore apply to the Rohingya upon similar grounds to the term “race”. These identifying factors must constitute the reasons for persecution in order for the individual to qualify as a refugee.

Turning to consider the oppression faced by the Rohingya, it appears that the roots of such victimisation lie precisely with the State authorities’ perception of the Rohingya as a distinct group owing to their racial background and religious beliefs. Faulkner and Schiffer call attention to the fact that the government authorities do not consider the Rohingya as indigenous to Myanmar.¹⁴² Moreover, in the various scrutiny processes initiated by the government, Rohingya’s identification was contingent on their registering as “Bengali”,¹⁴³ with their consequent exclusion from the national list of ethnic groups.¹⁴⁴

The IIFFM confirms these observations, defining State policies discriminating against the Rohingya “a process of othering”¹⁴⁵, a terminology which immediately conjures up the separateness and lack of belonging of the marginalised group in relation to the rest of the State’s population. As highlighted in the 2018 Report, the government authorities deny the existence of a Rohingya minority

¹³⁷ UNHCR Handbook, para. 68.

¹³⁸ Rajika L. Shah, “Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis.” *Loyola of Los Angeles International & Comparative Law Review* 41, no. 2 (2018): 189.

¹³⁹ UNCHR Handbook, para. 74.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Faulkner and Schiffer, *Unwelcomed?*, 149.

¹⁴³ Kyaw, “Unpacking the Presumed Statelessness”, 282: “[...] according to the leaked Action Plan, all Muslims in Rakhine [...] will also be required to undergo scrutiny and register as ‘Bengali’”.

¹⁴⁴ Parashar and Alam, “The National Laws of Myanmar”, 96.

¹⁴⁵ IIFFM 2018 Report, para. 459.

in Myanmar, instead referring to the group as “Bengalis” of Bangladeshi origin and insisting on their illegal status within the State.¹⁴⁶

These findings make clear that the Rohingya are consistently perceived as pertaining to a foreign nationality and this perception is at the core of the policy of oppression carried out against them by State and non-State actors in Myanmar. It can therefore be asserted that the Rohingya satisfy even the third condition of the definition of refugees.

The last requirement for an individual to be considered a refugee under international law is that they are “unwilling” or “unable” to benefit from the protection of their country of origin by reason of the well-founded fear of being persecuted there.¹⁴⁷ With regards to the Rohingya, this criterion must be measured against the ethnic group’s reaction to the repatriation efforts undertaken by Myanmar and Bangladesh in the last two years. According to the IFFM’s 2019 Report (from hereon in, the “2019 Report”), in 2018 the UNCHR conducted an assessment of the willingness of Rohingya members situated in Bangladesh to return to Myanmar upon request by the Bangladeshi government.¹⁴⁸ Those addressed manifested their reluctance to return to Myanmar, some hiding or even threatening or attempting to commit suicide in what was defined “an extreme demonstration of their resistance to forced repatriation.”¹⁴⁹ A Rohingya-organised protest took place in Cox’s Bazar for the sole purpose of expressing the participants’ hostility towards plans of return.¹⁵⁰

Renewed attempts at repatriation were met with a similar response.¹⁵¹ The reluctance of the Rohingya clearly signals an unwillingness to avail themselves of the protection of the State. These considerations aside, it must be remembered that the Rohingya are primarily *unable* to benefit from the protection of their State of origin. As we have seen, the patterns of discrimination and maltreatment faced by the Rohingya in Myanmar amount to persecution within the definition of the Geneva Convention. Such repressive conduct persists today, as has been evidenced by the Mission in its 2019 Report, and is indicative of the State of Myanmar’s inability to offer the Rohingya any protection from persecution.¹⁵² As a result, the Rohingya should be deemed both unwilling and unable to avail themselves of the protection of Myanmar.

¹⁴⁶ Ibid., para. 460.

¹⁴⁷ For an analysis of the notion of “protection” contained in the 1951 Geneva Convention, see Hugo Storey, “The Meaning of ‘Protection’ within the Refugee Definition.” *Refugee Survey Quarterly* 35, no. 3 (2016): 8-13.

¹⁴⁸ IFFM 2019 Report, para. 207.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., para. 209: “In August 2019, the Government of Myanmar agreed to the repatriation of 3,450 Rohingya refugees [...]. While the Government of Bangladesh made logistical arrangements for their return, none of the selected families agreed to the planned repatriation.”

¹⁵² IFFM 2019 Report, para. 176.

The conducted analysis makes it possible to conclude that the Rohingya are refugees under international law. This status has important implications regarding the legality of the repatriation agreements concluded between Myanmar and Bangladesh, particularly in light of the principle of *non-refoulement*¹⁵³ and that of the voluntariness of return, both of which specifically concern refugees. These aspects will be examined in depth in Chapter V of this work.

Concluding Remarks

This Chapter has examined the Rohingya's status under national and international law. The qualification of the Rohingya as a "minority" within Myanmar has made it possible to contemplate the forms of protection the group would have a right to under the international provisions on minorities, and which have nonetheless been denied its members at the national level. The progressive removal of the Rohingya's Myanmar citizenship has been identified as a key form of discrimination, both as a specific example of the negation of legal protection within the State, and as crucial to the subsequent ethnic cleansing operations endured by the minority. The analysis has then focused on the safeguards accorded stateless persons by the international instruments on statelessness, and the infringement of such safeguards by the State of Myanmar. Finally, Paragraph 4 of this Chapter has addressed the issue of the Rohingya's qualification of refugees under international law; the Geneva Convention has provided the legal basis by which to verify whether the Rohingya possessed all four of the constitutive traits which identify a person as a refugee, and the affirmative conclusion was reached. The following Chapter will now turn to examine whether the persecution faced by the Rohingya amounts to genocide as defined by the relevant instruments of international law, and the consequences in terms of the ensuing individual responsibility that such a conclusion would entail.

¹⁵³ See Roberto Virzo, "Il Coordinamento di Norme di Diritto Internazionale Applicabili allo Status dei Rifugiati e dei Bambini Migranti Via Mare" *Rivista del Diritto della Navigazione* 1 (2016): 151-2.

Chapter II: The Configuration of Individual Criminal Responsibility for the Crimes Committed in Myanmar

In the Introduction to this work, attention has been drawn to the brutal campaign conducted against the Rohingya by the Tatmadaw forces. The factual evidence of the attack was recounted in the IIFFM's 2018 Report¹ and triggered the ICC Prosecutor's request for a decision on the Court's jurisdiction over the alleged deportation of the Rohingya,² as well as the subsequent request for the commencement of an investigation into the Myanmar/Bangladesh situation.³ The authorisation of the investigation was granted by Pre-Trial Chamber III in November 2019.⁴ While the ICC did not address whether genocide was committed in Myanmar due to the absence of a request of this sort by the Prosecutor, the report of the IIFFM found extensive evidence as to the perpetration of genocidal acts against the Rohingya.⁵ Underlying these developments is the notion of individual responsibility for international crimes, which this Chapter seeks to describe; the analysis of the crimes' constitutive elements will serve to assess whether genocide and deportation actually took place in Myanmar. The focus on the acts committed against the Rohingya is limited to the crimes of genocide and deportation, being that the other international crimes substantiated in Myanmar were either directed at the civilian population in general, or they did not form the object of the ensuing criminal proceedings; an analysis of all the abstractly verifiable crimes would therefore deviate from the object of this thesis.

An evaluation of genocide's perpetration must start with its definition under the Genocide Convention and the other international instruments, among them the ICC Statute, in which such definition is replicated; the international jurisprudence of the criminal tribunals will also be relied upon to make clarity as to the crimes' constitutive traits.

¹ See Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (18 September 2018) ("IIFFM 2018 Report").

² Situation in Bangladesh/Myanmar, No. ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, April 9, 2018 ("Request on Jurisdiction").

³ Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15, No. ICC-01/19-7, July 4, 2019 ("Request for Investigation").

⁴ Situation in Bangladesh/Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19-27, November 14, 2019 ("Authorisation of Investigation").

⁵ IIFFM 2018 Report, para. 1388-1441.

1. The UN Convention against Genocide and its Application

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (from hereon in, the “Genocide Convention”) was adopted in the aftermath of the Second World War, as a response to the heinous crimes committed against Jews which had characterised the conflict. Whereas the indictment of certain high-ranking soldiers convicted of international crimes before the International Military Tribunal had included liability for genocide, the judgments delivered against the war criminals did not confirm charges for genocide, rather finding them guilty of crimes against humanity.⁶ The Genocide Convention was thus intended as an international legal instrument setting down a framework for the prosecution of those responsible for genocidal acts.⁷ This aim is reflected in Article 1 of the Convention, which provides that “[t]he 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.”⁸

Article 2 of the Genocide Convention sets out the definition of genocide 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.”⁹

The definition thus laid down is reproduced in the Statutes of the International Criminal Tribunals instituted specifically to try individuals charged with the international crimes committed in the former Yugoslavia and in Rwanda,¹⁰ and is further transposed in the Rome Statute of the

⁶ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Cambridge[etc.]: Cambridge University press, 2009, 43-44; Ines Gillich, “Between Light and Shadow: The International Law Against Genocide in the International Court of Justice’s Judgment in Croatia v. Serbia” *Pace International Law Review* 28, no. 1(2016): 121.

⁷ Yuval Shany, “The Road to the Genocide Convention and Beyond” in Paola Gaeta, *The UN Genocide Convention: A Commentary*, Oxford [etc.]: Oxford University press, 2009, 4.

⁸ Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (“Genocide Convention”).

⁹ Article 2 of the Genocide Convention.

¹⁰ SC Res 827, UN SCOR, 3127th mtg., U.N. Doc. S/Res/827, May 25, 1993, as amended by SC RES 1877, UN SCOR 64th sess, 6155th mtg, UN Doc S/RES/1877, 7 July 2009 (“ICTY Statute”) Article 7; SC Res 955, UN SCOR, 3453rd mtg, UN Doc S/RES/955, November 8, 1994, annex (“ICTR Statute”) Article 6.

International Criminal Court;¹¹ it therefore represents the necessary starting point for the analysis of the constitutive elements of this international crime.

Article 2 identifies the two main components of the crime of genocide as being the material element or *actus reus* and the mental element, otherwise referred to as *mens rea* or the “guilty mind”.¹² As has been noted, “[a]ctus reus connotes the external element of the crime.”¹³ Only the acts indicated in Article 2 can integrate the crime of “genocide” (provided they are corroborated with the necessary subjective factor), meaning that acts not included in the list necessarily fall outside this particular form of criminal liability.¹⁴

1.1. Prohibited Genocidal Acts

The first act contemplated in Article 2 of the Genocide Convention is that of “killing members of the group.”¹⁵ In legal terminology, “[k]illing means causing the death of a person.”¹⁶ For the genocidal act to take place, it is necessary that the external result (meaning, the death of the member of the group) has taken place; however it is not required that more than one person is killed. As the Trial Chamber of the International Criminal Tribunal for Rwanda noted in *Prosecutor v Jean Mpambara*, “[...]the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.”¹⁷ What is instead necessary is that the act is intentional, although premeditation is not requested.¹⁸

Article 2(b) of the Convention contemplates “[c]ausing serious bodily or mental harm to members of the group”.¹⁹ This material element distinguishes between physical and psychological damage: the former aspect requires “[...] harm that seriously injures a person’s health, causes

¹¹ Schabas, *Genocide in International Law*, 5; Emanuela Fronza, “Genocide in the Rome Statute,” in Flavia Lattanzi and William A. Schabas, *Essays on the Rome Statute of the International Criminal Court*, vol. I. Ripa Fagnano Alto: Il Sirente, 1999: 105-132. See also Article 6 of the Rome Statute of the International Criminal Court, July 17, 1988, 2187 UNTS 38544 (entered into force July 1, 2002).

¹² Paul Behrens and Ralph Henham, *Elements of Genocide*, New York; London;: Routledge, 2013. See Gaeta, *The UN Genocide Convention: A Commentary*, 89.

¹³ Elies Van Sliedregt, *Individual Criminal Responsibility in International Law*. New York: Oxford University press, 2013, 40.

¹⁴ Florian Jessberger, “The Definition and the Elements of the Crime of Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 89; Roger O’Keefe, *International Criminal Law*. Oxford [etc.]: Oxford University press, 2015, 147.

¹⁵ Article 2(a) of the Genocide Convention.

¹⁶ Jessberger, “The Definition and the Elements of the Crime of Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 96.

¹⁷ *The Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, September 11, 2006, para.8.

¹⁸ *The Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment, July 31, 2003, para. 515: “As regards the underlying acts, the word “killing” is understood to refer to intentional but not necessarily premeditated acts.”

¹⁹ Article 2(b) of the Genocide Convention.

disfigurement or causes any serious injury to the external or internal organs or senses of the victim.”²⁰ Mental harm instead involves psychological impairment that meets a certain threshold of gravity and is more than merely temporary in character.²¹ Whereas the damage has to be serious, it need not be perpetual or irreparable.²²

What is interesting with regards to Article II (b) is the fact that certain decisions of the International Criminal Tribunals have associated forcible transfer and deportation to the physical and mental harm described therein.²³ For example, in *Prosecutor v. Blagojević and Jokić*, the Trial Chamber found that the forcible transfer caused by the perpetrators was intended to cause serious psychological damage to the victims.²⁴ Similarly, in *Prosecutor v Al Bashir*, Pre-Trial Chamber I held that “serious bodily and mental harm” also covered forcible displacement.²⁵ This is particularly relevant when considering the Rohingya case, being that the International Criminal Court has established its jurisdiction over the crime of deportation (which is classified as a crime against humanity in the Rome Statute). If it were demonstrated that deportation may also integrate a specific genocidal act (i.e. causing serious bodily or mental harm), this could allow for the affirmation that the ICC’s jurisdiction in the Rohingya case also covers genocide – in the sub-form of deportation – under article 2 (b) of the Genocide Convention, and 6(b) of the Rome Statute. However, it has been specified that deportation and forcible transfer are not in themselves genocidal; they can at most be indicative of genocidal intent.²⁶

Sexual violence has also been found to constitute a specific form of physical and psychological harm, due to the impairment and distress instilled in the victims of such act. This is significant in relation the situation in Myanmar, being that, as has been mentioned in the Introduction to this work, the Independent International Fact Finding Mission for Myanmar (hereon in, the “IIFFM” or the “Mission”) identified rape as a central example of the perpetuation of crimes against the Rohingya.²⁷ The genocidal relevance of sexual violence will be discussed further in Paragraph 4 of this Chapter.

²⁰Guénaël Mettraux, *International Crimes: Volume 1., Genocide / Law and Practice*. Oxford: Oxford University Press, 2019, 260; *The Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, May 21, 1999, para.109.

²¹*The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, January 17, 2005 para.645.

²² *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para.502.

²³Jessberger, “The Definition and the Elements of the Crime of Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 99: “Harm may – depending on the individual case- also be caused through forcible transfer and deportation.”

²⁴ *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, January 17, 2005, para.654.

²⁵ *The Prosecutor v. Al Bashir*, Case No. CC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, July 12, 2010, para. 26-31.

²⁶ O’Keefe, *International Criminal Law*, 148.

²⁷ IIFFM 2018 Report, para. 1396-1398.

The prohibited act described under letter (c) of Article 2 is that of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”²⁸ This underlying act is distinguished from “killing” on account of the lack of immediacy which characterises the measures intended to bring about the group members’ death. As the Trial Chamber in *Prosecutor v Akayesu* made clear, the conduct here takes the form of “[...] methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”²⁹ The criminalised conduct therefore takes the form of “slow death measures”.³⁰

This offence does not require the intended result to have actually taken place, provided that the measures adopted against members of the protected group are aimed at eventually causing the death of such individuals; the destructive intent is at once a necessary and sufficient for this underlying act to materialise and give rise to the corresponding criminal liability of its author.³¹ As has been highlighted, the author’s conduct must be deliberately used as a method by which to bring about the annihilation of the group.³² Examples of acts that can fall within the scope of Article 2(c) are: “[...] systematic expulsion from homes; denial of medical services; and the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion.”³³

As with Article 2(b), deportation and forcible transfer have also been traced back to this specific genocidal act, subject to certain conditions. In *Prosecutor v Zdravko*, for instance, the Appeals Chamber stated that forced displacement alone did not amount to a genocidal act.³⁴ However, it then specified that forcible transfer could represent a relevant factor in assessing the subsistence of the *actus reus* described in Article 2(c) as a means by which to bring about the protected group’s destruction.³⁵ In other words, “[...] where accompanied by other forms of mistreatment or the denial of means of survival, such acts of displacement could fall within the scope of this prohibition.”³⁶

²⁸ Article 2(c) of the Genocide Convention.

²⁹ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para.505.

³⁰ Gerhard Werle and Florian Jessberger. *Principles of International Criminal Law*, 3rd ed. Oxford: Oxford University press, 2014, 305.

³¹ Mettraux, *International Crimes: Volume 1., Genocide / Law and Practice*, 271.

³² Jessberger, “The Definition and the Elements of the Crime of Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 101.

³³ *The Prosecutor v Mladic*, Case No. IT-09-92-T, Judgment, November 22, 2017, para. 3434.

³⁴ *The Prosecutor v Tolimir Zdravko*, Case No. IT-05-88/2-A, Judgment, April 8, 2015, para. 234.

³⁵ *Ibid*, para.209. See also *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Judgment, May 9, 2007 para.123.

³⁶ Mettraux, *International Crimes: Volume 1., Genocide / Law and Practice*, 273. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, para.190 (“2007 *Bosnian Genocide*”).

Turning to Article 2(d) of the Genocide Convention, “[i]mposing measures intended to prevent births within the group”³⁷ has been equated with “biological genocide”, meaning that the measures are inflicted on the group’s members with the aim of curbing procreation within the group, thus endangering its physical existence.³⁸ Measures that fall under Article 2(d) of the Genocide Convention include “[...] sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”³⁹ With regards to sexual violence, it has been noted that the violent act can have a preventive effect on both the physical and psychological level. From a physical perspective, rape by a non-member may entail the birth of children who will not belong to the protected group. The mental trauma suffered by the victim of rape may likewise hinder the person’s willingness to procreate.⁴⁰ As has been indicated above, these acts were perpetuated on a vast scale against the Rohingya as part of the counterinsurgency campaign undertaken by the Tatmadaw forces.

Article 2(e) of the Genocide Convention refers to the forcible transfer of children from the protected group to a different group.⁴¹ According to the International Law Commission in its 1996 Report, “The forcible transfer of children would have particularly serious consequences for the future viability of a group as such.”⁴² However, the eradication of children from their community of origin may also imperil the *cultural* existence of said group, being that the transferred children will realistically be raised according to a different culture with the resulting dismissal of that of origin.⁴³

1.2. The Mental Element

These prohibited acts must be accompanied by the mental element or *mens rea* in order for them to qualify as genocide.⁴⁴ As opposed to other international crimes, genocide presupposes the subsistence of specific intent (also known as *dolus specialis*), which has been described as “[...] an aggravated criminal intention, required in addition to the criminal intent accompanying the

³⁷ Article 2 of the Genocide Convention.

³⁸ See Werle and Jessberger. *Principles of International Criminal Law*, 306.

³⁹ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para.507. The Trial Chamber refers to the ICTR statute; however, as has been mentioned in the main text of this work, the ICTY and ICTR Statutes mirror the definition of genocide put forth in the Genocide Convention.

⁴⁰ *Ibid*, para. 507-508.

⁴¹ Article 2(e) of the Genocide Convention.

⁴² International Law Commission, Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996), U.N. GAOR, 51st sess, Suppl. No. 10, U.N. Doc. A/51/10, 46, para.17.

⁴³ Schabas, *Genocide in International Law*, 203.

⁴⁴ Jessberger, “The Definition and the Elements of the Crime of Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 89.

underlying offence.”⁴⁵ This means that in order for genocide to take place, it is not sufficient that the author of an underlying act intended to materially carry out that particular offence; it is necessary that the author have acted with the specific intent of destroying the protected group in whole or in part.⁴⁶ From this perspective, specific intent constitutes an ulterior mental element to the mere volition of the physically perpetrated crimes.⁴⁷ This is revealed in the opening phrase of Article 2 of the Genocide Convention, which provides that “[...] 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[.]”⁴⁸ The requirement that the genocidal acts be carried out with the specific aim of bringing about the group’s destruction entails that the criminal act is directed against the victim solely on account of the targeted person’s membership of the group.⁴⁹ This is evidenced by the use of the words “as such”: the addition indicates that the actual target of the criminal conduct is not the individual but the group to which that individual belongs, and which the perpetrator ultimately seeks to destroy.⁵⁰

Considering that the destructive intention reflects a mental attitude of the author of the act, it may be difficult to verify specific intent based on direct factual proof. This consideration has led to the identification of alternative means by which to infer *dolus specialis* from the circumstances of the case: in *Prosecutor v Jelisić*, the Appeals Chamber exemplified the inferential evidence as including “[...] the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”⁵¹ While the existence of a plan of destruction is not a precondition for genocide, it too may be serve to prove specific intent.⁵² As will be recounted in Paragraph 4 of this Chapter, the Mission relied heavily on these factual elements in order to establish whether the acts perpetrated against the Rohingya were accompanied with the requisite mental attitude.

With regard to the degree of intent, the argument that liability for genocide merely requires the knowledge that the perpetrated acts may result in the group’s destruction has been rejected; what

⁴⁵ Behrens and Henham, *Elements of Genocide*, 11.

⁴⁶ The Prosecutor v Jelisić, Case No. IT-95-10-A, Judgment, July 5, 2001, para.45.

⁴⁷ See Werle and Jessberger. *Principles of International Criminal Law*, 177.

⁴⁸ Article 2 of the Genocide Convention (emphasis added).

⁴⁹ See O’Keefe, *International Criminal Law*, 150: “It is not enough to intend to destroy members of the group only in their capacity as specific or random individuals.”

⁵⁰ Behrens and Henham, *Elements of Genocide*, 80; *The Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment, July 31, 2003, para. 521.

⁵¹ *The Prosecutor v Jelisić*, Case No. IT-95-10-A, Judgment, July 5, 2001, para. 47.

⁵² *Ibid.*, para. 48.

is required is that the individual actively pursues the obliteration of the protected group.⁵³ If this standard is met, it is not necessary that the group is actually destroyed.⁵⁴

The numeric aspect comes into play when considering that genocidal intent can be directed at the eradication of the group “in part”.⁵⁵ The issue of the portion of the group that needs to be targeted in order for genocide to occur has been addressed by holding it sufficient that a substantial part of the group is pursued.⁵⁶

1.3. The Protected Group

The last element essential to the emergence of genocide regards the protected group. As set down in Article 2 of the Genocide Convention, the underlying acts described in letters (a) to (e) must have been perpetrated with the aim of destroying “[...] a national, ethnical, racial or religious group, as such”.⁵⁷ The reference to the thus qualified groups is indicative of the Genocide Convention’s ambition to uphold their right to existence; this point was made clear by the General Assembly in Resolution 96(I) of 1946, which provides that “[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; [...]”.⁵⁸ An analogous conclusion was reached by the International Court of Justice (hereon in, also the “ICJ” or the “Court”) in its 1951 Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*: according to the Court, the object of the Genocide Convention is “to safeguard the very existence of certain human groups [...]”.⁵⁹ This objective is pursued through the criminalisation of any conduct directed at bringing about the protected groups’ destruction.⁶⁰ As has been noted in Chapter I of this work, the Convention can be said to create a framework of protection partly coinciding with that safeguarding minorities under international law, being that both sets of international norms are designed to protect a particular group, albeit with partially differing approaches.

Although the perception of an individual as belonging to one of the four groups described in Article 2 is important, particularly when considering the perpetrator’s persecutory intent,

⁵³ O’Keefe, *International Criminal Law*, 152; *The Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgment, December 14, 1999, para.85.

⁵⁴ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para. 497.

⁵⁵ Article 2 of the Genocide Convention.

⁵⁶ *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, August 2, 2001 para. 634.

⁵⁷ Article 2 of the Genocide Convention.

⁵⁸ The Crime of Genocide, G.A. Res. 96(I), UN Doc. A/RES/96, 11 December 1946.

⁵⁹ Reservations to the Convention on Genocide, Advisory Opinion, I.C. J. Reports 1951, p. 15, 23. See also Schabas, *Genocide in International Law*, 7-8.

⁶⁰ See Mettraux, *International Crimes: Volume I., Genocide / Law and Practice*, 195.

membership of the abovesaid groups must also be determined with reference to objective factors.⁶¹ The combination of objective and subjective elements is clearly illustrated in the *Kayishema and Ruzindana* judgment, where it was established that “[a]n ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”⁶² The designation of the group cannot be based solely on subjective grounds.⁶³ Members of the group must therefore possess defining national, racial, religious or ethnic traits, which serve to characterise them as having a distinct group identity.⁶⁴

Under the Genocide Convention, national groups may be identified either on account of their common citizenship or based on their common customs and cultural or linguistic heritage. From the first point of view, a national group has been defined as “[...] a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”⁶⁵ However, the bond cannot be described as only legal in nature, especially when considering that the Genocide Convention’s aim is that of protecting minorities; it is therefore more appropriate to refer to the broad concept of minorities, as those groups which share a common language, religion or ethnicity.⁶⁶

For the purpose of the Convention, a racial group is identified “[...] based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”⁶⁷ A religious group has been described as either having a common denomination or as partaking of the same rituals and spiritual beliefs.⁶⁸ The term is to be interpreted broadly, so as to comprise those creeds that distinguish themselves from traditional religions.⁶⁹ The notion of “ethnic” group is defined by the Convention as referring to a community of people with a common language or culture.⁷⁰ The notion intersects with that of “national group”, under the broad understanding of the term described above: with regards to both, it has been remarked that “[a] common culture, history, way of living, language or religion may form the common denominator of those concepts, though these elements need not be present cumulatively.”⁷¹

⁶¹ See *Prosecutor v Tolimir*, Case No. IT-05-88/2-T, Judgment, December 12, 2012, para. 735.

⁶² *The Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, May 21, 1999, para.98.

⁶³ Werle and Jessberger. *Principles of International Criminal Law*, 297.

⁶⁴ *Ibid*, 296.

⁶⁵ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para.512.

⁶⁶ See Schabas, *Genocide in International Law*, 134-138. The definition of minorities has been examined in Chapter 1.1 of this thesis.

⁶⁷ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para.514.

⁶⁸ *The Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, May 21, 1999, para.98.

⁶⁹ Mettraux, *International Crimes: Volume I., Genocide / Law and Practice*, 213.

⁷⁰ *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para.513.

⁷¹ Claus Kreß, “The Crime of Genocide under International Law” *International Criminal Law Review* 6 (2006): 476.

If all three conditions set out in Article 2 are met – that is to say, if at least one of the underlying acts indicated in letters (a) to (e) of the Article are perpetrated against members of a national, racial, ethnical or religious group, with the specific intent of bringing about the group’s destruction in whole or in part – then the crime of genocide can be said to have occurred.

Now that the constitutive elements of genocide have been illustrated, the analysis will turn to the individual criminal liability for genocidal acts, and international crimes in general, with a view to understanding the modes and specific traits of individual criminal liability under international law.

2. Preconditions for Individual Responsibility for Genocidal Acts

The concept of individual criminal liability in international law was first developed in the aftermath of the Second World War. The idea that an individual can be responsible for international crimes is reflected in the words of the Nuremberg judgment that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁷²

The Genocide Convention echoes this intention. Article 3 of the Convention accordingly sets out a list of possible forms of responsibility, providing that

- “[t]he 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.”

However, the forms of liability are not defined by the Convention; the notions have instead been endowed with meaning through the jurisprudence of the international tribunals, based on the interpretation of the Articles of their Statutes dealing with individual criminal responsibility. Article 6 of the ICTR Statute and Article 7 of the ICTY Statute symmetrically lay down five forms of criminal conduct,⁷³ providing that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”⁷⁴ What is

⁷² Trial of the Major War Criminals Before the International Military Tribunal (14 November 1945 – 1 October 1946) 22 IMT, 30 September 1946, para.465.

⁷³ Sliedregt, *Individual Criminal Responsibility in International Law*, 63.

⁷⁴ ICTY Statute, Article 7; ICTR Statute, Article 6.

relevant with regards to the forms of liability set out in these Articles is that “the modes of participation can be separated into modes of primary or principal liability, namely commission and - in the Tribunals' view - participation in a joint criminal enterprise, and modes of secondary or accessory liability, such as planning, ordering, instigating and aiding and abetting.”⁷⁵

The International Criminal Court has also elaborated on the concept of individual liability, at times adopting a divergent approach from that of the two *ad hoc* Tribunals. The definitions put forth by these international tribunals are not limited to genocide but are deemed to apply to all international crimes; insofar as they also apply to genocidal acts, they provide the basis for individual accountability for this international crime. Complicity in genocide, conspiracy to commit genocide and incitement to commit genocide are, on the other hand, modes specific to this particular crime; they will therefore each be analysed individually.

2.1. “Commission” of Genocide in the Jurisprudence of the International Criminal Tribunals and of the International Criminal Court

In the jurisprudence of the International Criminal Tribunals, “commission” of an international crime is not limited to the physical perpetration of the crime.⁷⁶ Whereas an action or omission causing the crime clearly implicates principal responsibility,⁷⁷ the direct authorship of the crime can also be established by reference to more complex schemes of contribution to the criminal conduct. This conclusion was reached by the International Criminal Tribunal for Rwanda in *Gacumbitsi v Prosecutor*, where the Appeals Chamber, referring to genocide, clarified that “[i]n the context of genocide [...] ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.”⁷⁸

This awareness led the International Criminal Tribunals to develop a specific form of commission of the crime defined “Joint Criminal Enterprise” (or “JCE”).⁷⁹ According to the Tribunals, JCE requires that a person participate – alongside others – in a common plan implicating the commission of an international crime. Where there is a shared criminal project, all contributors

⁷⁵Gerhard Werle, “Individual Criminal Responsibility in Article 25 of the ICC Statute” *Journal of International Criminal Justice* 5 (2007): 953-975.

⁷⁶ Cassese, Antonio, Guido Acquaviva, Mary Fan and Alex Whiting. *International Criminal Law: Cases and Commentary*. Oxford: Oxford University press, 2013.

⁷⁷ Barbara Goy, “Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad Hoc Tribunals,” *International Criminal Law Review* 12, no. 1 (2012): 8.

⁷⁸ *Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgment, July 7, 2006, para. 60.

⁷⁹ Cassese et al, *International Criminal Law: Cases and Commentary*, 334; Refael Leme, “Individual Criminal Liability and State Responsibility for Genocide Boundaries and Intersections,” *American University International Law Review* 34, no. 1 (2018): 98-101.

to the furtherance of the crime can be held criminally liable, provided the participation in the common design is voluntary.⁸⁰ It is not necessary that the plan precede the commission of the act; neither is it required that the participant personally execute the criminal conduct.⁸¹ Indeed, the contribution itself might very well be lawful in character,⁸² and need not be essential.

JCE embraces three distinct categories of common design; the *mens rea* element varies according to the contemplated category. The first category materialises when “[...] all co-defendants, acting pursuant to a common design, possess the same criminal intention.”⁸³ In this case, each of the participants will be held responsible for the crime – regardless of their material perpetration – if they voluntarily took part in a particular aspect of the common plan.⁸⁴

The second category embraces the “concentration camp” cases, so termed because the crimes are committed by a plurality of persons within the context of a system of ill-treatment of detainees.⁸⁵ The mental element required in order for the participant’s liability to be ascertained requires awareness of the system of abuse, and active participation in its perpetuation.⁸⁶ The position of authority of the individual within the system is sometimes taken into consideration as further indication of the underlying criminal intent.⁸⁷

The final category of common purpose regards the event that one of the participants commits a crime that falls outside the scope of the common plan.⁸⁸ According to the ICTY Appeals Chamber, those participants in the shared criminal design that did not perpetrate the crime may nonetheless be held responsible for the act if it represented “[...] a natural and foreseeable consequence of the effecting of that common purpose.”⁸⁹ The *dolus eventualis* mental element here comes into play,⁹⁰ being that the suspect contributed to the common design in spite of the awareness that its execution might bring about the commission the genocidal act by one of the other participants.⁹¹

The notion of JCE as a distinct mode of liability has specific implications with regards to the crime of genocide. Relying on the suspect’s voluntary participation in a common criminal plan

⁸⁰ *The Prosecutor v Tadic*, Case No.: IT-94-1-A, Judgment, July 15, 1999 para. 227.

⁸¹ Werle and Jessberger. *Principles of International Criminal Law*, 201.

⁸² Sliedregt, *Individual Criminal Responsibility in International Law*, 135.

⁸³ *Prosecutor v Tadic*, Case No.: IT-94-1-A, Judgment, July 15, 1999, para. 196.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 202. See also Werle and Jessberger. *Principles of International Criminal Law*, 203.

⁸⁶ *Prosecutor v Tadic*, Case No.: IT-94-1-A, Judgment, July 15, 1999, para. 202.

⁸⁷ *Ibid.*, para.203.

⁸⁸ Werle and Jessberger. *Principles of International Criminal Law*, 203.

⁸⁹ *Prosecutor v Tadic*, Case No.: IT-94-1-A, Judgment, July 15, 1999, para.204.

⁹⁰ See Sliedregt, *Individual Criminal Responsibility in International Law*, para. 41: “The volitional element of *dolus eventualis* ranges from being ‘indifferent to the result, to ‘being reconciled’ with the result as a possible cost of attaining one’s goal.”

⁹¹ *Ibid.*, 135.

and the foreseeable consequences of the cumulative conduct, the ICTY found that, for the individual liability to materialise, it is not necessary that the participant also share the criminal intention or *mens rea* required of the crime which is then perpetrated as a result of the common plan. This is also the case for “specific intent crimes”, first among which is genocide: the inference that can be drawn from the ICTY’s reasoning is that “[...] a person can be found guilty as a perpetrator of genocide, even if that person him or herself lacked the (specific) genocidal intent.”⁹²

The International Criminal Court (or “ICC”) adopts a different approach to commission of the crime. Under Article 25(3)(a) of the Rome Statute, three distinct forms of commission are identified: commission by the individual, commission jointly with another person, and commission through another person, regardless of the latter person’s criminal liability.⁹³ The first form of commission arises when the individual physically perpetrates the crime in his or her individual capacity.⁹⁴

When, on the other hand, the person commits the crime “jointly with another person”, the conduct amounts to co-perpetration, a concept illustrated by the ICC in the *Lubanga* case as hinging on the coordinated nature of the individual contributions directed at the realisation of the crime, in such a way that “[...] any person making a contribution can be held vicariously responsible for the contributions of all others and, as a result, can be considered as a [principal] to the whole crime.”⁹⁵ Joint co-perpetration therefore requires that each participant perform a specific act essential to the realisation of the intended result. The contribution, coupled with the underlying agreement between co-perpetrators, results in the responsibility of all participants for the same criminal event.⁹⁶ The difference from JCE lies in the fact that “the suspect and the other co-perpetrator must carry out essential contributions [...] which result in the fulfilment of the material elements of the crime”⁹⁷; in other words, the subjective element alone is not sufficient, and must be accompanied by an essential criminal input by each of the co-perpetrators for their criminal

⁹² Werle and Jessberger. *Principles of International Criminal Law*, 203; *The Prosecutor v Tolimir*, Case No. IT-05-88/2-T, Judgment, December 12, 2012, para. 898: “It is not necessary for the accused to possess the requisite intent for the extended crime. This is applicable also to specific intent crimes, such as genocide and persecution. [...]”

⁹³ Rome Statute of the International Criminal Court, July 17th, 1998, 2187 UNTS 90 (entered into force on July 1st, 2002) (“Rome Statute”) Article 25(3)(a); Werle, “Individual Criminal Responsibility in Article 25 of the ICC Statute”, 957.

⁹⁴ Werle, “Individual Criminal Responsibility in Article 25 of the ICC Statute”, 958.

⁹⁵ *The Prosecutor v Lubanga Dyilo*, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, January 29, 2007, para. 326.

⁹⁶ William A. Schabas, *An Introduction to the International Criminal Court*. 4th ed. Cambridge: Cambridge University press, 2014, 227.

⁹⁷ *The Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, June 15, 2009, para.350.

liability to subsist.⁹⁸ This approach revolves around the notion of “control” needed to establish criminal liability, which entails that “[...] although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.”⁹⁹ On the subjective level, it is necessary that all persons contributing to a crime act with the intent required in relation to that particular crime.¹⁰⁰ Relying on Article 30 of the Rome Statute and the “intent and knowledge” requirements set out therein, it is possible to infer that the suspect must either intend the crime to take place as a result of the common plan’s execution, or be otherwise cognizant that the performance of the plan will result in the crime’s perpetration.¹⁰¹

Perpetration through another person, or indirect perpetration, takes place when the crime is physically committed by a person other than that who has decisional power as to its commission.¹⁰² In order for the indirect perpetrator to be held responsible as a principal for a crime performed by others, it is required that the individual exercise control as to its enactment.¹⁰³ It is, on the other hand, irrelevant whether the person who physically commits the crime is in turn responsible;¹⁰⁴ the principal’s responsibility subsists even in those situations where the latter individual is coerced into performing an act which he or she would not otherwise have committed.¹⁰⁵ From this angle, “[t]he provision aims at assuring that the subject who utilized the other individual as a means for the crime is to be held responsible.”¹⁰⁶

2.2. Other Modes of Individual Liability for Genocide

Article 25 letters (b) and (c) of the Rome Statute addresses lesser forms of individual criminal responsibility. Under letter (b), a person is liable for an international crime if that person “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted”.¹⁰⁷ Letter (c) in turn contemplates the accountability of an individual who “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted

⁹⁸ See *The Prosecutor v Lubanga Dyilo*, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, January 29, 2007, para. 334.

⁹⁹ *Ibid.*, para.342.

¹⁰⁰ Werle and Jessberger. *Principles of International Criminal Law*, 207.

¹⁰¹ O’Keefe, *International Criminal Law*, 180.

¹⁰² *Ibid.*

¹⁰³ Werle, “Individual Criminal Responsibility in Article 25 of the ICC Statute”, 964.

¹⁰⁴ Article 25(3)(a) of the Rome Statute.

¹⁰⁵ O’Keefe, *International Criminal Law*, 181.

¹⁰⁶ Vincenzo Militello, “The Personal Nature of Individual Criminal Responsibility and the ICC Statute,” *Journal of International Criminal Justice* 5, no. 4 (2007): 947.

¹⁰⁷ Article 25(3)(b) of the Rome Statute.

commission, including providing the means for its commission”.¹⁰⁸ The various modes of participation in criminal conduct referred to in these letters are commonly grouped under the notion of “complicity”.¹⁰⁹

“Ordering” presupposes the existence of a hierarchical relationship between the superior giving the order and the subordinate acting in execution of the imparted instructions.¹¹⁰ However, it is not necessary that the position of authority be formalised, provided that the accused have the capacity to coerce another into performing a certain action; “[t]he existence of such authority is a question of fact.”¹¹¹ With regards to the *mens rea* element, the ICTY, referring to the analogous provision contained in Article 7 of the ICTY Statute,¹¹² held that the mere awareness of the probability that a crime occur in execution of the ordered conduct is sufficient grounds for establishing liability:¹¹³ the subjective standard seems to be that of *dolus eventualis*.¹¹⁴ The crime under Article 25(2)(b) of the Rome Statute therefore has a similar scope as that indicated by the ICTY.¹¹⁵ The other modes of liability indicated under letter (b) – namely, “soliciting” and “inducing” differ from “ordering” only in that they do not require a hierarchical relationship.¹¹⁶

“Aiding” “abetting”, and “assisting” may be considered accessory modes of liability, and refer to those individuals who contribute in a substantial manner to the perpetration of the crime with knowledge of their involvement.¹¹⁷ Whether intent is a necessary component of these forms of participation is controversial, but the words “[f]or the purpose of facilitating the commission” in Article 25(3)(c) point to the affirmative solution.¹¹⁸ In *Furundžija*, the ICTY dwelled on the meaning of the terms “aiding” and “abetting” set out in Article 7 of the ICTY Statute, and observed that the assistance offered by the accomplice could also take the form of moral support.¹¹⁹ It further established that the conduct of the accomplice need not “bear a causal relationship to, or be a *conditio sine qua non* for, those a principal”,¹²⁰ provided they play some role in the commission of the act.

¹⁰⁸ Article 25 (3)(c) of the Rome Statute.

¹⁰⁹ Schabas, *An Introduction to the International Criminal Court*, 227.

¹¹⁰ Sliedregt, *Individual Criminal Responsibility in International Law*, 135.

¹¹¹ Goy, “Individual Criminal Responsibility before the International Criminal Court”, 51.

¹¹² Article 7 of the ICTY Statute.

¹¹³ *The Prosecutor v Blaškić*, Case No.: IT-95-14-A, Judgment, July 29, 2004 *para.42*.

¹¹⁴ Sliedregt, *Individual Criminal Responsibility in International Law*, 106.

¹¹⁵ *Ibid*, para.109.

¹¹⁶ O’Keefe, *International Criminal Law*, 188.

¹¹⁷ Cassese et al, *International Criminal Law: Cases and Commentary*, 381.

¹¹⁸ *Ibid*, 382. For a different solution, based on a reading of the ICTY Statute (which lacks the reference to the aim of furthering the criminal conduct) see *The Prosecutor v. Furundžija*, Case No. T-95-17/1-T, Judgment, December 10, 1998, para. 247.

¹¹⁹ *The Prosecutor v. Furundžija*, Case No. T-95-17/1-T, Judgment, December 10, 1998, para.232.

¹²⁰ *Ibid.*, 233.

When analysing “complicity” as a mode of individual criminal responsibility, it is important to consider that Article 3 of the Genocide Convention specifically mentions “complicity in genocide” as an autonomous form of individual liability. In the jurisprudence of the International Criminal Tribunals, the issue was raised as to whether “complicity in genocide” and “aiding and abetting” referred to the same form of criminal responsibility.¹²¹ This is because the Articles of the ICTY and ICTR Statutes dealing with individual liability provide that responsibility lies with “[a] person who [...] otherwise aided and abetted in the planning, preparation or execution of *a crime referred to in articles 2 to 5 of the present Statute* [...]”.¹²² This would entail that aiding and abetting could also apply in relation to genocide, being that genocide is contemplated in Article 2 of the ICTR Statute and Article 4 of the ICTY Statute. However, these provisions also criminalise “complicity in genocide” as a mode of individual liability specific to genocide.¹²³ This led the two *ad hoc* Tribunals to address the issue of the distinctive factors separating aiding and abetting from complicity in genocide, with differing solutions.¹²⁴ In *Prosecutor v Akayesu*, for example, the ICTR Trial Chamber held that whereas “aiding and abetting” required that the accomplice possess the same genocidal intent or *dolus specialis* as the principal perpetrator, in “complicity in genocide” knowledge of the principal’s specific intent would be sufficient.¹²⁵ In *Prosecutor v Krstic*, on the other hand, the ICTY came to the opposite conclusion, providing that “Article 4(2)’s requirement that a perpetrator of genocide possess the requisite ‘intent to destroy’ a protected group applies to all of the prohibited acts enumerated in Article 4(3), *including complicity in genocide*.”¹²⁶

The ICC Statute does not bring about similar issues. Article 6 of the Statute deals with genocide solely with reference to its underlying acts; “complicity in genocide”, on the other hand, is not expressly mentioned among the modes of individual liability contemplated in Article 25. This means that complicity in genocide can be traced back to the various modes of liability described

¹²¹ *The Prosecutor v. Krstic*, Case No: IT-98-33-A, Judgment, April 19, 2004, para.140-142.

¹²² Article 7 of the ICTY Statute; Article 6 of the ICTR Statute (emphasis added).

¹²³ Article 2(3)(e) of the ICTR Statute; Article 4(3)(e) of the ICTY Statute.

¹²⁴ Sliedregt, *Individual Criminal Responsibility in International Law*, 172; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para.547: “where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.”

¹²⁵ *Ibid.*; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para.545: “[...] the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” See also

¹²⁶ *The Prosecutor v. Krstic*, Case No: IT-98-33-A, Judgment, April 19, 2004, para.142 (emphasis added). See also Harmen G. van der Wilt, “Genocide, Complicity in Genocide and International v. Domestic Jurisdiction,” *Journal of International Criminal Justice* 4, no. 2 (2006): 246.

in Article 25, letters (b) and (c) which as has been seen are all included in the general notion of “complicity”.¹²⁷ In consequence, the *mens rea* and material elements are the same as those illustrated with regards to “ordering, soliciting and inducing” and “aiding, abetting or otherwise assisting”, namely, a substantial contribution to the perpetration of the genocidal act, and knowledge of the individual’s involvement in the crime. With regards to aiding and abetting, however, it should be reiterated that the contribution is made “[f]or the purpose of facilitating the commission”; the mere awareness of the accomplice’s assistance in the criminal act does not seem sufficient here.¹²⁸

Article 25(3)(d) of the ICC contemplates a residual form of contribution in criminal conduct, affirming the liability of the individual who “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.” This mode of liability has been said to represent the least grave form of criminal participation, embracing all types of contribution to crimes perpetrated by a specific group.¹²⁹ Article 25 sets down further conditions for individual responsibility to take place: the contribution must be intentional (meaning that the volition must cover the individual’s acts), and must be carried out either for the purpose of perpetuating the group’s criminal conduct or purpose, or with awareness of group’s intention to commit a crime within the jurisdiction of the Court.¹³⁰ This indicates that the liability set down under letter (d) may arise even in those cases where the contribution was not undertaken with the criminal intent required of the resulting crime.¹³¹

The Genocide Convention also prohibits “incitement to commit genocide” as an ulterior form of individual liability.¹³² This mode of liability is also contemplated in Article 25(3)(e) of the Rome Statute, which provides for the responsibility of the individual who “[...] directly and publicly incites others to commit genocide.”¹³³ The provision is crime-specific, meaning that liability for incitement of others can rise only if the encouragement in question regard the commission of genocidal acts.¹³⁴ What differentiates incitement to commit genocide from other crimes is that it is an inchoate offence, meaning that the conduct is punishable irrespective of whether the intended result – the perpetration of the offence - actually materialises.¹³⁵ The proscription clearly pursues

¹²⁷ Sliedregt, *Individual Criminal Responsibility in International Law*, 178.

¹²⁸ *Ibid.*

¹²⁹ Goy, “Individual Criminal Responsibility before the International Criminal Court”, 67; Werle and Jessberger, *Principles of International Criminal Law*, 219-220.

¹³⁰ Article 25 (3)(d) of the Rome Statute.

¹³¹ Werle and Jessberger, *Principles of International Criminal Law*, 219.

¹³² See Article 25(3)(e) of the Rome Statute.

¹³³ *Ibid.*

¹³⁴ See Behrens and Henham, *Elements of Genocide*, 147.

¹³⁵ *Ibid.*; *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998, para. 562: “The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit

a preventive aim, in consideration of the mobilising effects public incitement can have on extended groups of people; underlying the provision is the awareness that “[...] it is necessary to prevent such incitement in order to forestall the process.”¹³⁶

From the objective point of view, the mode of liability requires that the incitement be “direct” and “public”.¹³⁷ In order for the encouragement to be direct, “[...] it must be more than a vague or indirect suggestion.”¹³⁸ The further condition that incitement be public entails that the call for genocide must be addressed at a large audience or general public, as opposed to minor groupings of individuals.¹³⁹ However, it need not amount to an explicit invitation to commit genocide, and may also be implicit,¹⁴⁰ provided that the nuanced language may be grasped by the audience.¹⁴¹ What is at all times required is the specific genocidal intent of the author, as well as the correlated intention to incite the audience to perpetrate genocide.¹⁴² As will become apparent when analysing the IFFM’s 2018 Report,¹⁴³ the rhetoric of State authorities against the Rohingya was an important contributor to the 2016 and 2017 offences directed at the ethnic minority; its significance is therefore better understood in light of the ensuing crimes.

Conspiracy to commit genocide is another mode of liability specific to genocide. Whereas the mode is contemplated in article 3(b) of the Genocide Convention,¹⁴⁴ no mention of conspiracy to commit genocide is made in the ICC Statute. The material element consists of “[...] an agreement between two or more persons to commit the crime of genocide”.¹⁴⁵ As with incitement to commit genocide, it is not necessary that the crime actually be perpetrated; conspiracy to commit genocide is therefore another example of an inchoate crime. Neither is it necessary that the suspect have participated in the agreement’s formation, meaning that even those who join the criminal gathering at a later stage can be held responsible under this provision.¹⁴⁶ Lastly, the subjective element must take the form of *dolus specialis* or the specific intent to bring about the protected group’s destruction in whole or in part.¹⁴⁷

such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.”

¹³⁶ Behrens and Henham, *Elements of Genocide*, 147.

¹³⁷ Cassese et al, *International Criminal Law: Cases and Commentary*, 404.

¹³⁸ *The Prosecutor v Bikindi*, Case No. ICTR-01-72-T, Judgment, December 2, 2008, para. 387.

¹³⁹ O’Keefe, *International Criminal Law*, 197-198.

¹⁴⁰ *The Prosecutor v Bikindi*, Case No. ICTR-01-72-T, Judgment, December 2, 2008, para.387: “A direct appeal to genocide may be implicit; it need not explicitly call for extermination, but could nonetheless constitute direct and public incitement to commit genocide in a particular context.”

¹⁴¹ *Nahimana et al v The Prosecutor*, Case No. ICTR-99-52-A, Judgment, November 28, 2007, para. 700.

¹⁴² *The Prosecutor v Bikindi*, Case No. ICTR-01-72-T, Judgment, December 2, 2008, para. 419.

¹⁴³ See Paragraph 3 of this Chapter.

¹⁴⁴ Article 3(b) of the Genocide Convention.

¹⁴⁵ *The Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgment, July 7, 2006, para. 92.

¹⁴⁶ O’Keefe, *International Criminal Law*, 197.

¹⁴⁷ *Ibid.*

2.3. Volition and Standard of Proof

As can be inferred from the conducted analysis, all of the described forms of individual criminal liability presuppose the subsistence of either a volitional or a cognitive element.¹⁴⁸ Whereas this will vary according to the specific mode of liability taken into account, Article 30 of the Rome Statute provides a general framework for the subjective element of all crimes; the conditions set out therein must therefore be met in order for an international crime to be attributed to the alleged author. Pursuant to Article 30, a person is only criminally liable “[...] if the material elements are committed with intent and knowledge.”¹⁴⁹ Intent is described both in relation to the conduct, and in relation to the consequence. From the first point of view, intent mandates that “[...] [the] person means to engage in the conduct”.¹⁵⁰ The condition puts the performed action in relation with the author’s volition, requiring that former be the result of the latter.¹⁵¹ Referred to the consequence, it is necessary that the person either “means to cause that consequence”¹⁵² or is otherwise “aware that it will occur in the ordinary course of events.”¹⁵³ With regards to the awareness of the event, it has been observed that “[...] an act is considered intentional when the risk that a certain consequence materializes was virtually certain.”¹⁵⁴ This degree of volition is therefore a step higher than the *dolus eventualis* element, considering that, for the latter to be present, it is sufficient that the individual have considered the risk that the conduct lead to a certain result and have acted in spite of this understanding.¹⁵⁵ Knowledge, on the other hand, involves “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.¹⁵⁶ Said circumstances need not form the object of the perpetrator’s intent, provided that he or she has taken them into account.¹⁵⁷

The provision laid down in Article 30 may be said to be subsidiary in character, especially in light of subjective elements described in relation to each specific crime set out in the Rome Statute; from this perspective, “[t]he general rule requiring intent or knowledge is hardly necessary for most of the crimes listed in the Rome Statute, because the definitions have their own built-in

¹⁴⁸ Werle and Jessberger. *Principles of International Criminal Law*, 178-179.

¹⁴⁹ Article 30 of the Rome Statute.

¹⁵⁰ Ibid.

¹⁵¹ Werle and Jessberger. *Principles of International Criminal Law*, 180.

¹⁵² Article 30 of the Rome Statute

¹⁵³ Ibid.

¹⁵⁴ Sliedregt, *Individual Criminal Responsibility in International Law*, 47.

¹⁵⁵ Ibid.

¹⁵⁶ Article 30 of the Rome Statute.

¹⁵⁷ Werle and Jessberger. *Principles of International Criminal Law*, 183.

mental requirement.”¹⁵⁸ Genocide, for example, presupposes a specific intent to annihilate a protected group either integrally or partially; clearly the mental element requires an additional intention to the mere voluntariness of the author’s conduct. It is therefore appropriate that Article 30 indicate that its provisions apply “[u]nless otherwise provided.”¹⁵⁹

With regards to genocide, the Elements of Crimes specify that unless the individual conduct alone is enough to cause the protected group’s destruction, for the crime to be established it must take place “in the context of a manifest pattern of similar conduct directed against that group”.¹⁶⁰ This requirement has been interpreted as setting down a measure by which to ascertain the existence of genocidal intent.¹⁶¹ In assessing whether the individual has perpetrated genocide, one must first verify whether that person is able to destroy the protected group by resorting to his individual means;¹⁶² if this is not the case, the individual must have acted within the framework of a pattern of criminal conduct directed against the group for the genocidal intent to be established.¹⁶³ As will be seen when analysing the findings of the IFFM’s 2018 Report, the existence of a scheme or pattern of criminal conduct was amply resorted to for the purposes of determining whether the crimes in Myanmar were perpetrated with the intent to destroy the Rohingya community.¹⁶⁴

3. Individual Criminal Responsibility for the Crime of Deportation

In its 2018 Report, the IFFM also addressed whether the crime of deportation had been committed in Myanmar. What is more, the ICC Prosecutor’s investigation into the crimes committed in Myanmar is based on the assumption that deportation under Article 7 of the Rome Statute has materialised in the territory of the State. As has been illustrated in the Introduction to this thesis, the Prosecutor’s request for the authorisation to commence an investigation in the State was preceded by the submission that the ICC address the question of whether it had jurisdiction over the crime of deportation when this partially took place on the territory of a contracting State. The ICC’s answer in the affirmative constituted the basis for its subsequent authorisation of the

¹⁵⁸ Schabas, *An Introduction to the International Criminal Court*, 236

¹⁵⁹ Article 30 of the Rome Statute; Schabas, *An Introduction to the International Criminal Court*, 236.

¹⁶⁰ Finalized Draft Text of the Elements of Crimes, in Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add.2, November 2, 2000 (“Elements of Crimes”), Article 6(a) n. 4, Article 6(b) n. 4, Article 6(c) n. 5, Article 6(d) n. 5, Article 6(e) n. 4.

¹⁶¹ Claus Kreß, “The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case” *Journal of International Criminal Justice* 7 (2009), 299.

¹⁶² *Ibid*, 300.

¹⁶³ *Ibid*, 305.

¹⁶⁴ IFFM 2018 Report, para. 1418-1432.

investigation into the crimes committed in Myanmar.¹⁶⁵ It is therefore useful to consider the salient aspects of the crime of deportation, and the conditions that generate individual liability for this crime.

In the Rome Statute, deportation is categorised as an underlying act of crimes against humanity.¹⁶⁶ In order for a crime to qualify as a crime against humanity it is necessary that it satisfy three sets of conditions.¹⁶⁷ The first requirement is that the crime is perpetrated in the context of a “widespread and systematic attack”;¹⁶⁸ Article 7(2)(a) of the Rome Statute specifies that an attack is “a course of conduct involving the multiple commission of acts [...] pursuant to or in furtherance of a State or organizational policy to commit such attack”.¹⁶⁹ The attack must therefore be imputable to a State or other organised entity.¹⁷⁰ It is not required that the attack be of a military nature;¹⁷¹ what is instead required is that it is “planned, directed or organised”¹⁷² rather than integrating forms of merely sporadic or spontaneous violence.¹⁷³ In *Kunarac et al*, the Appeals Chamber indicated such factors as the effects of the attack on the affected population, the number of casualties, the interference of state officials and the nature of the crimes, as well as the existence of “identifiable patterns of crimes”,¹⁷⁴ as elements pointing to the existence of such an attack. If the individual conduct fits into this wider pattern of crimes, it is not necessary that it in turn be of a systematic nature: even a circumscribed set of acts may be sufficient for the purposes of liability, provided they are not erratic.¹⁷⁵

The systematic attack must be put in relation with the second condition of crimes against humanity, which is that the attack be “directed against the civilian population.”¹⁷⁶ Under international law, the term “civilians” denotes “[...] persons who are not members of the armed forces”;¹⁷⁷ therefore a civilian population is made up of all persons who qualify as civilians.¹⁷⁸ Crimes against humanity require that the perpetrated acts have the (aggregate) civilian population,

¹⁶⁵ See Situation in Bangladesh/Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19-27, November 14, 2019.

¹⁶⁶ Article 7(1)(d) of the Rome Statute.

¹⁶⁷ Article 7 of the Rome Statute.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, Article 7(2)(a).

¹⁷⁰ Werle and Jessberger. *Principles of International Criminal Law*, 342.

¹⁷¹ Schabas, *An Introduction to the International Criminal Court*, 111.

¹⁷² *The Prosecutor v Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, June 15, 2009, para. 81.

¹⁷³ *Ibid.*

¹⁷⁴ *The Prosecutor v Kunarac et al*, Case No. IT-96-23 & 23/1, Judgment, June 12, 2002, para. 95.

¹⁷⁵ *The Prosecutor v Kunarac et al*, Case No. IT-96-23 & 23/1, Judgment, June 12, 2002, para. 96.

¹⁷⁶ Article 7 of the Rome Statute.

¹⁷⁷ *The Prosecutor v Martić*, Case No. IT-95-11-A, October 8, 2009, para. 297. See also Protocol II, Article 50.

¹⁷⁸ Protocol II, Article 50.

rather than the individual, as their object;¹⁷⁹ the condition highlights the crimes' collective dimension.¹⁸⁰

The third condition regards the *mens rea* or subjective element: the act must be carried out "with knowledge of the attack".¹⁸¹ It is not enough for the act to be carried out with the correlated intent; the perpetrator must also be aware that his individual conduct features as a part of a wider plan or pattern of crimes targeting the civilian population.¹⁸² Knowledge of the specifics of the attack, on the other hand, is not essential.¹⁸³

If these three elements are present, a crime against humanity will have been perpetrated, regardless of whether the conduct occurs in the context of a war or in times of peace.¹⁸⁴

Deportation integrates an example of crimes against humanity, as is made clear by its inclusion among the underlying acts listed in Article 7 of the Rome Statute.¹⁸⁵ Under the Statute's terms, deportation amounts to the "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."¹⁸⁶

The definition of deportation therefore revolves around a series of constitutive factors, which have to be cumulatively present in order for the crime take place. Some of these elements are shared with the other underlying acts of crimes against humanity; the fact that the conduct must take place within the context of a systematic attack against the civilian population,¹⁸⁷ and the perpetrator's awareness that his or her individual conduct is a part or is understood to be a part of the attack¹⁸⁸ correspond to the general conditions set out for this category of crimes. Other elements are specific to the crime of deportation, first among which is the coercive nature of the transfer, absent the justificatory grounds contemplated under international law.¹⁸⁹ With regards to the forcible nature of the act, the Elements of Crimes clarify that the term does not necessarily presuppose resort to physical force, but may also refer to "[...] threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive

¹⁷⁹ Werle and Jessberger. *Principles of International Criminal Law*, 334.

¹⁸⁰ *Ibid.*

¹⁸¹ Article 7 of the Rome Statute.

¹⁸² O'Keefe, *International Criminal Law*, 144; Schabas, *An Introduction to the International Criminal Court*, 114.

¹⁸³ *The Prosecutor v Kunarac et al*, Case No. IT-96-23 & 23/1, Judgment, June 12, 2002, para. 102.

¹⁸⁴ Cassese et al, *International Criminal Law: Cases and Commentary*, 154.

¹⁸⁵ Article 7(1)(d) of the Rome Statute.

¹⁸⁶ Article 7(2)(d) of the Rome Statute.

¹⁸⁷ Article 7(1)(d) n. 4 of the Elements of Crimes; Vincent Chetail, "Is there any Blood on My Hands? Deportation as a Crime of International Law." *Leiden Journal of International Law* 29, no. 3(2016), 923.

¹⁸⁸ Elements of Crimes, Article 7(1)(d) n. 5.

¹⁸⁹ *Ibid.*, n. 1.

environment.”¹⁹⁰ The condition is considered to be met when the genuine choice of the person played no part the displacement, thus attesting to the involuntary nature of the resulting expulsion.¹⁹¹

By means of such conduct, the person must have been transferred to a different State or location;¹⁹² the transboundary element of the crime serves to distinguish deportation from forcible transfer, which instead takes place within a State’s own borders.¹⁹³ The expulsion, however, only amounts to deportation if the removed person was formerly “lawfully present” within the State.¹⁹⁴ This requirement is particularly relevant when considering whether the Rohingya have in fact been deported from Myanmar. As has been suggested in Chapter 1 of this work, the legitimacy of the Rohingya’s presence in Myanmar has been challenged on a reiterated basis by the Myanmar authorities; members of the group have also been deprived of citizenship cards, and even mere identification cards, on an arbitrary basis.¹⁹⁵ In this respect, it has been noted that “the notion of presence does not equate with that of residence.”¹⁹⁶ This means, above all, that it is enough that the individual live in a certain community, regardless of the period of permanence.¹⁹⁷ Once lawful presence has been determined in accordance to this international standard, the fact that the deported individual’s presence in the State is considered unlawful under its domestic law becomes irrelevant. Likewise, the fact that the expulsion takes place in implementation of national legal norms by no means renders it is permissible under international law.¹⁹⁸

Deportation also mandates that the eviction of the individuals from the national territory occurs in the absence of the grounds which would render it lawful under international law. The second Protocol additional to the 1949 Geneva Convention, which sets down the rules for non-international armed conflicts, provides that the displacement of civilians can only occur for “reasons related to the conflict”, to ensure the safety of the affected civilians, or for other reasons of imperative military concern.¹⁹⁹ Absent these justificatory grounds, the civilians’ eviction from the State cannot be considered lawful under international law and will therefore integrate the crime of deportation, provided that the other constitutive features of the crime also subsist.

¹⁹⁰ Ibid, fn. 12.

¹⁹¹ *The Prosecutor v Stakic*, Case, No. IT-97-24-A, Judgment, March 22, 2006, para. 279.

¹⁹² Elements of Crimes, Article 7(1)(d) n. 1.

¹⁹³ Werle and Jessberger, *Principles of International Criminal Law*, 358.

¹⁹⁴ Elements of Crimes, Article 7(1)(d), n. 2.

¹⁹⁵ See IIFFM 2018 Report, 110-119.

¹⁹⁶ Vincent Chetail, “Is there any Blood on My Hands?”, 925.

¹⁹⁷ *The Prosecutor v Popovic et al*, Case No. IT-05-88-T, June 10, 2010, para. 900.

¹⁹⁸ Vincent Chetail, “Is there any Blood on My Hands?”, 925.

¹⁹⁹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 UNTS 17513 (entered into force on December 7, 1978) (“Protocol II”), Article 17 “The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.”.

3.1. Deportation as a Possible Genocidal Act

Another issue of concern is whether deportation can amount to a genocidal act. The issue has been touched upon when analysing the acts by which genocide can take place;²⁰⁰ as has been noted, both “causing serious bodily or mental harm to members of the group”,²⁰¹ and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”²⁰² may be inferred from the forced displacement of the protected group, provided it takes place with the requisite genocidal intent, and is corroborated by such other evidentiary elements as are necessary to establish the subsistence of genocide. This point of view was clarified by the ICJ in *Bosnian Genocide*; whereas the Court specified that deportation, even when forcibly carried out, does not necessarily equate with the destruction of the group, it then remarked that coerced displacements could nevertheless constitute genocide, if they were carried out with the necessary destructive intent, and possessed the constitutive traits of an underlying genocidal act.²⁰³

Any residual doubts as to the correlation between deportation and genocide are dissipated when considering ICC Pre-Trial Chamber I’s assertion that deportation, and ethnic cleansing in general, may amount to the commission of genocide when the objective elements indicated in Article 6 of the Rome Statute are brought about with the intent to destroy the protected group, in whole or in part.²⁰⁴ As has been noted, the solution adopted by these international tribunals is indicative of “[...] the intimate connection between genocide and ethnic cleansing as an integral part of the same criminal design.”²⁰⁵ These considerations will be further elaborated on when considering the ICC’s decision regarding its jurisdiction over the crime of deportation in Chapter III of this work.

Having examined the constitutive elements of both the crime of genocide and that of deportation, the analysis will now turn to the findings of the IIFFM as described by the Mission in

²⁰⁰ See Paragraph 1 of this Chapter.

²⁰¹ Article 1(b) of the Genocide Convention.

²⁰² *Ibid*, Article 1(c).

²⁰³ 2007 *Bosnian Genocide*, para. 190: “[...] the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as, for example, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region.” This view was confirmed by the Court in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, p. 3, para. 163. See also Kevin Aquilina and Klejda Mulaj, “Limitations in Attributing State Responsibility Under the Genocide Convention.” *Journal of Human Rights* 17, no. 1 (2018): 131.

²⁰⁴ *The Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, March 4, 2009, para. 145.

²⁰⁵ Vincent Chetail, “Is there any Blood on My Hands?”, 937.

its 2018 Report: the evidentiary material will serve to make clarity as to whether the crimes in question actually took place against the Rohingya.

4. The 2018 Report of the Independent International Fact-Finding Mission for Myanmar on the International Crimes Committed against the Rohingya People in Myanmar

The question whether genocide has been committed in Myanmar, with the correlated issue of ascertaining the individual responsibility for the crime, was thoroughly addressed by the IFFM in its 2018 Report; the same analysis was also conducted in relation to the crime of deportation. The Mission's findings therefore provide a useful tool in determining whether individual criminal liability for these crimes can be established in relation to the events in Myanmar.

4.1. The Mission's Findings on Genocide

In order to verify whether genocide had been perpetrated against the Rohingya, the Mission first satisfied itself that the minority is a protected group under the Genocide Convention's terms, as an ethnic, racial or religious group, or a combination of the three.²⁰⁶ Supporting this conclusion is the fact that the Rohingya self-identify as a distinct group, whilst Myanmar's authorities differentiate them from the rest of the population, refusing to recognise them as nationals of the State.²⁰⁷

The IFFM then considered whether any of the underlying genocidal acts had occurred in Myanmar. In assessing the subsistence of "killing",²⁰⁸ the Mission found that during the "clearance operations", "killings occurred with horrifying intensity".²⁰⁹ The killings were either indiscriminate or targeted, and were carried out using methods such as mass shootings, gang rapes followed by murder, and locking individuals in burning houses.²¹⁰ The 2017 operations were estimated to have caused more than 10.000 deaths.²¹¹ The Mission accordingly concluded that it had reason to believe that killing as an underlying genocidal act had taken place in Myanmar, on a systematic and widespread basis.²¹²

²⁰⁶ IFFM 2018 Report, para. 1390.

²⁰⁷ Ibid.

²⁰⁸ See Article 2(a) of the Genocide Convention.

²⁰⁹ IFFM 2018 Report, para. 1394.

²¹⁰ Ibid, para. 1395.

²¹¹ Ibid.

²¹² Ibid.

“Causing serious bodily or mental harm to members of the group”²¹³ was also considered in relation to the situation in Myanmar. Relying on the international definition of the act,²¹⁴ the Mission concluded that the physical injuries suffered by those Rohingya who survived the “clearance operations” amounted to “serious bodily harm”. It drew attention to the disfigurement and physical impairment resulting from bullet wounds, knife wounds and burns, as well as the effects of mutilation.²¹⁵ The results of sexual violence were also taken into account both as an autonomous form of “bodily harm” and in connection to the maiming of the victims, described as “an intentional act akin to a form of branding”;²¹⁶ the Mission drew on the factual evidence to remark that “[...] rape and sexual violence are steps in the destruction of the group.”²¹⁷ The survivors of these acts were found to be severely traumatised, thus meeting the “serious mental harm” threshold;²¹⁸ based on the collected evidence, the Mission concluded that serious bodily and mental harm was present among the Rohingya.²¹⁹

The IIFFM also found that the physical act of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”²²⁰ had occurred in Myanmar.²²¹ Recalling the notion of measures intended to bring about a slow death, the Mission underlined that the Rohingya “[...] have suffered oppressive and systemic restrictions on all aspects of their life [...]”,²²² and held that such restrictions appeared intended to bring about the group’s destruction. It examined both oppressive State policies, and the curtailment of such primary needs as food, livelihood and healthcare, and brought attention to the restrictions on movement and humanitarian assistance imposed on the Rohingya.²²³ It is in the context of this analysis that the Mission considered the forced displacement of the Rohingya, thus dwelling on both the systematic expulsion of members of the minority from their homes, and the involuntary exodus resulting from the violence perpetrated against the group as part of the “clearance operations”.²²⁴

The inclusion of displacement among the manifestations of the prohibited act under scrutiny is particularly relevant, as it rests on the assumption of the inextricable links between genocide and

²¹³ Article 2(b) of the Genocide Convention.

²¹⁴ See Chapter 2, Paragraph 1 of this thesis.

²¹⁵ IIFFM 2018 Report, para. 1397.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, para. 1398.

²¹⁹ *Ibid.*

²²⁰ Article 2(c) of the Genocide Convention.

²²¹ IIFFM 2018 Report, para. 1400.

²²² *Ibid.*, para. 1402.

²²³ *Ibid.*, para. 1403.

²²⁴ *Ibid.*, para. 1404.

the crime of deportation. It is therefore noteworthy that the Mission should then have expressly recalled the principle put forth in *Prosecutor v. Blagojević and Jokić* that “[...] the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself.”²²⁵ The inference that the deportation of the Rohingya may have integrated a form of genocide is in line with the international caselaw on the subsisting connection between the two crimes.²²⁶

Sexual violence against the Rohingya was also contemplated by the Mission. According to the 2018 Report, the extent and systematic character of rape and other forms of sexual violence were unequivocal indications of the intent to “destroy the very fabric of the community.”²²⁷

The Mission concluded that these factors, examined conjointly, and in relation to their protracted time-span, amounted to the imposition of conditions of life calculated to bring about the Rohingyas’ physical destruction.²²⁸

The last underlying act found to have taken place against the Rohingya is that of “imposing measures intended to prevent births within the group.”²²⁹ According to the IIFFM, the measures inflicted on women and girls pertaining to the Rohingya community were directed at undermining the group’s reproductive capacity.²³⁰ This finding was based on both the policies aimed at changing the demographic composition in Rakhine State, and the sexual violence perpetrated against Rohingya women and girls; from the latter perspective, the Mission determined that the destructive effects of sexual violence on the ability to procreate were both physical and psychological.

Having determined that four of the five underlying acts of genocide had taken place in Myanmar, the IIFFM turned to consider whether these acts were supported by the specific intent required for them to qualify as genocide. In this regard, the Mission clarified that its assessment of genocidal intent would be based on inferential evidence, rather than examining whether specific individuals had perpetrated the prohibited acts with the requisite intent.²³¹ The Mission’s *modus*

²²⁵ *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, January 17, 2005 para.666; IIFFM 2018 Report, para. 1405.

²²⁶ See Paragraph 4 of this Chapter.

²²⁷ IIFFM 2018 Report, para. 1406.

²²⁸ *Ibid.*, para. 1407.

²²⁹ Article 2(d) of the Genocide Convention.

²³⁰ IIFFM 2018 Report., para. 1409.

²³¹ *Ibid.*, para. 1418: “[...] the Mission has not concluded that particular individuals committed the identified prohibited acts with the requisite special intent, giving rise to individual criminal responsibility for genocide. Instead, the Mission assessed the body of available information in light of the jurisprudence of international tribunals, and considered whether the factors that have allowed for the reasonable inference of genocidal intent in other contexts and cases, are present in the case of the Rohingya in Rakhine State.”

operandi is in keeping with the standard of proof by which to verify genocidal intent set forth by the international tribunals.²³² An analysis of the inferential evidence collected by the Mission is therefore useful in establishing the subsistence of individual responsibility for genocide.

The IIFFM's appraisal of genocidal intent was based on a series of indicators. The first of such indicators was the hate rhetoric directed against the Rohingya; according to the Mission, the prohibited acts had been "[...] cultivated through an environment of long-standing, extreme and systemic discrimination based on the ethnic, racial, and/or religious identity of the Rohingya."²³³ The finding was centred on the dehumanising and derogatory language used to describe the Rohingya, which was identified as a precursor to the genocidal acts physically perpetrated against the group.²³⁴ The Mission established that "[i]n relation to the Rohingya, the general political doctrine is one of State-sanctioned oppression and persecution in all aspects of their life."²³⁵

Linked with the public condemnation of the Rohingya is the second set of indicators referred to by the Mission, namely the "specific utterances" of figures of authority such as government officials and military chiefs.²³⁶ Expressions such as "we will kill you all" and "you don't belong here" were found to have been uttered against the Rohingya, often in association with the accompanying violent acts.²³⁷ The Tatmadaw Commander-in-Chief, for example, allegedly referred to the "Bengali problem" as an "unfinished job" which the government was undertaking to address.²³⁸

The IIFFM also contemplated genocidal intent in light of the discriminatory policies aimed at changing the demographic composition in Rakhine State so as to reduce the percentage of Rohingya inhabitants.²³⁹ The indicator's subsistence was substantiated by evidence of legislation aimed at restricting births within the group, and by the practices of sexual violence carried out on an extensive scale against Rohingya women; it is interesting to note that the Mission linked the latter to the former, stating that it was in relation to the State authorities' intention to remove the protected group that the prohibited genocidal acts ultimately took place.²⁴⁰ The objective of creating an ethnically homogenous State was also put in relation with the forced displacement, the

²³² *The Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgment, June 1, 2001, para. 158; *The Prosecutor v Popovic et al*, Case No. IT-05-88-A, Judgment, January 30, 2015, para. 468; *The Prosecutor v Jelusic*, Case No. IT-95-10-A, Judgment, July 5, 2001, para. 47.

²³³ IIFFM 2018 Report, para. 1419.

²³⁴ *Ibid.*, para. 1421.

²³⁵ *Ibid.*

²³⁶ *Ibid.*, para. 1422.

²³⁷ *Ibid.*

²³⁸ *Ibid.*, para. 772, 1424.

²³⁹ *Ibid.*, para. 1425.

²⁴⁰ *Ibid.*, para. 1425-1426.

Mission specifying that the crimes aimed at displacing the Rohingya were a result of the authorities' "manifest intention" of eliminating the minority from Rakhine State.²⁴¹

The destructive intent is further corroborated by the fourth set of indicators considered by the Mission. The finding that "an organized plan of destruction"²⁴² was indeed present in Myanmar "support[s] the inference of genocidal intent" at the individual level.²⁴³ To demonstrate the existence of such a plan, the Mission listed such factors as the organised nature of the killings, and the consistency and systematic nature of the attacks perpetrated in the context of the "clearance operations" which "[...] could not have occurred in the absence of significant levels of forethought and organization."²⁴⁴ It expressly concluded that the methodical character in which the prohibited acts were carried out revealed "[...] an organised plan of destruction, supporting an inference of genocidal intent."²⁴⁵

Lastly, the IIFFM remarked that the sheer scale and ruthlessness of the attack, and the thoroughness with which it was carried out, satisfied the fifth set of indicators of genocidal intent. According to the Mission, the brutality of the attack against a protected group could in itself be indicative of the individual's genocidal intent, given that the indiscriminate violence against large numbers of individuals pertaining to a protected group is inherently directed at their destruction.²⁴⁶ The Mission found that the "clearance operations" carried out by the Tatmadaw made no distinction between the ARSA combatants and the civilian population residing in Rakhine State, and concluded that the viciousness of the campaign was such as to point to the subsistence of genocidal intent.²⁴⁷

In light of the conducted analysis, the Mission concluded that there were reasonable grounds by which to infer genocidal intent.²⁴⁸ It thereby affirmed that both the objective and the subjective elements of genocide had materialised against the Rohingya and, while specifying that it had not conducted the analysis on an individual basis, it nonetheless pointed to the Tatmadaw forces as the primary perpetrators.²⁴⁹

²⁴¹ See *Ibid.*, para. 1427.

²⁴² *Ibid.*, para. 1428.

²⁴³ *Ibid.*

²⁴⁴ IIFFM 2018 Report, para. 1429.

²⁴⁵ *Ibid.*, 1430.

²⁴⁶ *Ibid.*, para. 1432.

²⁴⁷ *Ibid.*, para. 1433.

²⁴⁸ *Ibid.*, para. 1141.

²⁴⁹ See *ibid.*, para. 382.

4.2. The Mission's Conclusion on the Subsistence of the Crime of Deportation

The IIFFM then turned to contemplate whether the crime of deportation could also be considered subsistent in relation to the situation in Myanmar. The Mission drew attention to the fact that, under customary international law, ordering or otherwise causing displacement amounts to a breach of international humanitarian law if the evacuation is not mandated for the purposes of protection of the civilian population or on imperative military grounds.²⁵⁰ Weighing the factual evidence regarding the displacement of the Rohingya against this provision, it affirmed that “[...] the context in which the displacements occurred strongly indicates that there were no imperative military or security reasons for such displacements”.²⁵¹ The Mission found that the Tatmadaw had ordered civilians to leave their villages, and had subsequently prevented them from returning.²⁵² It further uncovered an extensive practice based on the deliberate destruction and pillage of property,²⁵³ and held that such conduct at once compelled civilians to leave and wiped out any prospect of return.²⁵⁴ The Tatmadaw forces had “[...] intentionally, frequently and systematically directed attacks against the civilian population or individual civilians [...] including through killings, torture and sexual violence” thus triggering the targeted individuals’ mass displacement.²⁵⁵ The bombing and shelling of entire villages, and restrictions on food and medical supplies was also identified as being part of the attack.²⁵⁶ The complete disregard for the Rohingya’s human rights that resulted from these actions could in no way be justified on either security or military grounds;²⁵⁷ the “clearance operations” were neither necessary nor proportionate,²⁵⁸ and amounted to violations on an “overwhelming” scale.²⁵⁹

The Mission observed that these operations brought about the displacement of more than 725,000 Rohingya across the national border into neighbouring Bangladesh, thus introducing the transboundary element proper to the crime of deportation.²⁶⁰ Having noted that the decisive factor

²⁵⁰ IIFFM 2018 Report, para. 274; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), June 8, 1977, 1125 UNTS 17513 (entered into force on December 7, 1978) (“Protocol II”), Article 17 “The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.”. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, Cambridge [etc.]: Cambridge University press, 2005, 459.

²⁵¹ IIFFM 2018 Report, para. 282.

²⁵² IIFFM 2018 Report, para. 279.

²⁵³ *Ibid.*, para. 280.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, para. 282.

²⁵⁶ *Ibid.*, para. 311, 1281.

²⁵⁷ *Ibid.*, para. 1284.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, para. 1275.

²⁶⁰ *Ibid.*, para. 1489.

in establishing deportation is “the absence of a genuine choice on the part of the victim ”,²⁶¹ it found that the exodus from Myanmar was not of a voluntary character, being that the Rohingya had acted either upon orders from the Tatmadaw military forces, or to escape the large-scale violence and destruction directed against them.²⁶² The forced character of the displacement finds further confirmation in the “appalling conditions” of the Bangladeshi refugee camps to which the Rohingya effectively fled.²⁶³

Turning to assess whether the deportees’ former presence in Myanmar was lawful, the IFFM clarified that the notion “should not be equated to the legal concept of lawful residence”.²⁶⁴ The satisfaction of residency requirements or the recognition of the correlated status under the State’s national law could not serve to test “lawful presence”, it being sufficient to this end that the individual “lived” in the territory for an certain period of time.²⁶⁵ The Mission drew on this international concept of lawful presence, and the irrelevance in this respect of domestic provisions, to assert that the targeted minority had lived in Rakhine State on a legitimate basis, and stressed that “[t]he Rohingya’s arbitrary deprivation of nationality cannot be invoked by the State to argue that the Rohingya’s presence in Rakhine State would be unlawful or would have become unlawful.”²⁶⁶

Having found all the constitutive elements of the crime of deportation to have materialised in relation to the minority, the Mission concluded that it had reason to believe that deportation as a crime against humanity had taken place in Myanmar.²⁶⁷

Concluding Remarks

This Chapter has examined the criteria by which to establish the subsistence of individual responsibility for the crimes of genocide and deportation. The definition of genocide has been analysed in relation to the mental and material elements required for its perpetration; these have then provided the backdrop against which to examine the conditions required for individuals to incur in criminal liability for genocide, with particular attention given to the corresponding modes of liability. Paragraph 3 has instead dealt with the constitutive elements of the crime of deportation; particular attention has been given to the subsisting links between this crime and the crime of genocide, with due reference to the international caselaw on the matter. The findings of

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid., para. 1490.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

the IIFFM, as described in its 2018 Report, have then been weighed against this normative framework, with a view to assessing whether individual responsibility for both genocide and deportation could be identified in relation to the crimes committed against the Rohingya. These considerations will be relied upon in the following Chapter to determine the extent of the ICC's jurisdiction over the crimes perpetrated in Myanmar.

Chapter III: The ICC's Jurisdiction over the Bangladesh/Myanmar Situation

1. The Chamber's Power to Address the Prosecutor's Request on Jurisdiction

As has been recounted in the Introduction to this thesis, the IIFFM's 2018 and 2019 Reports¹ on the crimes against the Rohingya allegedly committed in Myanmar prompted the ICC Prosecutor Fatou Bensouda to file a request with the Court concerning the subsistence of the ICC's jurisdiction over the presumed crime of deportation from Myanmar to Bangladesh (from hereon in, the "Request on Jurisdiction" or "2018 Request"),² premised on the argument that at least a part of the crime took place on the territory of a State party to the Rome Statute.³ The ICC's involvement was openly condemned by the Government of Myanmar, which invoked the principle according to which treaties do not bind third States in order to confute the extension of the Court's jurisdiction.⁴ Notwithstanding the State's opposition, ICC Pre-Trial Chamber I (hereinafter, "PTC I" or the "Chamber") confirmed the Court's jurisdiction over the crime of deportation occurring between Myanmar and Bangladesh, based on the crime's inherently transboundary character.⁵ In order to do so, the Chamber specifically countered Myanmar's *pacta tertiis* argument by invoking the concept of the ICC's objective international legal personality.⁶ Both these arguments will be examined in the following subparagraphs.

1.1. The Effect of Treaties on Third States

Upon learning of the ICC Prosecutor's Request on Jurisdiction, the Government of Myanmar issued a series of statements to the effect that the ICC lacked grounds to deal with the crimes

¹ See Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (18 September 2018) ("IIFFM 2018 Report"); Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (16 September 2019) ("IIFFM 2019 Report").

² Situation in Bangladesh/Myanmar, No. ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, April 9, 2018 ("Request on Jurisdiction").

³ *Ibid.*, para. 2.

⁴ See Situation in Bangladesh/Myanmar, No. ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", September 6, 2018, para. 35 ("Decision on Jurisdiction").

⁵ *Ibid.*, para. 73.

⁶ See *Ibid.*, para. 48.

allegedly committed on its territory, being that it does not have jurisdiction with regards to third-party States to the Rome Statute.⁷

An important preliminary observation is that the issuance of these statements does not oblige the Court to take them into consideration. As was noted by the Prosecutor,⁸ whereas Article 103 of the ICC Rules of Procedure and Evidence mandates States to file their observations with the Registrar,⁹ no such formal submissions were made by the Government of Myanmar, which chose not to take part in the proceedings before the Court.¹⁰ The refusal to carry out these procedural requirements entails that the statements issued by the Government can be disregarded by the ICC.¹¹ Nonetheless, the position espoused therein is relevant to understanding the basis for PTC I's Decision on the Prosecutor's Request for Jurisdiction (hereinafter, the "Decision on Jurisdiction" or "2018 Decision"), as well as having been duly countered by the Chamber in its 2018 Decision;¹² its analysis is therefore advisable.

Myanmar's criticism of the ICC's involvement relies heavily on the State's status of third party to the Rome Statute, on account of its never having ratified the international instrument. This position is evidenced in the Ministry of the Office of the State Counsellor's Statement of April 13, 2018, according to which the Court lacks jurisdiction over Myanmar and the Prosecutor's Request on Jurisdiction contravenes the international law rule providing for the inapplicability of treaties to non-contracting States.¹³ Similar arguments were brought forth in a Government Statement dated August 9, 2018.¹⁴ The Government also held that the initiative purporting to extend the ICC's jurisdiction to facts occurring on the territory of Myanmar overlooks the fact that the Court,

⁷ Situation in Bangladesh/Myanmar, Annex E to the Prosecution Notice of Documents for Use in Status Conference, No. ICC-RoC46(3)-01/18-27- AnxE, June 19, 2018, 2 ("Annex E Statement"); Republic of the Union of Myanmar Ministry of the Office of the State Counsellor, Press Release, August 9, 2018 ("August 2018 Statement"), <https://therohingya.com/government-of-the-republic-of-the-union-of-myanmar-ministry-of-the-office-of-the-state-counsellor-press-release-dated-9-august-2018/>.

⁸ Notice of the Public Statement Issued by the Government of Myanmar, No. ICC-RoC46(3)-01/18-36, August 17, 2018 para. 2-3.

⁹ Article 103 of the ICC Rules of Procedure and Evidence, in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), provides that "1. [a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. [...] 3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations."

¹⁰ Notice of the Public Statement Issued by the Government of Myanmar, No. ICC-RoC46(3)-01/18-36, August 17, 2018, para. 2.

¹¹ *Ibid*; Decision on Jurisdiction, para. 22-23.

¹² See Decision on Jurisdiction, para. 34-48.

¹³ Annex E Statement, 2: "Nowhere in the ICC Charter does it say that the Court has jurisdiction over States which have not accepted that jurisdiction. Furthermore, the 1969 UN Vienna Convention on International Treaties states that no treaty can be imposed on a country that has not ratified it."

¹⁴ August 2018 Statement.

as any other intergovernmental organisation, acts in the interest and within the limits of States parties' consent.¹⁵

Myanmar's position rests on the *pacta tertiis nec nocent nec prosunt* principle enshrined in Article 34 of the Vienna Convention of the Law of Treaties (hereinafter, the "VCLT" or "1969 Convention"). Pursuant to this principle, a treaty creates neither rights nor obligations for third States if they do not consent thereto.¹⁶ As conventional instruments of international law, treaties therefore only bind States parties,¹⁷ i.e. those States which have consented to be bound by them in conformity with the pertinent rules of treaty law.¹⁸ This entails that an obligation contained in a treaty provision can only attach to a third State if it was so intended by the States parties to that treaty, and is accepted by the addressee in writing.¹⁹ The same applies to the rights deriving from treaty provisions, with the difference that in this case the third State's consent is presumed, on account of the favourable effects the State would supposedly benefit from by way of the extension.²⁰

As a general rule, the *pacta tertiis* principle also applies to the founding instruments of international organisations,²¹ meaning that third States are not obliged to abide by their provisions absent their consent. It follows that the Rome Statute is only binding on those States that have ratified it, thereby acquiring the status of States parties; the fact that Myanmar does not figure among them entails that it is exempt from the obligations arising from the Statute's provisions. It has been correctly observed, however, that treaties can produce effects even for non-contracting States.²²

The abovesaid observation reflects the theory that international treaties may introduce so-called "objective regimes".²³ According to this view, certain treaties, variably termed "status treaties" or "objective treaties", generate effects which are not limited to States parties but extend *erga*

¹⁵ Annex E Statement, 2.

¹⁶ Article 34 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ("VCLT"): "A treaty does not create either obligations or rights for a third State without its consent".

¹⁷ Article 26 of the VCLT provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

¹⁸ Article 2(1)(g) of the VCLT defines "party" as "[...] a State which has consented to be bound by the treaty and for which the treaty is in force".

¹⁹ Article 35 of the VCLT.

²⁰ *Ibid.*, Article 36. See also Bing Bing Jia, "The International Criminal Court and Third States" in Antonio Cassese, *The Oxford Companion to International Criminal Justice*, Oxford [etc.]: Oxford University press, 2009, 161.

²¹ Gennady M. Danilenko, "The Statute of the International Criminal Court and Third States," *Michigan Journal of International Law* 21, no. 3 (2000): 448.

²² *Ibid.*

²³ Christian J. Tams, *Enforcing Erga Omnes Obligations in International Law*, Vol. 43, Cambridge [etc.]: Cambridge University press, 2005, 80.

omnes.²⁴ The general interest underlying the principles and rights upheld in such treaties would account for a derogation from the otherwise applicable *pacta tertiis* principle.²⁵

The “objective regimes” theory was first advanced in relation to treaties regarding a certain territory, its status and delimitations, the sea or airspace;²⁶ the aim was that of setting forth a series of universally applicable rules on these matters.²⁷ A more recent approach applies the concept of “status treaties” even to those international instruments regarding human rights;²⁸ considering the objectives set forth in the Rome Statute’s Preamble,²⁹ the treaty could arguably fit into this category.

Despite the jurisprudence on the *erga omnes* effects of certain treaties in the abovementioned fields,³⁰ the concept of “objective regimes” was not included in the normative framework of the VCLT. Upon considering the option, the International Law Commission (“ILC”) intentionally avoided codification, holding that it would facilitate the Great Powers’ imposition of conditions on developing countries,³¹ as well as being a superfluous addition to the 1969 Convention.³² The authority of the concept therefore remains controversial. Significantly, PTC I did touch upon this theory in its Decision on Jurisdiction, asserting that “[...] under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law”.³³ The Chamber’s reasoning is based on the ICC’s objective international legal personality; this notion merits attention, and will be duly analysed.

²⁴ Carlos Fernández de Casadevante Romani; “Objective Regime” in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2015 (encyclopedia entry).

²⁵ *Ibid.*; Tams, *Enforcing Erga Omnes Obligations in International Law*, 81.

²⁶ Francesco Salerno, “Treaties Establishing Objective Regimes” in Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention*, Oxford [etc.]: Oxford University press, 2011, 225.

²⁷ *Ibid.*

²⁸ Romani; “Objective Regime” in *Max Planck Encyclopedia of Public International Law*, para. 14: “Other examples of objective regime effects can be found in the field of *human rights*. According to some publicists human rights treaties do not create merely subjective, reciprocal rights but rather particular legal orders involving objective obligations to protect human rights”.

²⁹ The Preamble to the Rome Statute includes the following excerpt: “[t]he States Parties to this Statute [...] [m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; [r]ecognizing that such grave crimes threaten the peace, security and well-being of the world, [a]ffirming 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, [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, [...]”, in Rome Statute of the International Criminal Court, July 17th, 1998, 2187 UNTS 90 (entered into force on July 1st, 2002) (“Rome Statute”).

³⁰ See *S.S. Wimbledon (U.K. v Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), para. 30; *International Status of South-West Africa*, Advisory Opinion, I.C.J. Reports 1950, p. 128, 132. See also Malgosia Fitzmaurice, “Third Parties and the Law of Treaties” *Max Planck Yearbook of United Nations Law* 6 (2002): 84-86.

³¹ Romani; “Objective Regime” in *Max Planck Encyclopedia of Public International Law*, 11; Salerno, “Treaties Establishing Objective Regimes” in Cannizzaro, *The Law of Treaties Beyond the Vienna Convention*, 227.

³² Alexander Proelss, “Article 34” in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 2nd 2018 ed, Berlin, Heidelberg: Springer Berlin Heidelberg, 2018, 678.

³³ Decision on Jurisdiction, para. 44. See also *Ibid.*, 45-47.

1.2. The *Kompetenz-Kompetenz* Principle and the ICC's Objective International Legal Personality

In addressing Myanmar's affirmation of the Court's lack of jurisdiction, PTC I began by clarifying that as an international tribunal it had the competence to establish the extent of its jurisdiction autonomously.³⁴ The Chamber's assertion is based on the principle of *compétence de la compétence* or *Kompetenz-Kompetenz*, which provides that international tribunals are endowed with the power to determine their own jurisdiction and can interpret the relative provisions of their constitutive instruments to this end.³⁵ The Chamber further noted that the *Kompetenz-Kompetenz* principle had been espoused by the ICC and other tribunals on multiple occasions,³⁶ and maintained that it had since acquired the standing of general international law.³⁷ It thereby decided that it had the competence to deal with the Prosecutor's 2018 Request.

PTC I then considered the Government of Myanmar's claim that the ICC's consequent involvement in the Rohingya situation infringed the *pacta tertiis* principle,³⁸ and recalled its criticism that the proposed extension of the Court's jurisdiction would "[...] exceed the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of States Parties which have signed and ratified the Rome Statute".³⁹ PTC I, however, emphasised that Article 34 of the VCLT did not affect the Court's objective international legal personality. In doing so, the Chamber referred to the ICJ's Advisory Opinion on the *Reparation for Injuries* case,⁴⁰ regarding the possibility that the United Nations institute international judicial proceedings against a third State to the UN Charter for the reparation of the damage caused to the victim and to the organisation itself.⁴¹ In that instance, the ICJ had expressly stated that the UN's capacity to bring a claim against a non-member State was a direct consequence of the organisation's objective

³⁴ Ibid, para. 30.

³⁵ Ibid. See also *Nottebohm case (Preliminary Objections)*, Judgment of November 18th, 1953, I.C.J. Reports 1953, p. 111, 119: "[...] in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction".

³⁶ *The Prosecutor v Kony et al*, Case No. ICC-02/04-01/05-147, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, March 9, 2006, para. 22: "It is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence". See also *The Prosecutor v Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 18-19.

³⁷ Decision on Jurisdiction, para. 32

³⁸ Ibid., para. 35.

³⁹ Annex E Statement, 2.

⁴⁰ Decision on Jurisdiction, para. 38.

⁴¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C. J. Reports 1949, p. 174, 176-177 ("Reparations for Injuries").

international legal personality, which extended beyond the limits of State recognition.⁴² The UN's status as a subject of international law was therefore identified as the condition for it to operate on the international plane.⁴³

The principle espoused in *Reparation for Injuries* can be extended to other international organisations and tribunals;⁴⁴ in recognising them as international subjects, objective international personality enables them to enjoy rights and obligations under international law and entertain relations with other international persons.⁴⁵ The exercise of the functions with which the organisations are entrusted also derives from their international status.⁴⁶

What is relevant about the ICJ's decision is that it confirms that the international legal personality of an organisation can be opposed even to those States which are not members of the organisation or parties to its constitutive treaty.⁴⁷ As has been observed, objectivity entails that the international personality of the organisation is independent of the position adopted towards it by third States.⁴⁸ It is precisely on this argument that PTC I articulated its response to the Government of Myanmar's contention that the ICC Statute cannot affect non-party States.⁴⁹ The Chamber accepted the differences between the ICC and the UN emerging from their respective constitutive instruments.⁵⁰ It also, however, recognised the overriding similarities between the two organisations and drew on them to assert the Court's international legal personality.⁵¹ In particular, PTC I noted that the Rome Statute has been ratified by 120 States, thus attesting to the participation of a large part of the international community.⁵² Even those States that had decided not to ratify the Statute had actively participated in the preparatory negotiations as promoters of the international tribunal to be, which for the Chamber was indication of their support for the ICC's institution.⁵³

⁴² *Ibid.*, 185.

⁴³ James D. Fry, "Rights, Functions and International Legal Personality of International Organizations," *Boston University International Law Journal* 36, no. 2 (2018): 223.

⁴⁴ Nicolae Purdă, "Aspects on the International Legal Personality of International Organizations," *Challenges of the Knowledge Society* 2 (2012): 893; Pietro Pennetta, "International Regional Organizations: Problems and Issues" in Roberto Virzo and Ivan Ingravallo, *Evolutions in the Law of International Organizations*, Brill | Nijhoff: Leiden; Boston, 2015, 110-111.

⁴⁵ *Ibid.*

⁴⁶ *Reparations for Injuries*, 179: "[...] [the UN] could not carry out the intentions of its founders if it was devoid of international personality."

⁴⁷ Catherine Brölmann, "The International Court of Justice and International Organisations," *International Community Law Review* 9, no. 2 (2007): 184.

⁴⁸ Fry, "Rights, Functions and International Legal Personality of International Organizations", 229.

⁴⁹ See Decision on Jurisdiction, para. 39.

⁵⁰ *Ibid.*, para. 41.

⁵¹ *Ibid.*, para. 41-48.

⁵² *Ibid.*, para. 41.

⁵³ *Ibid.*, para. 42.

As mentioned in subparagraph 1.1., these considerations allowed the Chamber to assert that the Rome Statute may in some cases produce its effects even *vis-a-vis* third States, on account of the *erga omnes* purposes laid down in the Statute's Preamble.⁵⁴ The Court's stance seems to endorse the "objective regime" concept traditionally applied to the legal regulation of territories, and is particularly innovative when considering that the ILC decided not to include said concept in the VCLT. The aim to "end impunity" for the authors of international crimes thereby preventing their further commission features among the primary objectives of the Statute's Preamble,⁵⁵ along with the institution of an international penal tribunal – the ICC – dedicated to the crimes' prosecution; such activities can thus certainly be carried out regardless of the position adopted by third States, subject only to the rules on the Court's jurisdiction.

It is in these terms that PTC I affirmed the Court's international legal personality stressing that this personality is of an objective character and is not confined to that recognised by the States parties.⁵⁶ It further underlined that this status brought with it "the capacity to act against impunity for the most serious crimes of concern to the international community as a whole [...]".⁵⁷ The Chamber's conclusion finds support in Article 4 of the Rome Statute, which provides that the ICC is endowed with both international legal personality, and the legal capacity needed to exercise its functions.⁵⁸

It follows from the reasoning illustrated above that, if the conditions laid down in the Statute are met, the ICC may well exercise its jurisdiction with regards to nationals of non-party States.⁵⁹ As has been noted, States are free to transfer their sovereign powers in the criminal field to an international tribunal, as is the case with the ratification of the Rome Statute; a third State's condemnation of the tribunal's exercise of jurisdictional powers with regards to its own nationals, based solely on the grounds of the law of treaties, fails to acknowledge such transferral of powers.⁶⁰ More importantly, the determination as to whether the ICC may entertain criminal proceedings against nationals of third States rests entirely with the Court. Myanmar's argument that the Chamber's contemplation of the Request on Jurisdiction could in itself infringe the *pacta tertiis* principle does not take into account that the ICC as an international legal person does not need the consent of a third State to operate. Rather, it must verify that there are the necessary grounds for

⁵⁴ Ibid., para. 44-45.

⁵⁵ Preamble to the Rome Statute.

⁵⁶ Decision on Jurisdiction, para. 48.

⁵⁷ Ibid.

⁵⁸ Article 4 of the Rome Statute.

⁵⁹ Danilenko, "The Statute of the International Criminal Court and Third States," 448.

⁶⁰ Ibid., 453.

it to prosecute the crimes brought to its attention by the Prosecutor, but this ascertainment can be carried out by the Court autonomously on account of its objective international legal personality.

That being said, PTC I also conceded that “the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction.”⁶¹ This is because the ICC as an international tribunal does not enjoy universal jurisdiction over international crimes.⁶² The Court’s power to entertain proceedings is instead limited to those crimes that either share a connection with a State party to the Rome Statute, or have been deferred to it by a Chapter VII Resolution of the UN Security Council.⁶³ The conditions for the ICC’s jurisdiction are set down in Articles 12 to 15 of the Rome Statute; these provisions, and their interpretation by both the Prosecutor and the Court’s Chambers, will form the object of the following Paragraph.

2. The ICC’s Jurisdiction over the Crime of Deportation from Myanmar to Bangladesh.

As has been mentioned on more occasions, PTC I’s response to the Prosecutor’s Request on Jurisdiction was to the effect that the ICC has jurisdiction over the crime of deportation allegedly committed in Myanmar and Bangladesh because the crime had partially taken place on the territory of the latter State, which is a party to the Rome Statute. The Court further left open the possibility that the Prosecutor invest it with proceedings concerning other crimes within the Statute, provided they have a connection with Bangladesh. The Prosecutor accordingly presented the Court with a request for authorisation of an investigation into the situation concerning Myanmar and Bangladesh pursuant to Article 15 of the Rome Statute (hereinafter, the “Request for Investigation” or “2019 Request”), in relation to the crime of deportation, and the additional crimes of persecution and inhumane acts. Significantly, the Prosecutor chose not to mention genocide among the crimes for which the Request for Investigation was advanced. The ICC Pre-Trial Chamber III (or “PTC III”) authorised the investigation on November 14, 2019,⁶⁴ once again leaving unhindered the possibility that the Prosecutor apply for an investigation regarding other crimes within the Court’s jurisdiction.⁶⁵

⁶¹ Decision on Jurisdiction, para. 48.

⁶² Claus Kreß, “The International Criminal Court as a Turning Point in the History of International Criminal Justice” in Cassese, *The Oxford Companion to International Criminal Justice*, 144.

⁶³ See Jia, “The International Criminal Court and Third States” in Cassese, *The Oxford Companion to International Criminal Justice*, 1621-2.

⁶⁴ Situation in Bangladesh/Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19-27, November 14, 2019 (“Authorisation of Investigation”).

⁶⁵ *Ibid.*, para. 126.

This Paragraph analyses both the Prosecutor’s Request on Jurisdiction, and the ICC’s 2018 and 2019 Decisions, with a view to examining the grounds for the Court’s jurisdiction over the crimes committed in Myanmar, and the extent thereof. It will consider the conditions for the Court’s jurisdiction over the deportation of the Rohingya from Myanmar to Bangladesh, with particular attention given to Article 12 of the Rome Statute, and to the importance of territoriality in affirming the ICC’s jurisdiction.

2.1. Article 12 of the Rome Statute and the Prosecutor’s Request for a Ruling on Jurisdiction

The ICC’s ability to prosecute the crimes listed in Article 5 of the Rome Statute is not without limitations. The grounds for the Court’s jurisdiction are laid down in Article 12 of the Statute, which provides that the Court may institute proceedings only for the crimes committed by the national of a State party, or which – regardless of the perpetrator’s nationality – have taken place on the territory of a State party.⁶⁶ These two grounds for jurisdiction may be described as those of territoriality and active nationality.

Article 12 also leaves open the possibility that a third State accept the ICC’s jurisdiction on an *ad hoc* basis, thereby allowing the Court to prosecute its nationals or crimes committed within its territory despite its not having ratified the Statute; the third State must in this case lodge the declaration with the Court’s Registrar and collaborate accordingly.⁶⁷ If a third State refers a situation occurring within its territory or by its nationals the territoriality or active nationality connection need not subsist, being that with the referral the non-contracting State actively seeks the Court’s intervention and thereby accepts its jurisdiction.⁶⁸

Another instance in which the crimes’ nexus with a State party to the Rome Statute is not necessary is in the case of a UN Security Council deferral.⁶⁹ If the Security Council, acting under Chapter VII of the UN Charter, defers a situation to the ICC Prosecutor, the Court can exercise its jurisdiction even with regards to those crimes that bear no relation whatsoever to the States parties,

⁶⁶ Article 12(2) of the Rome Statute proceeds as follows: “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) [t]he 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) [t]he State of which the person accused of the crime is a national.”

⁶⁷ William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed., Cambridge: Cambridge University press, 2014, 84.

⁶⁸ See Danilenko, “The Statute of the International Criminal Court and Third States,” 479.

⁶⁹ Article 13(b) of the Rome Statute provides that “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] (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”.

because they were neither committed on the territory of one such State, nor carried out by a party State's nationals.⁷⁰ In such a case, the ICC does not require the third State's consent in order to institute criminal proceedings for the crimes perpetrated on its territory or by its nationals.⁷¹

The ICC's involvement in the situation in Myanmar relies instead on the exercise of the Prosecutor's *proprio motu* powers. Article 15 of the Rome Statute enables the Prosecutor to commence investigations acting of her own accord. The procedure described in the Article requires the Prosecutor to carry out a preliminary examination in those cases where she believes one or more statutory crimes to have been committed.⁷² If she is satisfied that there are reasonable grounds to carry out an investigation, the Prosecutor must then seek the assigned ICC Pre-Trial Chamber's authorisation via a formal request accompanied by the supporting evidence. However, and this is of particular importance in the Bangladesh/Myanmar situation, if the crimes brought to the Court's attention by the Prosecutor concern a third party to the Rome Statute, the competent Pre-Trial Chamber can only authorise the investigation if the traditional grounds for jurisdiction – active nationality or territoriality – subsist.⁷³

It is for this reason that the Prosecutor chose to precede the Request for Investigation – indeed, the preliminary examination itself – with a request that the Court indicate whether it had or lacked jurisdiction over the crime of deportation alleged to have been committed in the territory of Bangladesh and Myanmar. It must be noted that the Prosecutor's Request on Jurisdiction does not follow the procedural rules ordinarily applicable to the presentation of such requests.⁷⁴ This aspect was expressly criticised by the Government of Myanmar, which in its August 2018 statement drew attention to the fact that under Article 19 of the Rome Statute a request for a ruling on jurisdiction should follow, rather than precede, the opening of an inquiry.⁷⁵ Such a stance is supported by the mention to “the situation” contained in paragraph 3 of the abovementioned provision.⁷⁶ In the

⁷⁰ Danilenko, “The Statute of the International Criminal Court and Third States”, 453.

⁷¹ *Ibid.*

⁷² Article 15 of the Rome Statute: “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 nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. [...]”

⁷³ Article 15(4) of the Rome Statute provides that “[i]f 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” (emphasis added).

⁷⁴ See Michail Vagias, “The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh: Certain Procedural Questions,” *Leiden Journal of International Law* 31, no. 4 (2018): 989-991.

⁷⁵ August 2018 Statement, para. 5, 9.

⁷⁶ Article 19(3) of the Rome Statute provides that “[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”

Government of Myanmar's view, the rule contained in Article 19(3) would allow the Prosecutor to assess the subsistence of crimes within the Rome Statute before advancing a jurisdictional request, thus representing one of the many "procedural safeguards" necessary to ensure the subsequent proceeding's impartiality.⁷⁷ The Prosecutor's decision to present PTC I with the Request on Jurisdiction without having first carried out a preliminary examination was described in the August 2018 statement as a circumvention of such safeguards and as acceptance of the criminal proceedings in the absence of the requisite legal basis.⁷⁸

The matter was explicitly addressed by the Prosecutor herself in the Request on Jurisdiction. In the application, she contended that the jurisdictional requests advanced pursuant to Article 19(3) of the ICC Statute are not limited to any one stage of proceedings, but can be presented both in the context of a particular case (i.e. where one or more individuals are already being investigated for the crimes), or in the preceding phase, regarding a situation.⁷⁹ She further affirmed that such requests can be filed with the Court even prior to the opening of proceedings and, while recognising that the 2018 Request on Jurisdiction represented the first occasion where a ruling on jurisdiction was sought, affirmed the Prosecutor's discretion as to the stage of proceedings in which to advance such requests.⁸⁰ The exceptional nature of the Myanmar/Bangladesh situation, represented by the possible perpetration of a statutory crime both on the territory of a State party, and on that of a third State, had prompted the Prosecutor to file the 2018 Request before the commencement of a preliminary examination.⁸¹

Another issue that needs be addressed before examining the content of the 2018 Request is that of the applicability of the legal basis invoked by the Prosecutor to justify its presentation. As described above, the Request on Jurisdiction rests on Article 19 of the Rome Statute, which for the Prosecutor legitimises a request on jurisdiction in any phase of criminal proceedings, as well as before their commencement. In addressing the issue, however, the PTC I chose to rely on a different legal basis, namely Article 119(1) of the Rome Statute, and defined the Prosecutor's position regarding Article 19 as "controversial".⁸² Under the former provision, any dispute

⁷⁷ August 2018 Statement, para. 6.

⁷⁸ See *ibid.*, para. 9.

⁷⁹ Request on Jurisdiction, para. 53. See also Decision on Jurisdiction, para. 26: "The Prosecutor submits that this provision empowers her to seek a ruling on a question of jurisdiction or admissibility at any stage of the proceedings.³¹ She bases this argument, firstly, on a plain reading of the terms of article 19(3) of the Statute, which do not make a distinction between the situation stage and the case stage. [...]". For a distinction between "cases" and "situations", see Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Vol. 34, Leiden; Boston: Martinus Nijhoff, 2008, 91, 93.

⁸⁰ Request on Jurisdiction, para. 55.

⁸¹ *Ibid.*

⁸² Decision on Jurisdiction, para. 27. See also Michail Vagias, "Case No. ICC-RoC46(3)-01/18," *American Journal of International Law* 113, no. 2 (2019): 368-369.

regarding the ICC's judicial functions is decided by the Court.⁸³ Having deemed the dispute on jurisdiction to be subsistent,⁸⁴ the Chamber concluded that Article 119 could constitute a valid legal basis for the Prosecutor's 2018 Request, thus effectively requalifying the grounds upon which it was presented. Alternatively, Article 21(1)(b), concerning the application of the international law principles on jurisdiction, could also be relied on to entertain the Prosecutor's 2018 Request.⁸⁵

As has been mentioned, the application advanced by the Prosecutor stemmed from the need to ascertain whether the grounds to exercise her *proprio motu* powers pursuant to Article 15 of the Rome Statute in relation to the crime of deportation could be considered subsistent. Myanmar not being a party to the Statute, the institution of proceedings by way of the Chamber's authorisation of an investigation could only take place if either the territoriality or the active nationality nexus were found to exist.⁸⁶ Considering that the crimes reported by the IFFM were committed by nationals of Myanmar, the active nationality requirement could in no way be considered satisfied, so that territoriality remained the only possible basis for the ICC's jurisdiction.

The restrictive grounds upon which the activation of the Court could take place induced the Prosecutor to circumscribe the object of the Request on Jurisdiction to deportation only. This is because, as has been underlined in Chapter 2 above, the crime of deportation set forth in Article 7(1)(d) of the Rome Statute is an inherently transboundary crime, meaning that it is only consumed when the conduct 'carries' into a State other than that where the perpetration began.⁸⁷ The Prosecutor based her 2018 Request on the assumption that the Court had jurisdiction over the deportation of the Rohingya "[...] because an essential legal element of the crime – crossing an international border – occurred on the territory of a State which is a party to the Rome Statute (Bangladesh)".⁸⁸ She proceeded by requesting that the Chamber rule as to whether the ICC has territorial jurisdiction in those cases where the deportation of one or more individuals takes place from the territory of a third State to that of a State party.⁸⁹

In so doing, the Prosecutor recognised that the alleged deportation of the Rohingya into Bangladesh took place as a result of the 2017 "clearance operations", and that the attacks in which

⁸³ Article 119 of the Rome Statute.

⁸⁴ See Decision on Jurisdiction, para. 28. The Chamber explained in its decision that disputes concerning the jurisdiction of the Court could be included among the more general ones concerning "judicial functions" mentioned in Article 119 of the Rome Statute.

⁸⁵ Decision on Jurisdiction, para. 29.

⁸⁶ See Geoff Curfman, "ICC Jurisdiction and the Rohingya Crisis in Myanmar" *Just Security* (online), January 9, 2018: <https://www.justsecurity.org/50793/icc-jurisdiction>.

⁸⁷ Gerhard Werle and Florian Jessberger. *Principles of International Criminal Law*, 3rd ed. Oxford: Oxford University press, 2014, 358.

⁸⁸ Request on Jurisdiction, para. 2.

⁸⁹ *Ibid.*, para. 4.

these operations consisted were both widespread and systematic, and directed at removing the Rohingya presence from Myanmar.⁹⁰ Whereas the perpetrator of the crime of deportation need not have acted with the specific intent to permanently drive the victims out of his or her State's territory,⁹¹ the Prosecutor's assertion in this regard may be seen as confirmation of the "knowledge of the attack" proper to the more general category of crimes against humanity,⁹² of which deportation is an example. The same reasoning applies to the widespread and systematic nature of the "clearance operations" evidenced in the 2018 Request, being that crimes against humanity require even that legal element.⁹³

The Prosecutor then turned to address the meaning of "conduct" in Article 12(2)(a), which lays down the territorial grounds for the ICC's jurisdiction.⁹⁴ The attention to the term derives from the fact that whereas the Rohingya did flee to Bangladesh as a direct result of the organised attacks perpetrated against them, the attacks themselves were not physically carried out in the latter State. The Court could therefore only have jurisdiction on the deportation of the minority if "conduct" were interpreted broadly, as a synonym for "crime" inclusive of both the actions carried out by the perpetrators and their results.⁹⁵ The Prosecutor noticed that in Article 12(2)(a), the two notions are used interchangeably to describe the territoriality nexus;⁹⁶ the provision in fact requires the *conduct* to have taken place on the territory of a State party, but then uses the term *crime* when describing the alternative possibility that it be committed "on board a vessel or aircraft",⁹⁷ if the State of registration is a party to the Statute.⁹⁸ As remarked in the 2018 Request, "[i]t would be illogical for the test to vary according to the physical characteristics of the particular location",⁹⁹ the necessary consequence being that "conduct" must be interpreted as an equivalent of "crime". This in turn led Prosecutor to conclude that the territoriality requirement necessary for the Court's jurisdiction encompasses both the acts materially perpetrated by the author and their legally mandated results.¹⁰⁰

The conclusion drawn by the Prosecutor is to the effect that the ICC can exercise its judicial powers with regards to the deportation of the Rohingya, being that the "conduct" carried out by the Tatmadaw in the context of the "clearance operations" produced its criminally relevant

⁹⁰ *Ibid.*, para. 10.

⁹¹ *The Prosecutor v Stakic*, Case, No. IT-97-24-A, Judgment, March 22, 2006, para. 278.

⁹² Article 7(1) of the Rome Statute.

⁹³ *Ibid.*

⁹⁴ Request on Jurisdiction, para. 28.

⁹⁵ See Curfman, "ICC Jurisdiction and the Rohingya Crisis in Myanmar".

⁹⁶ *Ibid.*, para. 46.

⁹⁷ See Article 12(2)(a).

⁹⁸ *Ibid.*

⁹⁹ Request on Jurisdiction, para. 46.

¹⁰⁰ *Ibid.*, para. 47.

consequence in Bangladesh. This again revolves around the crime of deportation's transboundary nature, and the legal requirement that the forced displacement occur across an international frontier.

The cross-border element, however, also prompted the Prosecutor to tackle another issue regarding the grounds for the ICC's jurisdiction, namely whether all legal elements of the crime need have occurred on the territory of a State party for it to subsist. In addressing this issue, the Prosecutor drew a parallel between the ICC's prosecutorial powers and those of States. She noted that under international criminal law States can prosecute crimes even when these only partially took place within their territory, it not being necessary that all of the crime's constituent elements have taken place therein.¹⁰¹

As with the ICC, among the principles guiding the jurisdictional powers of national courts is that of territoriality, which can be variously construed.¹⁰² A first option is that of "subjective territoriality", which provides for a State's jurisdiction in those cases where the conduct began within its territory and was completed in another State.¹⁰³ "Objective territoriality" instead subsists when the crime commenced elsewhere but is completed on the State's territory.¹⁰⁴ Lastly, the "effects" doctrine endows States with jurisdiction over those crimes the effects of which materialise on their territory, even when the crimes themselves took place entirely in a different State.¹⁰⁵ Whereas the extension of the effects doctrine to the ICC is contentious,¹⁰⁶ the Prosecutor held that the other forms of territoriality could certainly be applied in establishing the Court's jurisdiction. In ratifying the Rome Statute, the States parties to it chose to delegate their prosecutorial functions to the ICC; this objective can only be fulfilled if the Court's territorial jurisdiction is of the same latitude as that of its member States over the same crimes.¹⁰⁷

The assertion that the ICC has jurisdiction even with regards to crimes that have only partially materialised on a State party's territory has important implications with regards to the crime of deportation. As evidenced by the Prosecutor, the crime's transnational character is such that it may also take place from the territory of a State party to that of a third State or from the territory of a

¹⁰¹ Request on Jurisdiction, para. 29. See also Cedric Ryngaert, "Territorial Jurisdiction Over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law," *International Criminal Law Review* 9, no. 1 (2009): 188.

¹⁰² See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Law Regime*, Cambridge [etc.]: Cambridge University press, 75.

¹⁰³ Request on Jurisdiction, para. 32.

¹⁰⁴ *Ibid.*, para. 32. See also Ryngaert, "Territorial Jurisdiction Over Cross-Frontier Offences", 189.

¹⁰⁵ Request on Jurisdiction, para. 30.

¹⁰⁶ Schabas, *An Introduction to the International Criminal Court*, 82: "[...] given the silence of the Statute about the effects jurisdiction, there are compelling reasons in favour of a strict construction of Article 12 and the exclusion of such a concept".

¹⁰⁷ Request on Jurisdiction, para. 49.

third State to that of a State party. This is exactly what happened in the case of the Rohingya: the acts carried out in the “clearance operations” were such that members of the minority were forced to cross the international border into Bangladesh, thus giving way to the crime of deportation. If the Court’s jurisdiction were interpreted as being narrower than that of its member States, and restricted to those crimes entirely committed within their territories, the Court’s prosecution with regards to the deportation from a third State to that of a State party would inevitably be curbed,¹⁰⁸ with a resulting vacuum in criminal proceedings even in those cases where part of the crime took place in a State party to the Statute.

All these arguments were employed by the Prosecutor in support of her claim that the ICC had jurisdiction over the deportation of the Rohingya from Myanmar to Bangladesh. They were consequently taken into consideration by PTC I in addressing the Prosecutor’s 2018 Request.

2.2.The Pre-Trial Chambers’ Decisions Regarding the ICC’s Involvement in the Bangladesh/Myanmar Situation

In its Decision on Jurisdiction, PTC I endorsed the Prosecutor’s view that the ICC had jurisdiction over the deportation of the Rohingya from Myanmar to Bangladesh. A similar position was adopted by Pre-Trial Chamber III (hereinafter, “PTC III” or “the Chamber”) in order to authorise the Prosecutor’s subsequent Request for Investigation presented a year later. Being that the two Chambers adopted similar arguments to espouse the Prosecutor’s requests, both their decisions will be analysed in this subparagraph.

2.2.1. Pre-Trial Chamber I’s Decision on Jurisdiction

The Decision on Jurisdiction issued by PTC I revolves around the peculiarities of the crime of deportation. Having recalled that the crime of deportation entails a person’s international displacement, without the requisite legal grounds, “by expulsion or other coercive acts”,¹⁰⁹ the Chamber examined the meaning of the latter terms. As has been recounted, the Prosecutor based her application on the assumption that deportation can occur even when the coercive acts themselves lack the transboundary character, being that they were all committed in a single State, when they nonetheless resulted in the forced migration of the victims to a different State.¹¹⁰ PTC

¹⁰⁸ Ibid.

¹⁰⁹ Article 7(2)(d) of the Rome Statute; Decision on Jurisdiction, para. 61.

¹¹⁰ Request on Jurisdiction, para. 28.

I's focus on the correct interpretation of "expulsion or other coercive acts" is relevant to understanding whether the requisite conduct indeed materialised in the case of Myanmar.

It is therefore significant that the Chamber should have described deportation as "an open-conduct crime",¹¹¹ meaning that it can be integrated by a variety of human actions causing the involuntary migration, such as the denial of fundamental human rights, murder, torture, destruction of property and sexual violence.¹¹² To do so, the Chamber relied on the Court's Decision on the Confirmation of Charges in *Ruto et al*, in which the crime of deportation's "open-ended" nature was expressly acknowledged.¹¹³ While PTC I did not dwell on the matter, it is worth noticing that in this decision ICC Pre-Trial Chamber II took the reasoning still further, arguing that the acts variously committed by the perpetrator must have "[...] force[d] the victim to leave the area where he or she is lawfully present",¹¹⁴ and that the crime's commission can only be established in the presence of a causal link between the conduct and the ensuing displacement of the victim to a different State.¹¹⁵ Read in this light, the acts carried out by the Tatmadaw undoubtedly integrate the "coercive acts" criminalised in Article 7(1)(d) of the Rome Statute, being that they provoked the Rohingya's forced exodus from Myanmar to Bangladesh.¹¹⁶

PTC I instead relied on the interpretation of deportation put forth in *Ruto et al* to confirm the subsistence of the ICC's jurisdiction even when only one legal element of the crime or a part thereof is committed on the territory of a State party to the Statute.¹¹⁷ The principle espoused by PTC I was first established by the Permanent Court of International Justice (or "PCIJ") in the 1927 *Lotus* case, to which the Chamber made express reference. In the case, which concerned the collision between a French steamer – the *Lotus* – and Turkish ship named S.S. *Boz Kourt*, resulting in the death of eight Turkish soldiers, the French Government had contested the criminal proceedings instituted in Turkey on the grounds that the State lacked jurisdiction for offences caused on the high seas by foreign nationals. In rejecting this argument, the PCIJ recognised the principle of international criminal law according to which "[...] offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as

¹¹¹ Decision on Jurisdiction, para. 61.

¹¹² Ibid.

¹¹³ *The Prosecutor v Ruto et al.*, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, February 4, 2012, para. 244.

¹¹⁴ Ibid.

¹¹⁵ Ibid, para. 245: "[...] in order to establish that the crime of deportation or forcible transfer of population is consummated, the Prosecutor has to prove that one or more acts that the perpetrator has performed produced the effect to deport or forcibly transfer the victim. Absent such a link between the conduct and the resulting effect of forcing the victim to leave the area to another State or location, the Chamber may not establish that deportation or forcible transfer of population pursuant to article 7(2) (d) of the Statute has been committed."

¹¹⁶ Curfman, "ICC Jurisdiction and the Rohingya Crisis in Myanmar".

¹¹⁷ Decision on Jurisdiction, para. 64.

having been committed in the national territory [of the forum State], if one of the constituent elements of the offence, and more especially its effects, have taken place there.”¹¹⁸

Interestingly, the Chamber also referred to both Myanmar’s and Bangladesh’s penal codes, in the part where they affirm the States’ jurisdiction with regards to criminal conduct occurring outside or only partly on their territory.¹¹⁹ The mention was made in the context of the Chamber’s more general affirmation that under international criminal law, States’ national courts may institute criminal proceedings even with regards to crimes only partially perpetrated within their territories;¹²⁰ PTC I’s conclusion was to the effect that, the ICC having been delegated the jurisdiction ordinarily resting with its Member States, the scope of that jurisdiction must necessarily equal that of the delegating States.¹²¹ The rationale illustrated by the Chamber mirrors that put forward by the Prosecutor in her 2018 Request, and can thus be seen as a direct recognition of the Prosecutor’s stance on the matter.

The crime of deportation’s cross-border nature was also acknowledged in the 2018 Decision; the Chamber noted that the feature was not accompanied by requirements concerning either the origin or the destination of the crime, which would have had the effect of circumscribing the ICC’s jurisdiction on territorial grounds. The lack of similar limitations allows for the exercise of the Court’s prosecutorial powers even when only one element or a part of a crime took place on a State party’s territory.¹²² These considerations led the Chamber to assert the Court’s jurisdiction over the situation concerning the deportation of the Rohingya from Myanmar to Bangladesh on the same basis as that advanced in the 2018 Request.¹²³ Significantly, PTC I left open the possibility that the Prosecutor trigger the Court’s jurisdiction even with regards to other statutory crimes, at least part or a legal element of which occurred in a State party. The option indicated by the Chamber has important repercussions regarding the extension of the Court’s jurisdiction to the genocide allegedly perpetrated against the Rohingya, and will be dealt with in Paragraph 3 of this Chapter.

Acting on the Court’s Decision on Jurisdiction, the Prosecutor presented the Court with the Request for Investigation into the crimes of deportation, persecution, and inhuman acts. The 2019

¹¹⁸ S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser.A) No. 10 (Sept. 7), 23.

¹¹⁹ Decision on Jurisdiction, para. 67-8.

¹²⁰ *Ibid.*, para. 66.

¹²¹ *Ibid.*, para. 70.

¹²² *Ibid.*, para. 71.

¹²³ *Ibid.*, para. 72: “[...] the Chamber finds that, interpreted in the context of the relevant rules of international law and in the light of the object and purpose of the Statute, the Court may assert jurisdiction pursuant to article 12(2)(a) of the Statute if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute.” See also Guilfoyle, Douglas. “The ICC Pre-Trial Chamber Decision on Jurisdiction Over the Situation in Myanmar.” *Australian Journal of International Affairs* 73, no. 1 (2019): 2, 4.

Request does not, on the other hand, make mention of the crime of genocide. This is regrettable, as a pronouncement of the Court on an investigation for genocide would make clarity as to whether the conditions for the exercise of its jurisdiction over the crime subsist in the Myanmar/Bangladesh case. On November 14, 2019, PTC III issued the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (hereinafter, the “Authorisation of Investigation”), thereby authorising the Prosecutor’s investigation.

2.2.2. Pre-Trial Chamber III’s Authorisation of Investigation

PTC III’s Authorisation of Investigation for the crimes indicated in the Request for Jurisdiction was in line with the procedure set forth in Article 15 of the Rome Statute. As we have seen, this Article requires that, in those cases where statutory crimes are deemed to have been committed, the Prosecutor must seek an authorisation of investigation from the assigned Pre-Trial Chamber. The Chamber can only allow the investigation if it retains that there is “a reasonable basis to proceed with and investigation” and believes the case “to fall within the jurisdiction of the Court”.¹²⁴ Both grounds were held by PTC III to be present in the case of Myanmar.

In assessing the subsistence of grounds for jurisdiction, the Chamber embraced the argument that “conduct” should be considered as a notion interchangeable with “crime”, and noticed that for certain crimes this entailed including the consequences of the criminal action within the conduct’s scope.¹²⁵ In the case of deportation, the consequence was identified as the removal of the victim from the territory of the State, which could be carried out either physically by the author, or indirectly, as a result brought about by the perpetrator’s “coercive acts”.¹²⁶ PTC III also confirmed the position illustrated in the Decision on Jurisdiction that a crime need only partly have taken place on the territory of a State party for the ICC to exercise the corresponding jurisdiction.¹²⁷ The Chamber recalled the principle whereby States delegating their powers to an international organisation endow it with the authority necessary to achieve the purported aims¹²⁸ and, in applying this principle to jurisdiction, averred that the territorial jurisdiction of the ICC should be of the same latitude as that enjoyed by the single member States.¹²⁹ Being that under customary

¹²⁴ Article 15(4) of the Rome Statute. Article 15(5) proceeds by stating that “[t]he 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.”

¹²⁵ Authorisation of Investigation, para. 50.

¹²⁶ *Ibid.*, para. 51-52.

¹²⁷ *Ibid.*, para. 61.

¹²⁸ *Ibid.*, para. 60.

¹²⁹ *Ibid.*

international law, States can institute criminal proceedings even over conducts only partially occurring on their territories, the Court too should be able to exercise its jurisdiction over crimes partially committed in States parties to the Rome Statute. The Chamber then applied this conclusion to the alleged deportation of the Rohingya and found that their migration across national borders into Bangladesh – a State party to the Rome State – created the territorial connection necessary for the Court to exercise its jurisdiction.¹³⁰

Having reaffirmed that deportation falls within the Court’s jurisdiction even if only a part of the crime took place on the territory of a State Party, PTC III turned to assess whether the other condition for the authorisation set forth in Article 15(4) – the “reasonable basis to proceed with an investigation” – could be considered subsistent in the case at hand. The requirement laid down in this Article can be seen as running parallel to that indicated in Article 53(1), which provides that the Prosecutor must commence an investigation only if she retains that there is a “reasonable basis to proceed”.¹³¹ The Prosecutor’s evaluation must turn on whether the collected information “[...] provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”.¹³² While the exact meaning of the criterion is not specified further in the Statute, it has been noted that the mere plausibility of the crime’s perpetration would meet the required threshold.¹³³ The same measure applies in determining whether to authorise the Prosecutor’s *proprio motu* investigation under Article 15(4).¹³⁴

The conditions for there to be a “reasonable basis” were analysed at length in the 2010 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (hereinafter, the “Kenya Decision”) issued by the ICC’s Pre-Trial Chamber II (or “PTC II”).¹³⁵ In the Kenya Decision, PTC II explained that, being that the authorisation of an investigation is necessarily issued in the preliminary examinations stage, the “reasonable basis” requirement forms the “lowest evidentiary standard”.¹³⁶ This derives from the fact that the evidence collected by the Prosecutor at this stage of proceedings is bound to be incomplete.¹³⁷ The aim underlying the standard was seen as that of avoiding trivial or politically driven investigations that could hinder the ICC’s integrity.¹³⁸ Based on these considerations, PTC

¹³⁰ Ibid., para. 62.

¹³¹ Article 53(1) of the Rome Statute.

¹³² Ibid.

¹³³ Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 96.

¹³⁴ See *ibid.*, 107.

¹³⁵ Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr, March 31, 2010, para. 27.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid., para. 32.

II concluded that in assessing the subsistence of reasonable grounds, the competent Chamber must determine whether the alleged commission of an Article 5 crime is grounded on a “sensible or reasonable justification”.¹³⁹

The “reasonable basis” standard therefore required PTC III to verify whether the subsistence of the crime of deportation was in fact plausible in the case of Myanmar. This could only be the case if the constitutive elements of the particular crime against humanity were found *prima facie* to have materialised in relation to the Rohingya.

In applying the test to the situation brought before it by the Prosecutor, PTC first considered whether crimes against humanity could credibly have been committed against the Rohingya. Having recalled that under Article 7 of the Rome Statute, crimes against humanity consist of criminally relevant actions forming part of a “widespread and systematic attack” perpetrated in furtherance of a State policy and aimed at the civilian population, the Chamber found that the supporting material to the Prosecutor’s Request for Investigation substantiated the allegation as to the subsistence of these elements. The available information indicated that the Rohingya had been “gradually deprived of citizenship”,¹⁴⁰ and had suffered “severe violations of their human rights for decades [...]”.¹⁴¹ The 2016 and 2017 “clearance operations” were seen both as an escalation of the violations perpetrated against the Rohingya, and as being primarily imputable to the Tatmadaw,¹⁴² which “essentially dominates the government”.¹⁴³ According to PTC III, the evidence at hand corroborated the claim that these forces had “[...] allegedly murdered, tortured, raped, sexually assaulted, mutilated, and imprisoned or otherwise severely deprived the Rohingya men and women of their physical liberty”.¹⁴⁴ Such acts all presented a similar pattern,¹⁴⁵ and were carried out either in villages almost entirely inhabited by the Rohingya, or only against those residents of Rohingya ethnicity.¹⁴⁶ Read together, these findings led the Chamber to assert that there was a sufficient basis to believe that widespread and systematic violence had been perpetrated against the Rohingya, and that this was part of a wider State policy directed against the minority population.¹⁴⁷

¹³⁹ Ibid., para.35.

¹⁴⁰ Authorisation of Investigation, para. 67.

¹⁴¹ Ibid.

¹⁴² See *ibid.*, para. 69, 75, 77.

¹⁴³ Ibid., para 64.

¹⁴⁴ Ibid. para. 77.

¹⁴⁵ Ibid., para. 81.

¹⁴⁶ Ibid., para. 80.

¹⁴⁷ Ibid., para. 92.

Having confirmed the likelihood of crimes against humanity, PTC III turned to address whether the Prosecutor's allegations regarding the crime of deportation could be considered equally "reasonable". Once again, it weighed the facts emerging from the available evidence against the legal requirements of deportation, namely the forcible displacement of persons lawfully present in the State across the State's borders absent the grounds considered permissible under international law.¹⁴⁸ While pointing out that the proof of the lack of permissible grounds lies with the Prosecutor, the Chamber noted that the "[...] deportation of a State's own nationals as well as the arbitrary or collective expulsion of aliens is generally prohibited".¹⁴⁹ The Chamber called to mind the rule of international humanitarian law which allows displacement only to ensure the population's safety or on imperative military grounds; it, however, stressed that the displacement resulting from "an unlawful activity" in no way fulfilled these conditions.¹⁵⁰ This reasoning would seem to suggest that, the Rohingya's involuntary migration being the immediate consequence of the criminally relevant coercive acts perpetrated against them, the justifications set down under humanitarian law could in no way apply. A conclusion of this sort finds support in the claim put forward in the IIFFM's 2018 Report that based on the findings "[...] there were no imperative military or security reasons for such displacements".¹⁵¹

PTC III also observed that the lawful presence of the victim had to be evaluated in the light of the existing rules of international, rather national, law and was therefore to be kept distinct from the concept of residence.¹⁵² While the Chamber did not apply this legal requirement to the Rohingya except in relation to the wider category of crimes against humanity, its reference to the minority's longstanding presence within Myanmar's Rakhine State can be seen as a validation of the requirement's subsistence.¹⁵³

Relying on the evidentiary material on record, PTC III found that the coercive acts perpetrated by the State's security forces in the midst of the 2016 and 2017 forced a total of over 700,000 Rohingya to flee to neighbouring Bangladesh;¹⁵⁴ the causal link was such that the Prosecutor's conclusion on the crime of deportation's perpetration could be considered reasonable, within the meaning of Article 15(4).¹⁵⁵ On these grounds, the Chamber authorised the commencement of an investigation.

¹⁴⁸ See Article 7(2)(d) of the Rome Statute.

¹⁴⁹ Authorisation of Investigation, para. 98

¹⁵⁰ Ibid.

¹⁵¹ IIFFM 2018 Report, para. 282.

¹⁵² Authorisation of Investigation, para. 99.

¹⁵³ See *ibid.*, para. 13, 66.

¹⁵⁴ *Ibid.*, para. 105.

¹⁵⁵ *Ibid.*, para. 108.

Read together, the Pre-Trial Chambers' decisions can be seen as an endorsement of the Prosecutor's view as to the subsistence of an adequate basis for the ICC's involvement in the Myanmar/Bangladesh situation. The decisions confirmed both the Court's jurisdiction over the case, and the reasonable basis for the Prosecutor to carry out an investigation. Their position regarding jurisdiction rested on the same arguments brought forth by the Prosecutor, namely the overlap between the notion of "conduct" and that of "crime", and the need for only a legal element or a part of a crime to have taken place on the territory of a State Party for the Court to assert its jurisdiction. The evidentiary material gave credibility to the contention that the Rohingya had been deported from Myanmar by way of a series of unlawful acts impermissible under international law.

The Chambers' stance regarding the existence of deportation should not be downplayed, as it paves the way for the Court's future involvement in proceedings concerning other crimes only partly perpetrated in States Parties.¹⁵⁶ While the Chambers did mention such a possibility in relation to the Prosecutor's 2018 and 2019 Requests, they did not elaborate on the matter further, thus leaving doubts as to the application of the standard of the crime's partial commission in a State Party to other Article 5 crimes.¹⁵⁷ In particular, the decisions left unsolved the question whether the ICC could entertain proceedings even for the genocide alleged to have been committed in Myanmar. This issue will form the object of the following Paragraph.

3. Assessing the ICC's Jurisdiction over Genocide in Myanmar

In its Decision on Jurisdiction, PTC I did not address whether the ICC could have jurisdiction over crimes other than deportation. Neither did PTC III examine the feasibility of genocide upon authorising the Prosecutor's investigation. This is because the Prosecutor did not extend the object of her Request for Investigation to genocide, instead limiting them to the crimes of deportation, persecution, and other inhumane acts. The Prosecutor's restraint was probably due to her aim of being granted the authorisation needed to commence an investigation, particularly considering the

¹⁵⁶ See Vagias, "The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh", 982.

¹⁵⁷ PTC I did consider the issue in relation to the crime of persecution but the crime of persecution is not an independent crime (it can only materialise in connection with other statutory crimes) and must therefore be considered conjointly with other Article 5 crimes (Article 7(1)(h) of the ICC Statute). The Chamber accordingly accepted the possibility that it have jurisdiction over the crime of persecution if the crime's constitutive elements were found to subsist, but only in connection with the crime of deportation (see Decision on Jurisdiction, para. 75-76). It also considered the possibility that it have jurisdiction over the crime of inhumane acts under Article 7(1)(k) of the Statute, on account of the dire conditions of the Rohingya refugees in Bangladesh (ibid, para.77); this aspect will be analysed further in Paragraph 3 below.

difficulty of proving the subsistence of the requisite grounds for an investigation into genocide at such an early stage of proceedings.

It must be noted, however, that both Chambers left open such a possibility. In the Decision on Jurisdiction, having established that the ICC may exercise its jurisdiction if an essential element of a statutory crime or a part thereof is perpetrated on the territory of a State party,¹⁵⁸ PTC I went on to clarify that this standard “[...] may apply to other crimes within the jurisdiction of the Court as well”.¹⁵⁹ Similarly, in the Authorisation of Investigation issued a year later, PTC III enounced the principle whereby “[t]he Chamber authorises the commencement of the investigation in relation to any crime within the jurisdiction of the Court committed at least in part on the territory of Bangladesh, or on the territory of any State Party [...]”,¹⁶⁰ and then stressed that “[...] the Prosecutor is not restricted to the incidents identified in the Request and the crimes set out in the present decision but may, on the basis of the evidence gathered during her investigation, extend her investigation to other crimes against humanity *or other article 5 crimes*, as long as they remain within the parameters of the authorised investigation”.¹⁶¹

The Chambers’ statements are based on Article 15 of the Rome Statute, Paragraph 4 of which provides that the assigned Pre-Trial Chamber’s authorisation does not preclude new decisions of the Court on jurisdiction and admissibility.¹⁶² This is linked to the possibility that the Prosecutor “reconsider” her determinations regarding the commencement of an investigation or prosecution on the basis of the newly collected evidence.¹⁶³ The emphasis placed by the Chambers on their decisions’ non-preclusive character is of particular relevance to assessing the ICC’s jurisdiction over the crime of genocide alleged to have taken place against the Rohingya.

An evaluation of this sort must begin by examining the grounds upon which PTC I established its jurisdiction over the crime of deportation, in order to verify whether such grounds can be considered subsistent even with regard to genocide. It has already been highlighted that the confirmation of the Court’s jurisdiction over deportation rested on the crime’s partial commission on a State party. The principles evoked to substantiate this conclusion were that of “objective territoriality” which, as has been illustrated, requires the crime to have been concluded on the State

¹⁵⁸ Decision on Jurisdiction, para. 72.

¹⁵⁹ Ibid., para. 74.

¹⁶⁰ Authorisation of Investigation, para. 126.

¹⁶¹ Ibid (emphasis added).

¹⁶² Article 15(4) of the Rome Statute: “[i]f 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”.

¹⁶³ Article 53(4) of the Rome Statute provides that “[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information”.

party's territory, the principle of ubiquity and that of the crime's constitutive elements.¹⁶⁴ Under the ubiquity principle, a State has jurisdiction over a crime if any one of its elements – irrespective of their constitutive or other nature – took place within its territory.¹⁶⁵ Applied to the ICC, this principle would endow the Court with jurisdiction if at least one element of the crime took place within a State Party, regardless of whether or not that element is essential to the crime. The constitutive elements theory instead mandates that a *constitutive* element of the crime occur on a State party's territory for the State to exercise its judicial powers; the Chamber found the same principle to apply to proceedings before the Court.¹⁶⁶ Any one of these standards would have to be fulfilled in relation to the crime of genocide alleged to have been perpetrated against the Rohingya for the ICC to affirm its jurisdiction even with regard to this crime.

A first approach could be that of proving that certain underlying genocidal acts were carried out on Bangladeshi territory. Several facts could be invoked to corroborate this theory. For example, it has been reported that several Rohingya members fleeing to Bangladesh were killed or abused along the journey to the latter State,¹⁶⁷ a circumstance which PTC III expressly referred to in its Authorisation of Investigation.¹⁶⁸ It is not clear whether this conduct also manifested itself once in Bangladesh, but if this were the case, it could provide a basis upon which to verify whether at least one underlying genocidal act had taken place in this State party. “Killing members of the group” immediately springs to mind;¹⁶⁹ “[c]ausing serious bodily or mental harm to members of the group” could also be found to apply.¹⁷⁰ However, this approach would necessarily be limited to those acts occurring on the territory of Bangladesh, and would ignore the possible connection with the potentially genocidal conduct occurring in Myanmar; in this sense, it might turn out to be exceedingly restrictive, and curtail a more significant extension of the ICC's jurisdiction. Ascribing certain arguably isolated acts to a wider genocidal policy might also prove particularly difficult, with the result that, while the immediate perpetrators of those acts may be brought to justice, the accountability of all the other members of the State apparatus allegedly involved in the genocidal policy would inevitably be compromised.

¹⁶⁴ See Authorisation of Investigation, para. 62, where the Chamber recollects the grounds on which the Court's jurisdiction over deportation was affirmed.

¹⁶⁵ Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge: Cambridge University press, 2014, 23.

¹⁶⁶ Authorisation of Investigation, para. 56.

¹⁶⁷ Global Rights Compliance, Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, Doc. No. ICC-Roc46(3)-01/18-9, May 30, 2018, para. 23 (“Victims Submission”).

¹⁶⁸ Authorisation of Investigation, para. 88.

¹⁶⁹ See Article 6(a) of the Rome Statute.

¹⁷⁰ Article 6(b) of the Rome Statute.

A different solution could be that of retaining that the genocide of the Rohingya persists in Bangladesh on account of the conditions to which the refugees are subjected in that State and the obstruction of their return to Myanmar. This argument was employed by the international legal partnership Global Rights Compliance in the Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Rome Statute (hereinafter, the “Victims Submission” or the “Submission”) filed with the Court on May 30, 2018.¹⁷¹ In the Submission, attention was brought to the nature of the crime of genocide as a “continuing crime”.¹⁷²

Under criminal law, a continuing (or continuous) crime is a crime that, as the name suggests, continues for a certain period of time. More specifically, the crime begins with the author’s unlawful action and lasts for as long as the illegal situation created by the perpetrator persists.¹⁷³ It only ceases when the perpetrator brings this situation to an end.

The Victims Submission makes reference to the fact that, in its commentary to the Draft Articles on State Responsibility (from hereon in, “Draft Articles”), the ILC recognised genocide as being a continuing crime, stating that “[o]nce [the threshold for genocide] is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide”.¹⁷⁴ Whereas the Draft Articles concern the responsibility of States, rather than individuals, the argument was used to further the claim that the genocide committed against the Rohingya was in fact perpetuated even on Bangladeshi territory.¹⁷⁵

In the Submission, it is contended that “[h]aving subjected the Rohingya’s [sic.] to the most severe deprivation of their rights within Myanmar, the Myanmar authorities continue to act to subject the Rohingyas who have fled to Bangladesh to conditions that prevent any recuperation, recovery or enjoyment of their fundamental rights” and drew on the described state of affairs to affirm that “[b]y continuing this campaign and condemning the Rohingyas to a choice between genocidal and persecutory violence or refugee camps where recovery from extreme violence is impossible, the Myanmar authorities maintain and continue their attack on the Rohingya in both Myanmar and Bangladesh.”¹⁷⁶ The argument put forth in the Submission is twofold, as it relies

¹⁷¹ Victims Submission.

¹⁷² Ibid., para. 33.

¹⁷³ Ronzitti, Natalino. *Introduzione al Diritto Internazionale*, 4th ed. Turin: Giappichelli editore, 2013. See also Victims Submission, para 67.

¹⁷⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session (23 April – 1 June and 2 July – 10 August 2001), GA Res. 56/83 (annex), U.N. GAOR, 56th sess, suppl. No. 10, U.N. Doc. A/56/10 (12 December 2001) para. 3 of the commentary to Article 15 (“Draft Articles”).

¹⁷⁵ See Victims Submission, para. 32.

¹⁷⁶ Ibid., para. 33.

both on the deliberate impediment of the Rohingya's return to Myanmar, and on the dire conditions of the overcrowded refugee camps in which the Rohingyas are consequently obliged to live.¹⁷⁷ Both elements complement each other and are seen as the two features of a same criminal design.¹⁷⁸

The situation described in the Submission may credibly integrate the underlying act proscribed under Article 6(b) or, alternatively, 6(c) of the Rome Statute; its partial commission in Bangladesh would provide the ICC with a basis for the exercise of its jurisdiction even over the alleged genocide of the Rohingya. To this end, it would have to be demonstrated that the conditions in the Bangladeshi refugee camps, and their compulsory nature (deriving from the impediment of the Rohingya's return to Myanmar due to the severe human rights abuses they would have to face there) amount either to "serious bodily or mental harm" or "conditions of life calculated to bring about [the group's] destruction in whole or in part".¹⁷⁹

When examining this possibility, it might be useful to consider PTC I's assessment as to the subsistence of the Court's jurisdiction over "inhumane acts" under Article 7(1)(k) of the Rome Statute, being that it largely hinged on both the Rohingya's situation in Bangladesh, and the obstruction of their return to Myanmar. In the 2018 Decision, the Chamber brought attention to the fact that the Rohingya refugees are allegedly forced to live in "appalling conditions" in the Bangladeshi camps.¹⁸⁰ It also recognised that the information at hand suggested Myanmar authorities were impeding the Rohingya's return to Myanmar, notwithstanding the repatriation agreements formally concluded with the Government of Bangladesh.¹⁸¹ In clarifying that, were the two elements to meet the standard set forth under Article 7(1)(k), the "inhumane acts" set forth therein could fall under the Court's jurisdiction, the Chamber recalled the human rights principle whereby "no one may be arbitrarily deprived of the right to enter one's own country" and further observed that such an impediment "causes "great suffering, or serious injury [...] to mental [...] health"". ¹⁸² As becomes immediately apparent, causing mental harm is one possible form of the genocidal act described in Article 6(b); if the requisite genocidal intent were also demonstrated to be subsistent, this would entail that part of the genocide against the Rohingya – in the form of causing the minority members "severe bodily or mental harm" – has to all effects been committed

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ See Article 6(b) and (c) of the Rome Statute.

¹⁸⁰ Decision on Jurisdiction, para. 77.

¹⁸¹ Ibid.

¹⁸² Ibid., para. 78.

in Bangladesh. Considering that the State is a party to the Rome Statute, the Court’s jurisdiction over the crime would inevitably be established.

The “continuous crimes” argument has alternatively been relied upon by some to suggest that the “conditions genocide” also occurred in Bangladesh.¹⁸³ This possibility finds support in a series of reports issued by human rights organisations, which describe the situation in refugee camps as untenable. According to these sources, the camps sheltering Rohingya refugees are “severely overcrowded”,¹⁸⁴ with shortage of water, poor hygiene conditions and the concrete risk of disease outbreaks.¹⁸⁵ These conditions, imposed on the Rohingya by way of the obstruction of their return, could reasonably amount to “conditions of life calculated to bring about [the group’s] physical destruction” within the terms of Article 6(c) of the Rome Statute.¹⁸⁶

Once again, the Prosecutor would have to prove that the subjection of the Rohingya to such dire circumstances through the impediment of their return to Myanmar is the result of a deliberate design intended to eventually cause the group’s extinction. This might be particularly difficult considering the Government efforts at concluding a repatriation agreement with Bangladesh; however, it must be remembered that the violence against the Rohingya continues in Myanmar in spite of these formal negotiations, as is recounted in the IFFM’s 2019 Report.¹⁸⁷ What is more, certain measures seem to have been adopted by the Myanmar authorities purposely to impede the Rohingya’s return. The placing of mines along the border separating Myanmar from Bangladesh is certainly one such example.¹⁸⁸ The burning of formerly Rohingya-populated villages is also indicative of the State authorities’ strategy to constrain the Rohingya presence to the territory of Bangladesh, by physically destroying their homes back in Myanmar.¹⁸⁹ In the Mission’s 2019 Report, it is recounted that “villages continue to be bulldozed and razed”, accounting for the destruction of over 200 settlements.¹⁹⁰ The land is reportedly either confiscated by the Government, or used as a site for new constructions, in what has been defined as a “demographic

¹⁸³ Kevin Jon Heller, “The ICC Has Jurisdiction over One Form of Genocide in the Rohingya Situation” *Opinio Juris* (blog) September 7, 2018. See also Vagias, “The Prosecutor’s Request Concerning the Rohingya Deportation to Bangladesh”, 986.

¹⁸⁴ Bill Frelick, “Rohingya Refugees in Bangladesh Need More Help” *Dhaka Tribune*, August 26, 2016, reproduced in *Human Rights Watch* (website) <https://www.hrw.org/news/2018/08/26/rohingya-refugees-bangladesh-need-more-help>;

¹⁸⁵ UNICEF, “Bangladesh: Humanitarian Situation Report No. 21 (Rohingya Influx)” *Reliefweb*, 4 February 2018.

¹⁸⁶ Heller, “The ICC Has Jurisdiction over One Form of Genocide in the Rohingya Situation”.

¹⁸⁷ IFFM 2019 Report, para 58: “The Mission concludes, based on its findings, that grave violations against the Rohingya continue and that there is a real and significant danger of the situation deteriorating further.” See also *ibid.*, para. 238.

¹⁸⁸ Victims Submission, para. 31.

¹⁸⁹ IFFM 2019 Report, para. 5.

¹⁹⁰ *Ibid.*

re-engineering of Rakhine State” that “fundamentally alter[s] the demographic landscape of the area”.¹⁹¹ Significantly, the IFFM also asserted that the destruction of the Rohingya’s homes compelled the minority members to live in inhumane conditions as refugees, “keeping them uprooted from their homes”:¹⁹² the required nexus between the critical conditions in the Bangladeshi camps and the Government-led efforts to keep the Rohingya from Myanmar is hence unequivocally established. These measures may give credibility to the supposition of the required genocidal intent’s subsistence, thus completing the elements needed to integrate both the genocidal act described in Article 6(b), and that indicated in Article 6(c). The Mission itself concluded that the laws and administrative measures adopted in Myanmar are evidence of the State authorities’ genocidal intent.¹⁹³

A different approach by which to prove genocide’s partial commission in Bangladesh would be that of recognising the connection between the crime of deportation and the underlying genocidal acts described in Article 6, letters (b) and (c) of the Rome Statute. The issue has been touched upon in Chapter 2 of this work; it has been noted that on numerous occasions, the international criminal tribunals have acknowledged that the forcible displacement of the victim can amount to a means intended to bring about the protected group’s destruction in whole or in part, either as an instance of serious bodily or mental harm, or as a destructive condition of life imposed on the group’s members.¹⁹⁴ The conclusion reached by these tribunals should be examined further, as it is of direct pertinence to the issue of the ICC’s potential jurisdiction over the alleged genocide of the Rohingya.

One instance in which the nexus between deportation and genocide was acknowledged was in *The Prosecutor v Karadzic and Mladic*.¹⁹⁵ In the Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (“Review of Indictments”), the ICTY Trial Chamber established that the SDS’s plan to create an ethnically homogenous State was carried out through the mass deportations of the Bosnian Muslims. Having noticed that the targeted group “could not, in accordance with the SDS plans, lay claim to any other specific territory”, the Chamber

¹⁹¹ Ibid, para. 139.

¹⁹² Ibid.

¹⁹³ Ibid, para. 238.

¹⁹⁴ See Chapter 2.1 of this thesis. See also *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, January 17, 2005, para. 654; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, para. 190 (“2007 Bosnian Genocide”).

¹⁹⁵ *The Prosecutor v Karadzic and Mladic*, Case No. IT-95-5-R61; IT-95-18- R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, July 11, 1996. Karadzic was the president of the Bosnian Serb administration in the territory of Bosnia and Herzegovina. Mladic became head of the Bosnian Serb army. Both were accused in the indictment of having committed genocide and crimes against humanity against the Bosnian Muslims and the Bosnian Croats in Bosnia and Herzegovina during the Bosnian conflict.

established that “[i]n this case, the massive deportations may be construed as the first step in a process of elimination”.¹⁹⁶ The analysis carried out in the Review of Indictments enabled the Chamber to assert that the genocidal act described in Article 4(b) of the ICTY Statute, namely, “causing serious bodily or mental harm to members of the group”,¹⁹⁷ had been carried out also through the protected group’s deportation.¹⁹⁸

The illustrated conclusion was confirmed by the ICTY in the context of other judgments. In the *Krstić* case, upon analysing Article 4(b) of the ICTY Statute, the tribunal’s Trial Chamber established that “[...] inhuman treatment, torture, rape, sexual abuse *and deportation* are among the acts which may cause serious bodily or mental injury”.¹⁹⁹ The assertion unambiguously recognises the possibility that deportation be carried out as a means by which to harm the protected group’s members either physically or mentally, thus integrating the corresponding genocidal act.

As was mentioned in Chapter 2.3, forcible displacement alone does not constitute an example of genocide, even when it is carried out only against the members of a particular group. Rather, it is necessary that the coerced dislocation take place in such a manner as to integrate any one of the underlying genocidal acts. This condition was expressly contemplated by the ICJ in *Bosnian Genocide*, which clarified that “[...] the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement”.²⁰⁰ Notwithstanding this clarification, the ICJ did not exclude the possibility that deportation constitute a form of genocide altogether; on the contrary, it emphasised that that conduct in question may well amount to genocide if it featured all of the traits common to any one genocidal act.²⁰¹ Significantly, the example made by the ICJ in support of its statement was to the effect that the dissolution of the group may be carried out by way of the deliberate infliction on the group’s members of conditions thought to bring about the group’s extinction.²⁰² In the ICJ’s view, were this operation carried out with the requisite *dolus specialis*, it would amount to genocide.²⁰³

What one can extract from these decisions is that deportation may, under the conditions described above, integrate a specific form of genocide, particularly those proscribed in Article 6(b)

¹⁹⁶ *Ibid.*, para. 94.

¹⁹⁷ See Article 4(2)(b) of the Rome Statute.

¹⁹⁸ *Ibid.*, para. 93.

¹⁹⁹ *The Prosecutor v Krstić*, Case No. IT-98-33-T, Judgment, August 2, 2001, para. 513.

²⁰⁰ *2007 Bosnian Genocide*, para. 190.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

and (c) of the Rome Statute. By applying this principle to the displacement of the Rohingya, one may therefore ascertain whether the crime of deportation which it has been said to constitute can also integrate a specific genocidal act.

In order to carry out this assessment, it may be useful to recall the findings revealed in the IFFM's 2018 Report. According to the Mission, the context leading up to the international displacement of the Rohingya was characterised by the Tatmadaw's intentional and systematic attack of the resident population.²⁰⁴ The 2018 Report also brings attention to fact that the uprooting of the population was accompanied by the subsequent large-scale destruction or confiscation of the abandoned villages.²⁰⁵ More importantly, the "mass expulsion" of the Rohingya is described as only understandable in light of the group's State-led oppression, which took the form of hate campaigns, institutionalised marginalisation, restrictions to livelihoods, and the "[a]ctively instigated violence" undertaken against the Rohingya, with the consistent involvement of State authorities.²⁰⁶ The emphasis placed on the overarching causal link between the intentional and Government-sanctioned oppression of the Rohingya, culminating in the widespread violence against them, and the resulting mass exodus indicates that the minority's deportation was one manifestation of a wider genocidal policy directed at the eradication of the Rohingya from Myanmar.

This criminal design must then be associated with the ensuing widespread killings, abuses, mutilation and the arson of villages, the occurrence of which forced the Rohingya to flee to Bangladesh; as has been noted, these crimes were most likely committed with the aim of removing the minority, chiefly through their coerced displacement.²⁰⁷ These elements, jointly considered, constitute a credible basis upon which to assert that the deportation of the Rohingya did in fact amount to genocide, either in the form of "severe bodily or mental harm" or in that of "inflicting conditions of life calculated to bring about [the group's] physical destruction, in whole or in part".²⁰⁸ With the consequence that, the deportation having partly taken place on the territory of Bangladesh, the ICC's jurisdiction would extend even over the crime of genocide.

The Chambers invested with the Prosecutor's 2018 and 2019 Requests did not make reference to any one of these approaches. However, PTC III's Authorisation of Investigation may have implicitly proposed an additional way by which to potentially assert the ICC's jurisdiction over

²⁰⁴ IFFM 2018 Report, para. 282.

²⁰⁵ *Ibid.*, para. 289.

²⁰⁶ *Ibid.*, para. 748.

²⁰⁷ Payam Akhavan, "The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation Under the ICC Statute," *Journal of International Criminal Justice* 17, no. 2 (2019): 334, 336.

²⁰⁸ See Article 6 (b) and (c) of the Rome Statute.

genocide. The solution was touched upon by the Prosecutor in the Request on Jurisdiction, where it was contended that certain crimes encompass “their legally required result [...]”,²⁰⁹ and that to consider only the acts materially undertaken by the author without taking into account such results would ignore the meaning of conduct – as a term equivalent to “crime” – put forward in Article 12(2)(a) of the Rome Statute.²¹⁰

PTC III endorsed this assertion, stating that “[...] depending on the nature of the crime alleged, the *actus reus* element of conduct may encompass within its scope, the consequences of such conduct”.²¹¹ In applying the enounced principle to the situation under scrutiny, the Chamber observed that “[...] [i]t is alleged that the coercive acts of the perpetrators, which took place in Myanmar, have forced the Rohingya population to cross the border into Bangladesh”.²¹² It has been correctly noted that the Chamber’s interpretation of the crime’s scope as inclusive of the consequences produced by the perpetrator’s conduct has the effect of potentially expanding the ICC’s jurisdiction over the Myanmar/Bangladesh situation significantly.²¹³ If the genocidal acts *and their consequences* are both included in the meaning of genocide, then the displacement of the Rohingya – being a direct consequence of the genocidal acts perpetrated against them – also falls within the scope of the Article 6 crime. This in turn would necessarily entail the establishment of the ICC’s jurisdiction over genocide, being that that the immediate results of the actions proscribed under Article 6 of the Rome Statute – in the form of the Rohingya’s coerced migration – also manifested themselves on the territory of Bangladesh.

This conclusion has been subject to criticism.²¹⁴ It has been pointed out, for instance, that the term conduct ordinarily refers to a person’s actions and not even the results that such actions bring about.²¹⁵ It is clear that PTC III’s consideration of the crime’s consequences as a part of the crime itself rests on its understanding of “conduct” under Article 12(2)(a). As has been described, the Chamber accepts the equivalence of the term with that of “crime”; denying that a crime encompasses even the results produced by the perpetrator’s behaviour would amount to challenging the Chamber’s interpretation of the two notions.

²⁰⁹ Request on Jurisdiction, para. 46.

²¹⁰ Ibid., para. 47.

²¹¹ Authorisation of Investigation, para. 50.

²¹² Ibid., para. 52.

²¹³ Dov Jacobs, “ICC PTC Authorises Investigation in Bangladesh/Myanmar: Some Thoughts” *Spreading the Jam* (blog) November 15, 2019: <https://dovjacobs.com/2019/11/15/icc-ptc-authorises-investigation-in-bangladesh-myanmar-some-thoughts/>

²¹⁴ See Marta Bo, “Crimes Against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity” *Opinio Juris* (blog), December 23, 2019; Paul Ardis Dennis Jr, “How Much Is Enough? The ICC’s Territorial Reach over Cross-Border Crimes” *North Carolina Journal of International Law* 41 (date missing): 194-199.

²¹⁵ Jacobs, “ICC PTC Authorises Investigation in Bangladesh/Myanmar: Some Thoughts”.

Another observation that can be made is that, in arguing that the ICC's jurisdiction may depend on the location of the consequences of an allegedly criminal act, PTC III seems to depart from the three theories expressly recalled to affirm its jurisdiction over the crime of deportation. As we have seen, the Chamber retained that PTC I's recognition of the Court's jurisdiction rested either on the objective territoriality theory, or on the ubiquity principle, or even on the constitutive elements approach.²¹⁶ However, the former Chamber's argument that the conduct can encompass its consequences, and that the Court's jurisdiction can accordingly depend on the whereabouts of such consequences, seems to endorse the effects doctrine, which is a different theory altogether. According to the effects doctrine, a State has jurisdiction over a certain crime if the effects of such crime materialised on its territory, even if the perpetrator's action took place elsewhere. Applying this theory to the ICC would mean expanding the scope of its jurisdiction considerably, but it may also disregard the territorial limits set down in Article 12 of the Rome Statute. What is more, when recalling the various theories by which a State's jurisdiction over a crime can be asserted in the context of the Request on Jurisdiction, the Prosecutor expressly excluded the effects doctrine's relevance for the purposes of the Request.²¹⁷ Why PTC III then chose to rely on the substance of such doctrine to affirm the ICC's jurisdiction is unclear.

A clarification as to whether genocide has partly taken place in Bangladesh would presuppose that the Prosecutor present the ICC with a request for the authorisation of an investigation genocide, or even a request regarding the Court's jurisdiction over said crime. Whilst it is regrettable that neither have been advanced by the Prosecutor thus far, a similar course of action is not excluded in future. Considering the doubts surrounding the matter, the activation of the Court is to be hoped for.

Having examined whether the ICC may entertain criminal proceedings for deportation, and the possibility that these may extend to the alleged genocide of the Rohingya, the attention must turn to another condition for the Court to exercise its jurisdiction on the Bangladesh/Myanmar situation, namely, complementarity.

4. The Principle of Complementarity

In her Request for an Authorisation of Investigation, the ICC Prosecutor held that the Court's involvement in the Rohingya situation satisfied the admissibility test. In order to do so, the Prosecutor contended that the State of Myanmar was unwilling to prosecute those responsible for

²¹⁶ See the beginning of this Paragraph.

²¹⁷ Request on Jurisdiction, para. 31.

the criminal actions reported to have been carried out against members of the minority. Her argument revolves around the concept of complementarity, which is commonly thought to be the primary measure of a situation's admissibility.²¹⁸ The notion, and its employment by the Prosecutor, will form the object of the following subparagraph.

4.1. Myanmar's Initiatives in Light of the Principle of Complementarity

The Preamble to the Rome Statute provides that the ICC "[...] shall be complementary to national criminal jurisdictions";²¹⁹ the principle is reiterated in the same terms in Article 1. Complementarity means that the ICC can only entertain criminal proceedings where they are not instituted at the national level.²²⁰ Under Article 18, when a situation comes to the attention of the Court, the Prosecutor must notify those States that have jurisdiction over the relevant crimes before commencing an investigation.²²¹ If any one of those States informs the Court that it has investigated or is investigating the persons under its jurisdiction for the crimes forming the object of the notification, the Prosecutor, at the request of such a State, defers the situation to investigation at the national level. The Prosecutor may initiate the investigation in spite of the State's request only if authorised to do so by the assigned Pre-Trial Chamber.²²²

The competent Pre-Trial Chamber's authorisation will in turn only be granted if the case is considered admissible before the Court, in accordance with the rules laid down in Article 17 of the Rome Statute. This means that the deference of a situation to a State can only take place if the Chamber determines that the situation brought before it by the Prosecutor is inadmissible, thereby denying the authorisation of an investigation; the deference mechanism must therefore be put in relation with the admissibility test set forth in Article 17 of the Rome Statute.²²³

²¹⁸ The other two conditions for a case within the ICC's jurisdiction to be admissible before the Court are that of double jeopardy (also known as *ne bis in idem*) and that of gravity, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford [etc.]: Oxford University press, 2010, 336.

²¹⁹ Preamble to the Rome Statute.

²²⁰ Antonio Cassese, "The Rationale for International Criminal Justice" in Cassese, *The Oxford Companion to International Criminal Justice*, 129.

²²¹ Article 18(1) of the Rome Statute provides that "[w]hen a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States".

²²² Article 18(2) of the Rome Statute.

²²³ See Luis Moreno-Ocampo, "A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor" in Carsten Stahn and Mohamed M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* Vol. 1, Cambridge [etc.]: Cambridge University press, 2011.

Pursuant to this Article, a situation is inadmissible before the ICC if one of four conditions is found to be subsistent. The first is that case is already subject to investigation or prosecution at the national level, provided that the State concerned has jurisdiction over the crimes concerned and is not “[...] unwilling or unable genuinely to carry out the investigation or prosecution”.²²⁴ The second is that the State with jurisdiction over the crimes concerned has already conducted an investigation but has decided against prosecuting the suspects.²²⁵ Once again, this condition only acts as an impediment to proceedings before the Court if the State’s decision does not derive from its inability or unwillingness to prosecute.²²⁶ Thirdly, inadmissibility may stem from the fact that the suspect has already been prosecuted for the aforesaid crimes at the national level, in which case the *ne bis in idem* principle set forth in Article 20 prevents the Court from instituting proceedings against the same person for the same crimes, in order to avoid a double prosecution having the same object. This impediment does not apply in the case of sham proceedings instituted at the national level purposely to cover the accused.²²⁷ The last condition determining a situation’s inadmissibility before the Court is if the case lacks the required gravity.²²⁸

Whereas the last source of inadmissibility merely regards the seriousness of a particular case, the other three deal with the complementarity between the ICC and national jurisdictions. It is clear from these conditions that in assessing whether or not a potential case is admissible before the Court, the assigned Pre-Trial Chamber must first see whether proceedings – in the form of an investigation or a trial – have been instituted at the national level; it must then verify that the concerned State is not “unwilling or unable genuinely” to carry out the investigation or prosecution.²²⁹ If these two conditions subsist, the case will be inadmissible; if, on the contrary, national proceedings are lacking or are not accompanied by the willingness or ability to prosecute those accused of crimes within the Court’s jurisdiction, then the Chamber may consider the potential case admissible and thereby authorise the requested investigation.²³⁰

As a reading of Article 17 makes clear, the principle of complementarity revolves around the notion of a State’s “unwillingness or inability genuinely to prosecute”,²³¹ defining these terms is a

²²⁴ Article 17(1)(a) of the Rome Statute.

²²⁵ Article 17(1)(b) of the Rome Statute.

²²⁶ *Ibid.*

²²⁷ Silvana Arbia and Giovanni Bassy, “Proactive Complementarity: A Registrar’s Perspective and Plans” in Stahn and El Zeidy, *The International Criminal Court and Complementarity*, 53-54.

²²⁸ Article 17(1)(d).

²²⁹ Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 185.

²³⁰ *Ibid.*: “A case is inadmissible when two cumulative criteria are met: the case must be or have been investigated or prosecuted by a state with jurisdiction, *and* the state must not be unwilling or unable to proceed genuinely.”

²³¹ See Article 17 of the Rome Statute.

necessary step to understanding whether a similar condition subsists in the Myanmar/Bangladesh situation.

Inability subsists if “[...] due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²³² The term therefore refers to structural deficiencies in a State’s judicial system such that the criminal prosecution of the accused is rendered impossible. Unwillingness instead concerns the intention to bring a person to justice: a State is said to be “unwilling” if its conduct signals a reluctance to investigate or prosecute the suspect, as can be gathered from circumstances such as the unjustified delay of proceedings, simulated trials, or the lack of impartiality and independence.²³³

These conditions were both analysed by the Prosecutor in her Request for Investigation, in order to demonstrate that the initiatives carried out in Myanmar with regard to the prosecution of those responsible for the crimes against the Rohingya did not suffice to impede proceedings before the ICC. The assessment carried out by the Prosecutor precedes that of the competent Pre-Trial Chamber (in this case, PTC III) and is laid down in Article 53(1)(b) of the Statute, which mandates the Prosecutor to ascertain that a case is admissible before opening an investigation.²³⁴ Consistently with the preliminary stage of the criminal proceedings, the Prosecutor only studied Myanmar’s unwillingness or inability in relation to “potential cases”, which she defined as “[...] the group of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s)”.²³⁵ Similarly, the crimes for which the assessment was carried out are those *alleged* to have been committed in Myanmar, and for which the investigation was requested.²³⁶

In order to determine whether Myanmar could be considered “unwilling or unable genuinely” to carry out an investigation or prosecution in relation to the alleged crimes, the Prosecutor examined the two chief initiatives undertaken at the national level to this end.²³⁷ Both regard only the investigation of the crimes, not their subsequent prosecution. However, the Prosecutor noted that, while the mere collection of evidence does not ordinarily entail the inadmissibility of a

²³² Article 17(3) of the Rome Statute. See also Mark A. Drumbl, “Policy through Complementarity: The Atrocity Trial as Justice” Stahn and El Zeidy, *The International Criminal Court and Complementarity*, 201.

²³³ See para. 17(2) of the Rome Statute. See also Schabas, *An Introduction to the International Criminal Court*, 193.

²³⁴ Article 53(1)(b) of the Rome Statute provides that “[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] (b) The case is or would be admissible under article 17; [...]”.

²³⁵ Request for Investigation, para. 225.

²³⁶ *Ibid.*

²³⁷ *Ibid.*, para. 234.

situation before the Court, the admissibility test may take such an activity into account if it has the potential to bring about criminal prosecutions.²³⁸

The first of the initiatives contemplated by the Prosecutor is the institution of the Tatmadaw Investigation Team (from hereon in, the “Investigation Team” or the “Team”), a team set up for the purpose of investigating into the alleged wrongdoing of the Tatmadaw and other forces.²³⁹ The collected evidence indicated that the Investigation Team’s initial findings were to the effect that the Tatmadaw military had observed the laws on conflicts in the execution of the “clearance operations”;²⁴⁰ the Team denied that the military forces had shot “innocent Bengalis”, or engaged in sexual violence, destruction of property, arson and looting.²⁴¹

The Prosecutor, however, noted that this initial conclusion was then overturned; the Request for Investigation reports the institution of a new investigation team for the inquiry into the Tatmadaw’s actions but emphasises that the team was led by the same Lieutenant-General as the first, which for the Prosecutor was indicative of the underlying identity between the two teams.²⁴² Neither was the newly instituted team concerned with the conduct of those considered the most responsible for the crimes perpetrated against the Rohingya;²⁴³ rather, the Prosecutor found that the investigation carried out by the team was limited to a single incident concerning the extrajudicial killing of civilian protesters in the village of Inn Din.²⁴⁴ What is more, whereas the seven army members found guilty or the killings were sentenced to a period of forced labour, the Prosecutor found that they were then reportedly released early.²⁴⁵

The novel investigation team’s activity was deemed by the Prosecutor to be insufficient for the purpose of obstructing the situation’s admissibility before the Court. The fact that the perpetrators were either found innocent or otherwise retrieved from prosecution indicated that the inquiry into the Tatmadaw’s conduct was aimed at shielding the military forces from criminal proceedings, thus attesting to the lack of a genuine willingness to prosecute.²⁴⁶ Further, the action taken against certain members of the Tatmadaw or other security forces did not regard the object of the Request

²³⁸ Ibid., para. 233.

²³⁹ Ibid., para. 234.

²⁴⁰ Ibid., para. 239.

²⁴¹ Ibid.

²⁴² Ibid., para. 241.

²⁴³ Ibid., para. 244.

²⁴⁴ Ibid. See also para. 241-243.

²⁴⁵ Ibid, para. 243.

²⁴⁶ Ibid., para. 236.

for Investigation,²⁴⁷ which instead deals with the responsibility of senior members of the military for the alleged crimes of deportation, persecution and other inhumane acts.²⁴⁸

The second initiative considered relevant by the Prosecutor in evaluating the admissibility of the Myanmar/Bangladesh situation was the setting up of the Independent Commission of Enquiry (hereinafter, the “ICOE”), a body of commissioners charged with the investigation of the human rights violations allegedly taking place in Myanmar. Upon analysing the ICOE’s activity, the Prosecutor noted that the commission was considered a “non-judicial body”, so that the admissibility test was necessarily restricted to an evaluation of its capacity to trigger prosecutions at the national level.²⁴⁹ She, however, remarked that the ICOE’s work was not indicative of such an objective.²⁵⁰ Whilst the commission is mandated to present its findings to the President of Myanmar, the type of measures that should follow from this submission is unclear.²⁵¹ The ICOE *was* found to have taken part in meetings with both the Myanmar authorities and the Investigation Team, and to have visited the areas affected by the violence, speaking to survivors and interviewing witnesses.²⁵² The impartiality of commissioners was nonetheless questioned, being that following these activities the ICOE communicated that it had failed to find evidence that there had been any human rights violations on the part of the State’s armed forces.²⁵³

Based on this analysis, the Prosecutor concluded that “[t]he ICOE’s establishment, mandate and powers do not show that it meets the admissibility requirements under article 17(1)(a) of the Statute demonstrating that the potential cases are being investigated and prosecuted”²⁵⁴ and asserted that the commission “[...] does not lead to the inadmissibility before the Court, pursuant to the principle of complementarity, of the potential case(s) identified in this Request [...]”.²⁵⁵

The Prosecutor’s conclusion echoes that put forward by the IIFFM in its 2018 and 2019 Reports: the Mission had already contended that the ICOE was neither intended for accountability nor could it be considered “an effective independent investigations mechanism”.²⁵⁶ The mandate and procedures upon which the ICOE acted were questioned,²⁵⁷ and its dependence on the national government identified as the principal impediment to the impartiality of its investigations.²⁵⁸ The

²⁴⁷ Ibid., para. 235.

²⁴⁸ Ibid., para 224.

²⁴⁹ Ibid., para. 253.

²⁵⁰ Ibid., para. 248.

²⁵¹ Ibid., para. 251.

²⁵² Ibid., para. 255.

²⁵³ Ibid., para. 256.

²⁵⁴ Ibid., para. 247.

²⁵⁵ Ibid.

²⁵⁶ IIFFM 2019 Report, para. 231.

²⁵⁷ IIFFM 2018 Report, para. 1619.

²⁵⁸ IIFFM 2019 Report, para. 231.

ICOE's inefficacy in bringing about justice led the Mission to assert that "[t]he Government's accountability efforts are woefully inadequate".²⁵⁹

Other previous initiatives undertaken at the domestic level were also examined in the Request for Investigation. However, the Prosecutor specified that "[...] none resulted in effective investigations leading to criminal accountability".²⁶⁰ Insofar as these initiatives were replaced by the two examined above, a detailed analysis of their activity falls outside the scope of this thesis; suffice it to say that they too were found not to challenge the admissibility before the ICC of the cases potentially arising from the Myanmar/Bangladesh situation.

Domestic initiatives aside, it must be noted that the Tatmadaw enjoy a significant level of impunity within Myanmar. According to the IIFFM's findings, the State's Constitution along with other legal provisions grant immunity to the members of the military and enable the Tatmadaw to "independently adjudicate its own matters".²⁶¹ More generally, the deficiencies in Myanmar's judiciary are such that the national courts are deemed inadequate for the purposes of holding the Tatmadaw members responsible for their criminally relevant conduct.²⁶² This is also due to the Tatmadaw's presence "in all levels of government" and the influence consequently exercised over the domestic courts, which render accountability impossible.²⁶³ The Prosecutor relied on these findings to stress Myanmar's unwillingness to carry out the required investigation and prosecution, and the consequent admissibility of the cases potentially arising from the Myanmar/Bangladesh situation before the Court.²⁶⁴

The Prosecutor's evaluation was not addressed by the PTC III upon authorising the investigation into the Bangladesh/Myanmar situation. The Chamber merely recalled the principle of complementarity, underlining that it had "taken note" of the part of the Request for Investigation concerning the admissibility of the cases that could arise out of the situation.²⁶⁵ It, however, concluded that "[g]iven the open-ended nature of the Request – there are at present no specific suspects or charges – and the general nature of the available information, the Chamber sees no need to conduct a detailed analysis, as this would be largely speculative".²⁶⁶ This was also due to

²⁵⁹ Ibid., para. 230.

²⁶⁰ Request for Investigation, para. 260.

²⁶¹ IIFFM 2018 Report, para. 1621.

²⁶² Ibid.

²⁶³ Ibid., para. 1648.

²⁶⁴ Request for Investigations, para. 272.

²⁶⁵ Authorisation of Investigation, para. 115.

²⁶⁶ Ibid.8b

the lack of an existing challenge of admissibility on the part of Myanmar, which would instead have rendered a pronouncement necessary.²⁶⁷

The Chamber's determination on the admissibility of a case is, in fact, of a discretionary nature, meaning that it can choose whether to consider the issue of its own accord.²⁶⁸ The assessment is only required if a challenge to the case's admissibility is made either by a State whose acceptance of the ICC's jurisdiction is necessary, or by a State with jurisdiction over the criminally relevant facts which contends that it has taken or is taking steps for the investigation of the same crimes and prosecution of the alleged perpetrators.²⁶⁹

In deciding not to address the question of the admissibility of the potential cases, the Chamber failed to consider the lawsuit filed with an Argentinian court for the same crimes forming the object of the Authorisation of Investigation.²⁷⁰

4.2. The Proceedings Before an Argentinian Court as a Potential Challenge to the ICC's Involvement

On November 13th 2019, only one day prior to PTC III's Authorisation of Investigation, the Burmese Rohingya Organization UK (or "Brouk") filed a complaint against Myanmar's State Counsellor Aung San Suu Kyi and other senior officials with an Argentinian court for the genocide and crimes against humanity allegedly committed in Myanmar.²⁷¹

The initiative undertaken in Argentina enacts the principle of universal jurisdiction, which enables the national courts of any one State to prosecute the alleged perpetrators of the so-called "core crimes" – namely genocide, crimes against humanity, and war crimes – acting in the interest of the international community as a whole.²⁷² The international crimes for which universal jurisdiction applies are of such gravity that their prosecution can occur even by those States with

²⁶⁷ See Article 19, para. 7 of the Rome Statute: "If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17." The State referred to in the provision is either a State with jurisdiction over the case which has undertaken an investigation or prosecution, or a State which must accept the Court's jurisdiction under article 12. The ensuing determination by the Court regards the situation's admissibility.

²⁶⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 365.

²⁶⁹ Article 19(2)(b).

²⁷⁰ See Andrew Boyle, "Accountability for Crimes against the Rohingya Being Pressed on Multiple Fronts" *Just Security* (blog), November 20, 2019.

²⁷¹ Complainant Files a Criminal Complaint Of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar – Universal Jurisdiction (Certified Translation), November 13, 2019 (hereinafter, the "Complaint"). The certified translation of the complaint is available at: <https://burmacampaign.org.uk/reports/genocide-case-against-the-military-and-government-in-burma-filed-in-argentina/>

²⁷² See Cryer, *Prosecuting International Crimes*, 84-85.

which the crime bears no connection; in these cases, the traditional territoriality and nationality criteria for establishing jurisdiction are not required.²⁷³ Neither is it necessary that the suspect be present on the territory of the forum State;²⁷⁴ at least according to the broad interpretation of the notion, the trial can validly take place *in absentia*. What is instead frequently invoked as a precondition for the exercise of universal jurisdiction is subsidiarity, which enables prosecution by a foreign State only if neither the State on the territory of which the crime occurred nor that of the nationality of the accused have taken steps in a similar direction.²⁷⁵ Being that these States bear a connection with the crimes, there is a presumption that they would be better placed to bring the suspects to justice; the action undertaken by other countries can only act as a replacement in the event of their ascertained inertia.²⁷⁶

The principle of universal jurisdiction finds recognition in Section 118 of the Argentinian Constitution, which expressly contemplates domestic trials for the crimes against international law committed abroad;²⁷⁷ Brouk relied on this and other provisions of the national legislation to institute proceedings for the crimes committed in Myanmar.²⁷⁸ The organisation also contended that no action had been taken by the territorial State to prosecute the suspects, so that the Argentinian Court could legitimately be seised of the matter in conformity with the principle of subsidiarity.²⁷⁹

The lawsuit filed by Brouk may raise questions as to the legitimacy of the ICC's involvement in the Myanmar/ Bangladesh situation. It has been mentioned that the Court is complementary to national jurisdictions, meaning that its activity is premised on the absence of criminal proceedings for the same crimes by those States which have jurisdiction over them.²⁸⁰ It has also been noted that the investigation or prosecution of the case by a State with jurisdiction determines the inadmissibility of the same potential case before the ICC, unless the State in question is found to be "unwilling or unable genuinely" to entertain such criminal proceedings: complementarity is, in

²⁷³ Ibid, 84. See also Florian Jessberger, "Universal Jurisdiction" in Cassese, *The Oxford Companion to International Criminal Justice*, 556.

²⁷⁴ Jessberger, "Universal Jurisdiction", 556-557.

²⁷⁵ Fannie Lafontaine, "Universal Jurisdiction - The Realistic Utopia," *Journal of International Criminal Justice* 10, no. 5 (2012): 1286.

²⁷⁶ Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" *Journal of International Criminal Justice* 1 (2003): 593.

²⁷⁷ Section 118 of the Argentinian Constitution provides that "[t]he trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but *when committed outside the territory of the Nation against public international law*, the trial shall be held at such place as Congress may determine by a special law." (emphasis added). The full text of the Argentinian Constitution is available at: <http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf>

²⁷⁸ See Complaint, 1.

²⁷⁹ Ibid, 2-3.

²⁸⁰ See Article 17 of the Rome Statute.

this sense, the primary measure of admissibility.²⁸¹ What must be added is that complementarity also applies in relation to universal jurisdiction: on account of the seriousness of the crimes proscribed in the Rome Statute, all States are entitled to carry out their investigation and prosecution and are, in this sense, States with jurisdiction over such crimes.²⁸² This is expressly recognised in the Preamble to the Rome Statute, which provides that “[...] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.²⁸³ The universal jurisdiction over the statutory crimes entails that the activation of the national courts of a State with no territorial link over the statutory crimes may, if the State is both willing and able to prosecute, bring about the inadmissibility of the potential case concerning the same crimes before the ICC.²⁸⁴ But this is precisely what happened with the Argentinian lawsuit. PTC III’s comment that “[...] on the basis of the currently available information, there is no indication that any potential future case would be inadmissible”²⁸⁵ reveals an either conscious or unconscious decision not to consider the complaint’s implications.

It must be observed that the complaint filed by Brouk is limited to the crime of genocide and crimes against humanity which the organisation believes were entirely committed in the territory of Myanmar.²⁸⁶ The decision to restrict the lawsuit’s object derives from Brouk’s awareness of the international proceedings brought before the ICC, and its willingness not to interfere with such proceedings.²⁸⁷ The organisation acknowledged the activation of the Court for the crimes partially taking place in Bangladesh. It, however, noted that “[...] up to the present no national or international judicial jurisdiction exists for deciding with the case as regards the crimes committed in the territory of Myanmar [...]”²⁸⁸ and that this was also true for the ICC, being that Myanmar’s decision not to ratify the Rome Statute prevented the extension of the proceedings taking place before the Court to those crimes perpetrated entirely on the third State’s territory.²⁸⁹ Significantly, Brouk included genocide in this list.²⁹⁰

²⁸¹ Article 17(1)(a) of the Rome Statute.

²⁸² Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 340: “Article 17 might suggest that such States fall within the category of ‘a State which has jurisdiction’, and thereby need to be considered in any analysis for the purposes of a complementarity determination”.

²⁸³ Preamble to the Rome Statute.

²⁸⁴ *Ibid.*, para. 341. See also Bo, “Crimes Against the Rohingya”: “The principle of complementarity requires deference to national prosecutions not limited to states with links to the crimes.”

²⁸⁵ Authorisation of Investigation, para. 117.

²⁸⁶ Complaint, 1.

²⁸⁷ *Ibid.*, 9.

²⁸⁸ *Ibid.*, 2-3.

²⁸⁹ *Ibid.*, 9.

²⁹⁰ *Ibid.*: “We have already placed on record that within the scope of the International Criminal Court an investigation is indeed being processed into crimes committed within the territory of Bangladesh against the ROHINGYA who escaped to that country from persecution in Myanmar. This has constituted very important news for the victims, but

So far, the ICC's investigation into the crimes against the Rohingya does not concern genocide: as has been examined, the Prosecutor did not extend the object of the Request for Investigation to this crime, and the omission relieved PTC III from the need to address whether proceedings for genocide could, in fact, be brought before the Court. However, it has also been noticed that there are numerous ways in which the Court's jurisdiction could extend to the genocidal acts allegedly perpetrated against the Rohingya.²⁹¹ If the Prosecutor decided to request an investigation into the alleged genocide of the Rohingya relying on any one of these solutions, Brouk's activation of the Argentinian court with regard to the same crime could oblige the Court to declare the potential case inadmissible on the basis of complementarity.²⁹² In fact, the Prosecutor herself may decide against instituting proceedings for genocide, being that Article 53(1)(b) of the Rome Statute requires the Prosecutor to consider whether the case potentially arising out of an investigation would be admissible before the Court before requesting the authorisation of the investigation.²⁹³

An evaluation of the significance of the Argentinian lawsuit for the admissibility of the potential cases before the ICC should also address the issue of the personal immunity enjoyed by Heads of Government before the courts of foreign States. A detailed analysis of the matter is premature at this stage, especially considering that the proceedings before the Court do not yet concern identified individuals. It has been mentioned, however, that Brouk's complaint has been filed against certain senior officials of Myanmar, State Counsellor Aung San Suu Kyi among them. The inclusion of the State Counsellor in the list of suspects raises questions as to the genuine ability of the Argentinian court to entertain proceedings against a foreign Head of Government in office. Indeed, the action brought before the court could well be condemned to ineffectiveness, being that the personal immunity attaching to Aung San Suu Kyi would shield her from prosecution before the domestic courts of foreign States regardless of the kind of actions for which the State Counsellor is accused. The immunity in question would shelter the senior state official even with respect to international crimes.²⁹⁴

This principle was clearly enounced by the ICJ in *Arrest Warrant* where, in holding that the Belgian arrest warrant issued against the Democratic Republic of Congo's Foreign Minister Yerodia infringed the customary international law on personal immunity, the Court clarified that "[...] although various international conventions or the prevention and punishment of certain

given that Myanmar hasn't ratified the Rome Statute, this case does not include the crimes committed in the territory of Myanmar, among others that of GENOCIDE."

²⁹¹ See *supra*, Chapter 3.3.

²⁹² See Bo, "Crimes Against the Rohingya".

²⁹³ See Article 53(1)(b) of the Rome Statute.

²⁹⁴ Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford [etc.]: Oxford University press, 2008, 218.

serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs” and that “[t]hese remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions”.²⁹⁵ By the ICJ’s own admission, Heads of Government also benefit from the same exemption.²⁹⁶

Were the Argentinian court to acknowledge the suspect’s personal immunity, the criminal proceedings would per force be stalled; it is to be imagined that the obstacle to trial that this would determine would amount to a “genuine inability to prosecute” in the terms described in Article 17. If this were the case, the ICC’s action – at least with regards to the State Counsellor – would be left unhindered.

It is probably too early to say whether the ICC will consider the complaint filed by Brouk a challenge to the admissibility of the future cases potentially arising from the Myanmar/Bangladesh situation before the Court itself, if only because the lawsuit has not yet been addressed by the Argentinian court. It has been correctly pointed out that any assessment of this sort will revolve around the complementarity mechanism, and the unwillingness or inability to genuinely prosecute set forth therein.²⁹⁷ If neither subsist, the ICC may be obliged to declare the potential cases’ inadmissibility and defer to proceedings in Argentina.

Concluding Remarks

This Chapter has examined the grounds for the ICC’s jurisdiction over the crime of deportation, as indicated in the Prosecutor’s Request for Jurisdiction and the Pre-Trial Chambers’ 2018 and 2019 Decisions. It has been noted that such jurisdiction derives the crime’s cross-boundary nature and the fact that it was partially committed on the territory of a State party to the Rome Statute. The Chambers’ reasoning largely hinged on its interpretation of the term “conduct” relevant for the establishment of proceedings, as being synonymous with “crime”, and therefore inclusive of the both the criminal actions and their legally mandated results. This reasoning was analysed as one of various ways by which the ICC’s jurisdiction could be extended to the crime of genocide allegedly perpetrated against the Rohingya, the others being the maintenance of refugees under the

²⁹⁵ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, para. 59.

²⁹⁶ Ibid, para. 51.

²⁹⁷ Bo, “Crimes Against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity”.

dire conditions of the Bangladeshi camps, and the configuration of deportation as a possible genocidal act. The concluding Paragraph instead addressed the issue of complementarity, and the extent to which the initiatives undertaken in Myanmar, and the lawsuit filed with an Argentinian court, can challenge the admissibility of potential future cases before the ICC. It has been observed that this largely depends on whether these States can be considered willing and able to investigate and prosecute those implicated in the statutory crimes, the which seems not to be the case insofar as Myanmar is concerned; the proceedings in Argentina, on the other hand, may challenge the ICC's jurisdiction if the Prosecutor decided to extend the proceedings before the Court to the crime of genocide perpetrated against the minority.

Having examined the basis for the ICC's involvement in the Myanmar/Bangladesh situation, premised on the possible subsistence of forms of individual criminal responsibility for the statutory crimes committed against the Rohingya, the analysis will now turn to consider the proceedings instituted by the Gambia before the International Court of Justice against the State of Myanmar, and the possibility that the same crimes have also given rise to the State's responsibility for genocide.

Chapter IV: The Issue of Myanmar's Responsibility for Genocide

On November 11, 2019, The Gambia lodged an application with the ICJ to the effect that Myanmar had infringed its obligations under the Genocide Convention.¹ Two months later the Court issued a provisional measures order mandating Myanmar to take steps aimed at inhibiting the furtherance of the alleged genocidal acts.² While the interim order has not yet ascertained a breach of the Genocide Convention on the part of Myanmar,³ its significance lies in the fact that it recognised the *prima facie* subsistence of the Rohingya's right under the Convention to be protected from the perpetration of genocide, and of the serious risk posed to such rights by the events occurring in Myanmar.⁴ It also affirmed The Gambia's standing to bring international proceedings against Myanmar albeit not being directly affected by the alleged breach of the Genocide Convention, on account of the *erga omnes* nature of the obligations concerned.⁵

The Gambia's lawsuit can be explained by the fact that the Genocide Convention is not merely concerned with the criminal liability of individuals; it also creates a series of obligations for States. The *erga omnes* nature of these obligations, and the importance of the values that they seek to protect, are such that they bind the parties towards all the States of the international community, regardless of whether or not these are also parties to the Convention.⁶ The same nature also entails that if the obligations are breached, the State responsible for the circumvention will suffer a series of consequences in addition to those ordinarily deriving from the commission of an internationally wrongful act.

Not only did The Gambia assert that Myanmar had fallen short of such *erga omnes* obligations; the applicant State also contended that Myanmar had *committed* genocide. The allegation raises the question whether a State, as an abstract entity, can commit genocide, and of the requirements needed in order to prove the State's special intent. This Chapter seeks to address these issues. The

¹ Application Instituting Proceedings and Request for Provisional Measures (Republic of the Gambia v. Republic of the Union of Myanmar) International Court of Justice, November 11, 2019 ("The Gambia Application"). See also Priya Pillai, "The Gambia v Myanmar at the International Court of Justice: Points of Interest in the Application." *Opinio Juris* (blog), November 13, 2019; Priya Pillai, "Three Complementary Legal Strategies for Accountability: A Momentous Week for the Rohingya" *Opinio Juris* (blog), November 19, 2019.

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Provisional Measures, Order of 23 January 2020 ("2020 Provisional Measures Order").

³ Marko Milanovic, "ICJ Indicates Provisional Measures in the Myanmar Genocide Case" *EJIL: Talk!* (blog) January 23, 2020.

⁴ Lorenzo Acconciamezza and Francesca Sironi de Gregorio, "Genocidio dei Rohingya? Sulle Misure Cautelari della Corte Internazionale di Giustizia nel Caso Gambia c. Myanmar" *Sidiblog* (blog) February 13, 2020.

⁵ Priya Pillai, "ICJ Order on Provisional Measures: The Gambia v Myanmar," *Opinio Juris* (blog), January 24, 2020; Shannon Raj Singh, "Standing on 'Shared Values': The ICJ's Myanmar Decision and its Implications for Atrocity Prevention" *Opinio Juris* (blog) January 29, 2020.

⁶ Marco Longobardo, "Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence" *International Journal of Human Rights* 19, no. 8 (2015): 1201.

analysis provides a backdrop for the illustration of The Gambia's Application; the prospective significance of the ICJ's Provisional Measures Order is also weighed against this normative framework.

1. Requirements for the Subsistence of State Responsibility

The international law on State responsibility is set down in the International Law Commission's (the "ILC") 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter, "Draft Articles").⁷ Article 1 of the Draft Articles provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."⁸ Article 2 specifies that an internationally wrongful act requires an action or omission constituting a breach of an obligation binding on the State, and that the conduct in question is attributable to the State.⁹ State responsibility therefore presupposes the existence of both an objective element, consisting of the infringement of an international duty, and a subjective element, in the form of the attribution of that infringement to the State;¹⁰ if both are present, the State can be said to have contravened international law.¹¹

With regards to the objective element, what is of concern for the purpose of establishing State responsibility is that the conduct attributed to that State infringes international law. On the other hand, whether or not that act is in conformity with the domestic law of the implicated State is entirely irrelevant, being that a State cannot invoke its own laws to circumvent the obligations imposed on it at the international level.¹² The principle was first formulated by the PCIJ in *Polish Nationals*¹³ and is now set down in unequivocal terms in Article 3 of the Draft Articles, which

⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries in Report of the International Law Commission on the Work of its Fifty-third Session (23 April – 1 June and 2 July – 10 August 2001), GA Res. 56/83 (annex), U.N. GAOR, 56th sess., suppl. No. 10, U.N. Doc. A/56/10 (12 December 2001) ("Draft Articles"). There is copious doctrinal material on State responsibility, but see, among others, James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility*, Oxford [etc.]: Oxford University Press, 2010; Robert Kolb, *The International Law of State Responsibility: An Introduction*, Northampton MA; Cheltenham, UK.

⁸ *Ibid.*, Article 1.

⁹ *Ibid.*, Article 2.

¹⁰ Natalino Ronzitti, *Introduzione al Diritto Internazionale*, 4th ed. Turin: Giappichelli editore, 2013, 379; Antonio Cassese, *International Law*, 2nd ed, Oxford: Oxford University press, 2005, 245-246.

¹¹ Draft Articles, Article 12: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

¹² See the ILC commentary on Article 3 of the Draft Articles.

¹³ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), para. 62: "It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

provides that an act can only qualify as internationally wrongful in accordance with the provisions laid down under international law and that “[s]uch characterization is not affected by the characterization of the same act as lawful by internal law”.¹⁴

The international obligation breached by the State may either be treaty-based, or it may derive from customary international law; it may also be a result of the State’s unilateral acts.¹⁵ The irrelevance of the obligation’s provenance is made clear by Article 12’s stipulation that the State incurs in international responsibility whenever its conduct deviates from an international obligation “*regardless of its origin or character*”.¹⁶ As will become apparent when analysing the duties laid down in the Genocide Convention, international obligations may vary in nature; whereas some are of a bilateral or multilateral character, thus binding the State towards one or even a definite set of States, other international obligations bind States towards the international community as a whole. The breach of the latter obligations brings about additional consequences specific to their nature.¹⁷

A further condition laid down in the Draft Articles is that the obligation is in force for the State at the time of the conduct.¹⁸ This entails, for instance, that an international provision may not be applied retroactively to an act of State for the purpose of alleging the State’s international responsibility.¹⁹

Turning to the analysis of the subjective element, the Draft Articles set out a series of conditions for a given conduct to be imputed to the State. The reason for this is that, whilst the State is a subject of international law, it is also an abstract legal person, meaning that it can only act through the interposition of individuals or groups.²⁰ For the individual conduct to be ascribed to the State, it is necessary that the person or persons who physically performed it enjoy a qualified connection with the State.²¹

Pursuant to Article 4, the acts carried out by a State organ are always considered acts of the State under international law, regardless of the specific functions exercised by the organ and the position covered within the organisation of the State.²² Whether or not an individual is an organ is

¹⁴ Article 3 of the Draft Articles.

¹⁵ Commentary to Article 12 of the Draft Articles, at para 3.

¹⁶ Article 12 of the Draft Articles (emphasis added).

¹⁷ See para. 6 of the commentary to Article 12 of the Draft Articles.

¹⁸ Article 13 of the Draft Articles.

¹⁹ See commentary to Article 13 of the Draft Articles.

²⁰ Commentary to Article 2 of the Draft Articles, at para. 5.

²¹ International Law Commission, “Attribution of Conduct to State”, page 38 of the Draft Articles.

²² Draft Articles, Article 4. See also James Crawford, *State Responsibility: The General Part*, Cambridge [etc.]: Cambridge University press, 117.

determined at the domestic level.²³ It will therefore be necessary to verify that the person committing the breach is a State official according to the domestic legal system of that State, although it is irrelevant whether the individual is an organ of the central government or of a territorial unit.²⁴ The executive, legislature and judiciary, for instance, will usually be considered State organs at the national level,²⁵ as will other internal ramifications of government.²⁶ However, the ILC has clarified that even in those cases where a person is not defined an organ by the State's internal law, the qualification may nonetheless be recognised for international purposes in light of the circumstances of each particular case. The extension of attributability on factual grounds combats the elusive conduct of those States which seek to avoid international responsibility by denying the author of the internationally wrongful act the status of State organ at the domestic level.²⁷

The conduct of an organ of State is attributed to the State “[...] even if it exceeds its authority or contravenes instructions”, provided that the organ acted in his or her official capacity.²⁸ This is because the *ultra vires* conduct is nonetheless formally carried out in the State's name,²⁹ the consequence being that “the State incurs in responsibility even when its organ acted outside his competence.”³⁰ It may be interesting to note that the example made in the ILC's commentary to Article 7 regards the conduct of the armed forces during conflicts; the Commission makes clear that the actions carried out by members of the military implicates the State even when they are performed “contrary to orders or instructions”.³¹ With reference to the Rohingya case, this would mean that even if it were proved that the Tatmadaw acted in contravention of State orders, their unlawful actions would nonetheless be ascribed to Myanmar, with all that this would entail in terms of the State's international responsibility.

Article 5 provides that the conduct of a person or entity that is not a State organ may nevertheless be imputed to the State if it is carried out in the exercise of governmental authority. The Article refers to those “parastatal entities”, such as public companies or agencies or even privatised corporations,³² which have received authorisation by the State to exercise “certain

²³ Article 4(2) of the Draft Articles.

²⁴ Cassese, *International Law*, 246. See also the commentary to Article 4 of the Draft Articles, at para. 6.

²⁵ See Crawford, *State Responsibility: The General Part*, 119-121.

²⁶ *Ibid*, 123-124.

²⁷ Para. 11 of the commentary to Article 4 of the Draft Articles.

²⁸ Draft Articles, Article 7. On the possible meanings of official capacity, see Kolb, *The International Law of State Responsibility: An Introduction*, 86.

²⁹ Commentary to Article 4 of the Draft Articles, para. 13.

³⁰ Cassese, *International Law*, 246. See also Benedetto Conforti *Diritto Internazionale*, 10th ed. Naples: Editoriale scientifica, 2014, 394.

³¹ Commentary to Article 7 of the Draft Articles, para. 4-5.

³² Commentary to Article 5 of the Draft Articles, para. 2.

elements of governmental authority” usually reserved to the State’s official organs.³³ If the conduct is carried out by the persons or entities in the exercise of the authority with which they have been entrusted, the act will be imputed to the State; this clearly includes those cases where the conduct is in contravention of international obligations binding on the concerned State. As with State organs, the act of the parastatal entity is considered an act of State even if it oversteps the limits of the bestowed authority or otherwise disregards the associated directives, and even if the State then disowns the conduct.³⁴

Persons who are not organs of the State can nonetheless be considered State organs for the purposes of attribution if they find themselves under the State’s direction or control, or act according to State instructions when executing the relevant conduct.³⁵ In the *Nicaragua* judgment, the ICJ dealt with the question whether the violations of international humanitarian law carried out by the *contras* could be considered actions of the United States for the purpose of ascertaining the latter’s international responsibility.³⁶ The Court established that control must be exercised over every single act of the individual for the corresponding responsibility to be imputed to the State,³⁷ it being insufficient that the State exercise control only over the general operation. The “effective control” criterion was reiterated by the Court in *Bosnian Genocide*,³⁸ with the consequent dismissal of the ICTY’s theory that the conduct of a group of individuals over whom the State exercised an overall control would engage the responsibility of the State for the group’s actions regardless of “whether or not each of them was specifically imposed, requested or directed by the State”.³⁹

The volitional element is usually not required for the purposes of State responsibility; as a general rule, a State answers for the wrongful conduct of its organs regardless of whether or not it was carried out with the intention to contravene international law, or otherwise resulted from the organs’ negligence.⁴⁰ This is not the case, however, if the primary obligation binding on the State

³³ *Ibid.*, para. 5.

³⁴ Article 7 of the Draft Articles.

³⁵ Draft Articles, Article 8; Ronzitti, *Introduzione al Diritto Internazionale*, 379-381. See also Pietro Pustorino, “The Control Criterion between Responsibility of States and Responsibility of International Organizations” in Roberto Virzo and Ivan Ingravallo, *Evolutions in the Law of International Organizations*, Brill | Nijhoff: Leiden; Boston, 2015, 407.

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 14 (*Nicaragua Case*).

³⁷ *Nicaragua Case*, para. 108-109, 115.

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 406 (2007 *Bosnian Genocide*): “This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed.”

³⁹ *The Prosecutor v Tadic*, Case No.: IT-94-1-A, Judgment, July 15, 1999, para. 122.

⁴⁰ *Conforti Diritto Internazionale*, 406-7.

presupposes a degree of culpability for its contravention to take place.⁴¹ The distinction is contemplated in the commentary to the Draft Articles, where the ILC makes clear that “[w]hether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question”.⁴² Where the norm containing the international obligation sets down a certain level of diligence, or proscribes conduct that is carried out with intent or fault, the organ’s volition becomes central to said norm’s contravention by the State.⁴³ It is noteworthy that the ILC should have chosen to illustrate the point by referring to Article 2 of the Genocide Convention;⁴⁴ the provision’s description of genocide as “any of the following acts committed with *intent* to destroy [...]”⁴⁵ makes it a clear example of a norm for the breach of which culpability is required.⁴⁶ As will become apparent further on in this Chapter, the International Court of Justice’s assessment of a State’s responsibility for genocide revolves around the verification of the subsistence of the intent to destroy a protected group on the part of its organs.⁴⁷

The subsistence of both the objective and the subjective elements is not in itself sufficient for the purpose of determining the State’s international responsibility. An assessment of this sort must also take into consideration whether there are any circumstances precluding wrongfulness.⁴⁸ The Draft Articles on State responsibility lay down six situations subsisting which conduct attributed

⁴¹ Ronzitti, *Introduzione al Diritto Internazionale*, 382; Riccardo Pisillo-Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States,” *German Yearbook of International Law* 35 (1992): 19. See also Marko Milanović, “State Responsibility for Genocide,” *European Journal of International Law* 17, no. 3 (2006): 568.

⁴² Paragraph (3) of the commentary to Article 2 of the Draft Articles.

⁴³ Beatrice Bonafé, *The Relationship Between State and Individual Responsibility for International Crimes*, Leiden; Boston: Martinus Nijhoff Publishers, 2009, 121: “[...] attribution of a wrongful act to the state means both attribution of prohibited conduct under international law carried out by a state organ, and attribution of the intent of the state organ. If no intent of the organ can be proved, attribution of the prohibited conduct alone would not be sufficient to entail state responsibility. Thus, state fault corresponds to the *mens rea* of the state organ.”

⁴⁴ Paragraph (3) of the commentary to Article 2 of the Draft Articles.

⁴⁵ Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (“Genocide Convention”).

⁴⁶ Anja Seibert-Fohr, “State Responsibility for Genocide under the Genocide Convention” in Paola Gaeta, *The UN Genocide Convention: A Commentary*, Oxford [etc.]: Oxford University press, 2009, 367: “[t]hrough human rights violations usually do not require a specific mental element, the case is different indeed with genocide. The intent to destroy [...] is part of the primary norm and by virtue thereof becomes relevant for the determination of state responsibility”. See also Brigitte Stern, “The Elements of an Internationally Wrongful Act” in Crawford, Pellet and Olleson, *The Law of International Responsibility*, 210: “[...] it cannot be ignored that international law does not completely eliminate an analysis of the intentions of a State as being relevant to the determination of a breach of international law in all domains. First, it may be noted that intention may sometimes be a constituent element of a breach of international law. Thus, massive and systematic attacks against the civilian population only constitute genocide if they are accompanied by the intention to destroy in whole or in part a national, ethnic, racial or religious group, as such.”

⁴⁷ See Paragraph 3.3.3. of this Chapter.

⁴⁸ See Jana Maftai, “Reflections on the International Responsibility of States for Wrongful Acts.” *Act Universitatis Danubius: Relationes Internationales* 8, no. 1 (2015): 46-50.

to the State that would ordinarily be unlawful is instead rendered compatible with international law.⁴⁹

The first of such circumstances is the consent of the State or States in favour of which that particular international obligation was introduced. For the consent to exclude wrongfulness, it must be valid, meaning that it must be granted by persons empowered by the State to do so and must not be coerced.⁵⁰ The ensuing State conduct must then be exercised within the limits of the expressed consent.⁵¹ If the obligation binds the State towards a plurality of States, the consent given by one of the beneficiaries does not do away with the unlawfulness of the breach in the relations with all the others. This means that for a multilateral obligation to be lawfully disregarded, it is necessary that the State implicated by the circumvention have previously or concomitantly obtained the consent of all the States in favour of which the obligation is laid down.

Another possibility subsisting which the State's conduct loses its otherwise wrongful character is if the State acts in self-defence in accordance the conditions set forth in the UN Charter.⁵² The provision must be read in conjunction with Article 51 of the Charter, according to which may respond to an armed attack in the exercise of their right to self-defence.⁵³ The scope of the provision is limited to those situations where the State is imperilled by an armed attack; the situation of danger enables the State to resort to the threat or use of force and therefore constitutes an exception to the proscription of force laid down in Article 2 paragraph 4 of the UN Charter.⁵⁴ However, the action undertaken in self-defence does not authorise the State to circumvent international humanitarian law in the event of an ensuing armed conflict;⁵⁵ non-derogable human rights norms must also be complied with.⁵⁶

Thirdly, wrongfulness is precluded if the act is carried out as a countermeasure to the internationally wrongful act of another State.⁵⁷ States injured by the international wrongdoing of others can react with measures which would be unlawful under ordinary circumstances but that

⁴⁹ International Law Commission, "Circumstances Precluding Wrongfulness", in Draft Articles, 71.

⁵⁰ See para. 4-5 of the commentary to Article 20 of the Draft Articles.

⁵¹ Para. 1 of the commentary to Article 20 of the Draft Articles.

⁵² Article 21 of the Draft Articles.

⁵³ Article 51 of the UN Charter, June 26, 1945, 1 UNTS XVI (entered into force October 24, 1945) ("UN Charter") provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

⁵⁴ Commentary to Article 21 of the Draft Articles, para. 1.

⁵⁵ *Ibid.*, para. 3.

⁵⁶ *Ibid.*

⁵⁷ Article 22 of the Draft Articles.

are justified by the wrongful action previously undertaken against them.⁵⁸ Being that the counteraction is taken in response to the conduct of another State, the deviance from the international obligation ordinarily binding on the injured State can only take place in relation to the offender.⁵⁹ Other conditions require the countermeasure to be commensurate with the provocation, transitory and reversible.

If the State's digression from an obligation is brought about by an unpredictable event over which the State has no control or any other "occurrence of an irresistible force", the unlawfulness of the divergent conduct is done away with, provided that the performance of the obligation in question is made impossible under the circumstances.⁶⁰ The situation described in Article 23 is that of *force majeure*, and includes both natural phenomena, such as earthquakes or draughts, and those events originating from human action (for instance, military destruction and insurrections).⁶¹ The preclusion of wrongfulness is contingent on the coerced nature of the non-compliant conduct resulting from the ungovernable situation, and only operates if the State neither contributed to the situation's formation nor accepted the possibility of its occurrence.⁶²

Under Article 24, an international obligation can be lawfully disregarded in the presence of a situation of distress, such that the State agent's conduct constituted the only reasonable means by which to bring the author or other persons in his or her care to safety.⁶³ The element distinguishing distress from *force majeure* is that in the former case, the author's conduct is voluntary, albeit constrained by the situation in which it is undertaken.⁶⁴ Distress cannot be invoked if the situation is triggered or otherwise facilitated by the conduct of the unobservant State; neither can it serve to justify those actions expected to "[...] create a comparable or greater peril".⁶⁵

The last circumstance precluding wrongfulness is necessity, which can only be relied upon to disregard an international obligation if the conduct imputable to the State was the only option available for the protection of an "essential interest" from a "grave and imminent peril", and did not in turn seriously compromise an "essential interest" of the States benefitting from the obligation or of the wider international community.⁶⁶ The interest underlying the deviant conduct may either be strictly national, or it may be upheld by the international community as a whole.⁶⁷

⁵⁸ Commentary to Article 22 of the Draft Articles, para. 1.

⁵⁹ *Ibid.*, para. 5.

⁶⁰ Article 23 of the Draft Articles.

⁶¹ Para. 3 of the commentary to Article 23 of the Draft Articles.

⁶² Article 23 of the Draft Articles.

⁶³ Article 24 of the Draft Articles.

⁶⁴ Commentary to Article 24 of the Draft Articles.

⁶⁵ Article 24 of the Draft Articles.

⁶⁶ Article 25 of the Draft Articles.

⁶⁷ Para. 2 of the commentary to Article 25 of the Draft Articles.

The provision set forth in Article 25 only applies to those international obligations for which it is not expressly excluded, and may not be invoked if the situation of necessity was brought on by the State's own conduct.⁶⁸

None of these circumstances can preclude the wrongfulness of an act which infringes a peremptory norm of international law. Pursuant to Article 53 of the Vienna Convention on the Law of Treaties (or "VCLT"), a peremptory or jus cogens norm is "[...] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".⁶⁹ The importance of the values enshrined in peremptory international norms is such that the exemption which would normally attach to the exceptional situations illustrated in Articles 20 to 25 of the Draft Articles is nullified in relation to conduct undertaken in breach of such provisions.⁷⁰ Significantly, the example of peremptory norm put forward by the ILC is that of the prohibition of genocide, crimes against humanity and other international crimes.⁷¹ This means that a State cannot rely on any one of the circumstances precluding wrongfulness to exonerate itself from responsibility for genocide or other international crimes.⁷² Applied to the Rohingya case, the provision set forth in Article 26 has important implications, as it inhibits any attempt by Myanmar to describe the crimes perpetrated by its agents as conduct rendered lawful by the context in which it was carried out.

Absent these justificatory grounds, the subsistence of both the objective and subjective elements entails the State's responsibility for the internationally wrongful act, with the correlated obligation to desist from the conduct and provide reparation of the injury.⁷³ The consequences of the ascertained breach will be analysed in the following subparagraph.

2. Consequences of the International Wrongdoing

In the *Chorzow Factory* case, the PCIJ enounced the principle whereby "[...] the breach of an engagement involves an obligation to make reparation in an adequate form."⁷⁴ The principle is

⁶⁸ Article 25 of the Draft Articles.

⁶⁹ Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 33 ("VCLT"). See also Schmalenbach, "Article 53" in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed., Berlin, Heidelberg: Springer, 2018, 978.

⁷⁰ See the commentary to Article 26 of the Draft Articles.

⁷¹ *Ibid*, para. 5.

⁷² *Ibid*, para. 4.

⁷³ Article 34 of the Draft Articles.

⁷⁴ *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), 21 ("*Chorzow Factory*"). The case concerned a lawsuit filed by Germany against Poland for the damage caused to two German companies by the Polish appropriation of the nitrate factory in Chorzow in contravention of the provisions of the Convention Concerning

often explained by distinguishing between primary and secondary obligations: the contravention of the former gives rise to one or more secondary obligations which the wrongdoer must comply with in order to neutralise the consequences of its unlawful conduct.⁷⁵ In this sense, the reparation owed to the injured State, and that State's corresponding claim to reparation, can be described as two facets of a new legal relationship stemming from the breach of an international obligation.⁷⁶ The Draft Articles accordingly speak of "legal consequences" of the wrongful act.⁷⁷ As the ILC made clear, the new relation arising from the breach "[...] does not mean that the pre-existing legal relation established by the primary obligation disappears":⁷⁸ the secondary obligations, or legal consequences, exist alongside the responsible State's "continued duty" to implement the disregarded international norm and do not replace the State's obligation to align itself with international law.⁷⁹ Compliance with the international norm therefore remains an autonomous duty of the offender toward the claimant State (or States).

The two key obligations arising from the contravention are the cessation of the unlawful conduct and the reparation of the resulting injury.⁸⁰ The requirement that the responsible State put an end to the wrongful act is set forth in Article 30 of the Draft Articles, which specifies that the obligation only applies "if [the act] is continuing".⁸¹ On the other hand, the obligation is not contingent on a request by the injured State; rather, it flows directly from international law, and the overarching interest for the restoration of the legal order.⁸²

Article 30 also provides for the correlated obligation of the responsible State to make assurances of non-repetition. Unlike the termination of unlawful conduct, guarantees of non-repetition are only needed "if the circumstances so require", and are therefore of an exceptional nature.⁸³ The need for such guarantees depends on whether there is a real risk that the State replicate the wrongful act in future.⁸⁴

Upper Silesia concluded between the two States. For a more detailed description of the case, see *Chorzow Factory*, 9-10.

⁷⁵ See James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," *The American Journal of International Law* 96, No. 4 (2002): 876.

⁷⁶ Benedetto Conforti *Diritto Internazionale*, 10th ed. Naples: Editoriale scientifica, 2014, 411. See also International Law Commission, "Content of the International Responsibility of a State", page 86 of the Draft Articles.

⁷⁷ See Article 28 of the Draft Articles.

⁷⁸ Para. 2 of the commentary to Article 29 of the Draft Articles.

⁷⁹ *Ibid.*, Article 29.

⁸⁰ Para. 2 of the commentary to Article 28 of the Draft Articles.

⁸¹ Article 30 of the Draft Articles. A breach of a continuing nature is defined in Article 14(2) of the Draft Articles as a breach that "[...] extends over the entire period during which the act continues and remains not in conformity with the international obligation."

⁸² Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," *The American Journal of International Law* 96, no. 4 (2002): 839-840.

⁸³ Crawford, *State Responsibility: The General Part*, 469.

⁸⁴ Ronzitti, *Introduzione al Diritto Internazionale*, 391.

The other central obligation emerging from the breach of an international provision is that of making reparation for the damage caused by the wrongful act.⁸⁵ In *Chorzow Factory*, the PCIJ specified that the duty to make reparation aims at eliminating the illegal consequences of the wrongful act and recreating the situation which would probably have materialised had the breach not taken place.⁸⁶ Pursuant to Article 31 of the Draft Articles, the injury for which reparation must take place encompasses both moral and material damage. Though the material damage may serve to quantify the reparation owed by the offender, its subsistence is not a precondition for the duty to make reparation.⁸⁷ The injury referred to in Article 31 is therefore essentially of a legal nature, and describes those rights upheld in the international provision that have been violated as a result of the wrongful conduct.⁸⁸ The injury must have been *caused* by the unlawful conduct, meaning that it must constitute the conduct's direct result; the causal link represents an essential condition underpinning the duty to make reparation.⁸⁹

Article 34 sets out three possible forms of reparation. These are restitution, compensation and satisfaction, and can be carried out "either singly or in combination".⁹⁰ The performance of some or all of these forms of reparation conjointly may be necessary under the circumstances in order to eliminate all of the breach's consequences.⁹¹

The first form of reparation is restitution, which is described in Article 35 as the obligation "[...] to re-establish the situation which existed before the wrongful act was committed [...]."⁹² The content of this remedial obligation will vary depending on the character of the provision breached by the responsible State: examples include "[...] return of territory, persons, or property, or the reversal of some juridical act, or some combination of them."⁹³ Juridical restitution takes account of those situations where certain provisions in force within the State, or its legal system globally considered, contravene one or more rules of international law; the removal of such

⁸⁵ See Article 31 of the Draft Articles.

⁸⁶ *Chorzow Factory*, para. 125: "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

⁸⁷ Commentary to Article 31 of the Draft Articles, para. 7.

⁸⁸ Para. 8 of the commentary to Article 31 of the Draft Article therefore clarifies that "article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case."

⁸⁹ *Ibid*, para. 9.

⁹⁰ Article 34 of the Draft Articles.

⁹¹ Para. 2 of the commentary to Article 24 of the Draft Articles.

⁹² Article 35 of the Draft Articles.

⁹³ Para. 5 of the commentary to Article 35 of the Draft Articles.

provisions will therefore be necessary in order to end the transgression.⁹⁴ The remedial obligation takes precedence over the other forms of reparation, with the consequence that monetary compensation can only intervene in substitution of restitution where the latter is rendered impracticable or disproportionate under the given circumstances.⁹⁵ Restitution is in fact only viable if the reestablishment of the *status quo ante* is “not materially impossible” and does not place on the responsible State a burden disproportionately higher than the benefit it would bring about.⁹⁶

If these conditions are not met, or if the restitution alone is insufficient for the purpose of eliminating the damage caused by the breach, the responsible State will have to repair the existing damage by resorting to compensation.⁹⁷ However, redress is only possible in relation to the “financially assessable” damage suffered by the injured State or its nationals, meaning that it cannot be relied upon to repair harm that is of a merely moral nature. This is because compensation usually takes the form of a monetary payment; it can therefore only address those losses that can be estimated in numbers.⁹⁸

Non-material damage is instead repaired by way of satisfaction. The remedy’s residual character is made clear by Article 37’s provision that a State can only resort to satisfaction if the injury cannot be restored by way of restitution or compensation.⁹⁹ The obligation may be carried out by way “[...] an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”, although the list is non-exhaustive.¹⁰⁰ The possible forms of satisfaction reveal its moral or even symbolic importance, which explains why this obligation will subsist even in those cases where the absence of any material damage renders the other forms of reparation unnecessary.¹⁰¹ Article 37 specifies that satisfaction must be proportionate to the degree of injury caused by the wrongful act, and cannot take place in a manner humiliating to the implicated State.¹⁰²

Cessation of the breach and reparation will normally be directed at the injured State.¹⁰³ The relationship arising from the breach is generally bilateral, meaning that the responsible State needs to fulfil the secondary obligations solely for the benefit of the injured State, and that only this State is entitled to ‘react’ to the breach. By the same token, the breach of a multilateral obligation will

⁹⁴ Ibid.

⁹⁵ See para. 3 of the commentary to Article 35 of the Draft Articles. See also *Chorzow Factory*, 10, 28

⁹⁶ Article 35 of the Draft Articles.

⁹⁷ See para. 1 of the commentary to Article 36 of the Draft Articles.

⁹⁸ Ibid, para. 4-5.

⁹⁹ Article 37 of the Draft Articles. See also Shelton, “Righting Wrongs,” 848.

¹⁰⁰ Article 37 (2) of the Draft Articles.

¹⁰¹ See para. 3 of the commentary to Article 37 of the Draft Articles.

¹⁰² Article 37(3) of the Draft Articles.

¹⁰³ Ronzitti, *Introduzione al Diritto Internazionale*, 377, 390-1, 397.

only generate the wrongdoer's responsibility towards the States that are parties to the infringed treaty. This rule suffers an important exception when the obligation infringed by the State derives from an *erga omnes* rule of international law; the values upheld in such norms is such that they bind States toward the international community as a whole, and the effects of their breach involve even those States that are not directly injured by the wrongdoing. The Genocide Convention's provisions are said to set forth precisely these kinds of obligations; an adequate understanding of the international proceedings instituted against Myanmar therefore mandates their analysis.

3. State Responsibility for Genocide

As has been mentioned, The Gambia's application revolved around the allegation that Myanmar had contravened the obligations laid down in the Genocide Convention. The two obligations expressly imposed on States by the Convention's provisions regard the prevention and repression of genocide, both of which are of *erga omnes* standing; as will become clear in the following subparagraphs, their peculiar nature entails that their breach brings about a series of consequences beyond those ordinarily stemming from an internationally wrongful act. The additional obligation not to commit genocide is also enshrined in the Convention, as it has been found to derive, albeit implicitly, from the duty to prevent genocide;¹⁰⁴ said proscription is considered to be peremptory in nature.¹⁰⁵ The Genocide Convention's provisions, and the effects stemming from their contravention, should therefore be analysed separately from the norms regulating the ordinary regime of State responsibility.

3.1. The *Erga Omnes* Nature of the Obligations Regarding Genocide

Article 1 of the Genocide Convention requires that States "[...] undertake to prevent and to punish" genocide.¹⁰⁶ The provision imposes two distinct duties on States parties to the Convention: that of preventing the commission of genocide, and that of punishing the perpetrators of genocidal acts.¹⁰⁷ Obligations bearing the same content bind States under customary international law.¹⁰⁸ What is more, the customary norms in question are considered to set down *erga omnes* duties for States, meaning that they bind States vis-à-vis all other States of the international community, each of

¹⁰⁴ 2007 *Bosnian Genocide*, para. 166.

¹⁰⁵ Amabelle C. Asuncion, "Pulling the Stops on Genocide: The State Or the Individual?" *European Journal of International Law* 20, no. 4 (2009): 1204-1205.

¹⁰⁶ Article 1 of the Genocide Convention.

¹⁰⁷ Mettraux, *International Crimes: Volume I., Genocide / Law and Practice*, 66.

¹⁰⁸ Ibid, 67; Shany, "The Road to the Genocide Convention and Beyond" in Gaeta, *The UN Genocide Convention: A Commentary*, 15.

which “[...] has a legal interest in ensuring respect for these obligations and an associated legal entitlement to demand and, if necessary, to seek to impose respect for them.”¹⁰⁹ Alongside the duty to prevent and punish genocide is the international law norm prohibiting States from perpetrating genocide.¹¹⁰ This norm is considered to be of peremptory standing,¹¹¹ as has been recognised by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo*.¹¹²

The duty to prevent genocide was evidenced by the ICJ in the *Bosnian Genocide* 1993 Provisional Measures Order, where it indicated that the States parties to the dispute were under an obligation to take provisional measures aimed at the protection of the rights provided for in the Genocide Convention.¹¹³ In the ensuing judgment, the Court made clear that the duty to prevent genocide is an obligation of conduct,¹¹⁴ meaning that, regardless of the achievement of the purported aim, the State incurs in responsibility if it “[...] manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”¹¹⁵ According to the Court, the duty to prevent genocidal acts arises when “[...] the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”¹¹⁶ Apprehension by the State of the preparation of genocide or of harboured genocidal intent that is not accompanied by such action of the State as can deter from the commission of genocide entails the responsibility of the inert State, provided that the genocide actually takes place.¹¹⁷

¹⁰⁹ Mettraux, *International Crimes: Volume 1., Genocide / Law and Practice*, 70-71.

¹¹⁰ Paola Gaeta, “On What Conditions Can a State Be Held Responsible for Genocide?” *The European Journal of International Law* 18, no. 4 (2007): 632.

¹¹¹ Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (“VCLT”).

¹¹² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, para.64. See also Carlo Focarelli, “I Limiti dello Jus Cogens nella Giurisprudenza Più Recente” *Rivista di Diritto Internazionale* 3 (2007): 638.

¹¹³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 3 para.45 (“1993 Provisional Measures Order”).

¹¹⁴ On the distinction between obligations of conduct and obligations of result, see Marco Longobardo, “L’Obbligo di Prevenzione del Genocidio e la Distinzione fra Obblighi di Condotta e Obblighi di Risultato” *Diritti Umani e Diritto Internazionale* 13, no. 2 (2019): 241-245, according to whom compliance with an obligation of conduct presupposes that a State act with the diligence needed to reach the prescribed result. With reference to genocide, States would therefore be under a duty to adopt all measures within their power to avoid the commission of genocide for them to be exempt from responsibility under international law, see *ibid*, 245-246, 253.

¹¹⁵ 2007 *Bosnian Genocide*, para. 430. See also Mark Gibney, “Genocide and State Responsibility,” *Human Rights Law Review* 7, no. 4 (2007): 763.

¹¹⁶ 2007 *Bosnian Genocide*, para. 431.

¹¹⁷ *Ibid*; Antonio Cassese, “On the Use of Criminal Law Notions in Determining State Responsibility for Genocide,” *Journal of International Criminal Justice* 5, no. 4 (2007): 885. Longobardo criticises the ICJ’s contention that genocide must take place in order for the State to incur in the breach of the obligation to prevent the crime’s commission, objecting that the contravention rather takes place when the State falls short of the diligence required to prevent the perpetration of the criminal conduct, regardless whether or not the crime then took place, in Longobardo, “L’Obbligo di Prevenzione del Genocidio e la Distinzione fra Obblighi di Condotta e Obblighi di Risultato”, 247-249.

For its part, the duty to punish genocide is articulated further in a series of Articles of the Genocide Convention.¹¹⁸ Article 4, for example, specifies that the authors of genocidal acts “[...] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”;¹¹⁹ thus attesting to the irrelevance of the official status of the perpetrator for the purposes of punishment. Article 5 in turn requires States to enact the domestic legislation needed to implement the Genocide Convention at the national level, setting down penalties for those found guilty of any one of the prohibited genocidal acts.¹²⁰ Prosecution at the national level is also mandated; pursuant to Article 6, individuals charged with genocidal acts or other acts listed in Article 3 are to be tried before the competent domestic tribunals of the State where the act was perpetrated, or by such international penal tribunal as has jurisdiction over events occurring in that particular State.¹²¹

The particular nature of the Genocide Convention’s provisions entails that the obligations contained therein bind a State party both towards all other States parties, and towards the international community as a whole; their *erga omnes* nature is such all States have a right to compliance with the corresponding international norms.¹²²

The distinction between ordinary obligations and obligations deriving from *erga omnes* norms of international law was first elucidated by the ICJ in the *Barcelona Traction* case. The case concerned a Belgian claim for the compensation of damages caused to its nationals, shareholders of the Canadian company Barcelona Traction Ltd, by certain unlawful actions imputable to Spain;¹²³ in refuting Belgium’s claim, the Court explained that “[...] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection” and asserted that “[b]y their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”¹²⁴ It then found that the rights infringed by the Spanish authorities lacked such a character; the fact that the Belgian shareholders were not the direct beneficiaries of such rights meant that Belgium was not entitled to invoke the diplomatic protection of its nationals in order to obtain the

¹¹⁸ Orna Ben-Naftali, “The Obligations to Prevent and to Punish Genocide” in Gaeta, *The UN Genocide Convention: A Commentary*, 44.

¹¹⁹ Article 4 of the Genocide Convention.

¹²⁰ *Ibid*, Article 5.

¹²¹ *Ibid*, Article 6.

¹²² Mettraux, *International Crimes: Volume 1., Genocide / Law and Practice*, 71: “[...] the obligations to prevent and to punish genocide are held not by states individually as their own interest, but *collectively* as the common interest of all.” See also Cassese, *International Law*, 262.

¹²³ *Barcelona Traction, Light and Power Company, Limited (second phase)*, Judgment, I.C.J. Reports 1970, p. 3 (“*Barcelona Traction*”).

¹²⁴ *Barcelona Traction*, para. 33.

requested compensation.¹²⁵ What is interesting about the ICJ's decision is that it expressly mentions "the outlawing [...] of genocide" among the sources of *erga omnes* obligations;¹²⁶ the inclusion clarifies that the provisions aimed at impeding and punishing the commission of genocide are of interest to all the States pertaining to the international community.

The existence of *erga omnes* obligations found further confirmation in the *East Timor* case, where the right of self-determination of peoples was referred to as "one of the essential principles of contemporary international law";¹²⁷ it was then reiterated by the Court in *Bosnian Genocide* with specific reference to the rights and obligations set forth in the Genocide Convention.¹²⁸ The inclusion of the Genocide Convention's provision in the list of *erga omnes* obligations entails that the duty to prevent and to punish genocide "[...] is not territorially limited by the Convention".¹²⁹

Of the Convention's obligations, at least the prohibition of genocide amounts to a *peremptory* norm of international law. Though the concepts of *erga omnes* and peremptory norms are often used interchangeably,¹³⁰ it is in relation to peremptory or *jus cogens* norms that the Draft Articles devise a framework for the aggravated responsibility of the State found to be in breach of the corresponding obligation.¹³¹ Certain other consequences of an international wrongdoing attach to all *erga omnes* norms, even those that are not of a peremptory and therefore non-derogable nature.¹³² All of these consequences will be examined in the following subparagraph.

3.2. Consequences of the Breach of Peremptory and of *Erga Omnes* Norms of International Law

Under Article 40 of the Draft Articles, aggravated responsibility derives from "[...] a serious breach by a State of an obligation arising under a peremptory norm of general international law."¹³³ It has already been noted that peremptory norms are those norms of general international law that

¹²⁵ See *ibid.*, para. 35, 44-45, 52, 101.

¹²⁶ *Ibid.*, para 34. See also Jan Wouters and Sten Verhoeven, "The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide." *International Criminal Law Review* 5 (2005): 404-405.

¹²⁷ *East Timor (Portugal v. Australia)*, Judgment, I. C.J. Reports 1995, p. 90, para. 29.

¹²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I. C. J. Reports 1996, p. 595, para. 31 ("*Bosnian Genocide* Preliminary Objections").

¹²⁹ *Ibid.*

¹³⁰ Picone accepts that the prevailing view is to the effect that *jus cogens* and *erga omnes* obligations are interchangeable notions but adopts a different view, contending, for instance, that *erga omnes* rules are not necessarily non-derogable, in Paolo Picone, "The Distinction between *Jus Cogens* and Obligations *Erga Omnes*" in Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention*, Oxford [etc.]: Oxford University press, 2011, 411-416.

¹³¹ Articles 40 and 41 of the Draft Articles expressly refer to peremptory norms of international law.

¹³² See Article 48 of the Draft Articles.

¹³³ Article 40 of the Draft Articles.

are recognised by States collectively as being non-derogable.¹³⁴ In order for the breach to be serious, it must entail “[...] a gross or systematic failure by the State to fulfil the obligation.”¹³⁵ The provision sets down a threshold of gravity which needs to be met in order for the rules on aggravated responsibility to apply. Whereas “gross” is used to “denot[e] violations of a flagrant nature”, thus describing the scale of the wrongdoing, for a violation to be “systematic” it must have been executed in a methodical and intentional manner.¹³⁶ In relation to genocide, the ILC has specified that gross and systematic breaches “by their very nature require an intentional violation on a large scale.”¹³⁷

If these conditions are met, the State will incur in aggravated responsibility and generate a new set of consequences in addition to those ordinarily emerging from the commission of internationally wrongful acts. In particular, all other States must cooperate to bring about the cessation through lawful means of the ascertained breach, and must not recognise as lawful the situation resulting therefrom; neither must they otherwise lend assistance aimed at its perpetuation.¹³⁸ All of these consequences have been upheld by the ICJ in the *Wall* Advisory Opinion, where the Court addressed the question of the legal consequences arising out of the Israeli Government’s construction of a wall on the Occupied Palestinian Territories by affirming that the construction was in breach of the *erga omnes* principle of self-determination,¹³⁹ as well as other norms of international humanitarian and human rights law.¹⁴⁰ It accordingly found that Israel was under an obligation to put an end to the ascertained violations by desisting from the construction of the wall, and make reparations to the persons damaged by the contravention.¹⁴¹ In appreciation of the *erga omnes* nature of the international norms breached by the State, the Court clarified that “[...] all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem” and that neither could they in any way assist in maintaining the situation resulting from said construction.¹⁴² States were also mandated “to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-

¹³⁴ Article 53 of the VCLT.

¹³⁵ *Ibid.* See also Crawford, *State Responsibility: The General Part*, 106.

¹³⁶ Para. 8 of the commentary to Article 40 of the Draft Articles.

¹³⁷ *Ibid.*

¹³⁸ Article 41 of the Draft Articles; Kolb, *The International Law of State Responsibility: An Introduction*, 56-57; Ronzitti, *Introduzione al Diritto Internazionale*, 397.

¹³⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, para. 122.

¹⁴⁰ *Ibid.*, para. 123-137.

¹⁴¹ *Ibid.*, para. 149-154.

¹⁴² *Ibid.*, para. 159.

determination is brought to an end.”¹⁴³ The Opinion therefore sheds light on the additional obligations emerging for States other than the author of the wrongdoing on account of the particular importance of the contravened norms.

The other effect peculiar to serious breaches of peremptory international norms and, indeed, to all *erga omnes* obligations, regards the position of the State which may invoke the international wrongdoing. Pursuant to Article 48, if the obligation contravened by the wrongful act “is owed to the international community as a whole”, then even those States that are not directly injured by the wrongdoing can invoke the offending State’s international responsibility.¹⁴⁴ It should be observed that the provision does not distinguish between *erga omnes* and peremptory rules of international law; the initiative undertaken by the non-injured State is justified in relation to the breach of either one of these norms, being that both are necessarily owed to a plurality of States.¹⁴⁵ The extension’s significance in relation to the Myanmar situation stems from the fact that the Genocide Convention contains both *erga omnes* obligations, in the form of the duties to prevent and punish genocide, and the peremptory obligation to abstain from committing genocide.

With regard to the content of the reaction, Article 48 specifies that a non-injured State “may claim from the responsible State” both the termination of the wrongdoing with guarantees of non-repetition, and compliance with the obligation to make reparation. In doing so, the State will be acting “in the interest of the injured State or of the beneficiaries of the obligation breached”.¹⁴⁶ The mention of beneficiaries other than States provides for a mechanism by which to ensure that the individuals materially injured by the contravention are repaid of the damage suffered through the intervention of any State of the international community. It is therefore particularly relevant to those situations, such as the Rohingya case, where the breach of international law affects the human rights of individuals rather than the rights of another State.¹⁴⁷

The rationale behind a non-injured State’s right to allege the international responsibility of another State for the breach of an *erga omnes* provision is better understood when considering the ICJ’s specification in *Barcelona Traction* that all States have “a legal interest in their protection”.¹⁴⁸ The collective interest for the compliance with an *erga omnes* obligation is such that the State invoking the responsibility for their breach can be said to act in the name of the

¹⁴³ Ibid.

¹⁴⁴ Article 48(1)(b) of the Draft Articles.

¹⁴⁵ See para. 6 of the commentary to Article 48 of the Draft Articles.

¹⁴⁶ Article 48(2)(a) and (b) of the Draft Articles.

¹⁴⁷ See Picone, “The Distinction between *Jus Cogens* and Obligations *Erga Omnes*” in Cannizzaro, *The Law of Treaties Beyond the Vienna Convention*, 415.

¹⁴⁸ *Barcelona Traction*, para. 33. See also Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*. Vol. 43. Cambridge [etc.]: Cambridge University press, 2005, 162-165.

international community as a whole. This particular feature was evidenced by the Court precisely in relation to the Genocide Convention; in the 1951 *Reservations to Genocide* Advisory Opinion, the Court clarified that the seriousness of the conducts proscribed by the Genocide Convention entails “the universal character both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’.”¹⁴⁹ From a practical standpoint, universal condemnation implies that any State is entitled to react to the breach of the Genocide Convention’s provisions, regardless whether or not it was directly affected by the contravention: the legal interest subsists even in the absence of injury.¹⁵⁰ As will be seen, this argument was explicitly put forth by The Gambia as justificatory grounds for its application against Myanmar; the filing State held that on account of the *erga omnes* character of the Genocide Convention’s provisions, all parties to the Convention are entitled to ensure compliance with the duties set out therein.¹⁵¹ Interestingly, the Gambia went so far as to accuse Myanmar of perpetrating genocide; this raises questions as to the possibility that a State be held responsible for the commission of international crimes, and the conditions that may give rise to this form of responsibility.

3.3. Debating Whether States Can Commit Genocide

Whereas the international responsibility of a State for the criminal conduct of its organs is uncontroverted, the question whether a State can perpetrate an international crime is covered in doubt. The ILC had attempted to address the issue in its 1996 Draft Articles on State Responsibility by introducing the concept of international crimes of the State in Article 19.¹⁵² However, States’ scepticism towards the notion,¹⁵³ and the reluctance to accept a system where States could be considered criminally liable for the conduct of their agents or organs,¹⁵⁴ led the ILC to dispense

¹⁴⁹ Reservations to the Convention of Genocide, Advisory Opinion: I.C. J. Reports 19-51, p. 15, 23 (“*Reservations to the Genocide Convention*”).

¹⁵⁰ See para. 10 of the commentary to Article 48 of the Draft Articles.

¹⁵¹ The Gambia Application, para. 126.

¹⁵² International Law Commission, Draft Articles on State Responsibility: Text of the Draft Articles Provisionally Adopted by the Commission on First Reading, in Yearbook of the International Law Commission Vol. II, Part II U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), 1997, at 58, Article 19 (2): “An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime j that community as a whole constitutes an international crime”.

¹⁵³ Cassese, “On the use of Criminal Law Notions in Determining State Responsibility for Genocide”, 877.

¹⁵⁴ David D. Caron, “State Crimes: Looking at Municipal Experience with Organizational Crime” in Oscar Schachter and Maurizio Ragazzi, *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden; Boston;: Martinus Nijhoff, 2005, 24.

with the concept in its final Draft, thereby replacing it with that of the aggravated international responsibility of States for the breach of *jus cogens* norms.¹⁵⁵

The issue was instead addressed by the ICJ in *Bosnian Genocide*.¹⁵⁶ The case concerned Bosnia's claim that Serbia (formerly the Federal Republic of Yugoslavia or "FRY") had committed genocide against the Bosnian Muslims residing in the territory of Bosnia and Herzegovina in the context of the 1992 to 1995 conflict, through the actions materially carried out by the organs of the self-proclaimed Republica Sprska and, in the case of the Srebrenica massacre, by the Bosnian Serb forces (or "VRS").¹⁵⁷ The Court found that, with the exception of the Srebrenica massacre, the criminally relevant acts committed in what was then Bosnia and Herzegovina did not amount to genocide, as it had not been demonstrated on a conclusive basis that they were performed with the requisite genocidal intent.¹⁵⁸ With regards to the Srebrenica massacre, the ICJ acknowledged the ICTY's assertion that the VRS, under the leadership of general Mladic, had perpetrated genocide against the Bosnian Muslims.¹⁵⁹ However, it held that the massacre could not be imputed to Serbia, being that the VRS were neither *de jure* organs or *de facto* agents of the respondent State,¹⁶⁰ nor were they individuals acting under the instructions of, or otherwise dependant on, the Serbian government.¹⁶¹ The ICJ also found that Serbia's complicity in genocide in the terms proscribed by Article 3(c) of the Genocide Convention could not be conclusively established, as it had not been convincingly proved that the assistance lent to the VRS was accompanied with the awareness of these forces' genocidal intent.¹⁶² The Court thus excluded Serbia's responsibility for both the commission of, and the complicity in, genocide,¹⁶³ and limited its final judgment to a recognition the State's contravention of the obligations to prevent and punish genocide.¹⁶⁴

In reaching these conclusions, the ICJ identified the criteria by which to determine a State's responsibility for the *commission* of genocidal acts. It first of all relied on the obligation to prevent

¹⁵⁵ For a detailed description of the process that led to the substitution in the Draft Articles of the notion of international crimes with that of the aggravated responsibility of States for the breach of obligations set forth in peremptory norms of international law, see James Crawford, "International Crimes of States" in Crawford, Pellet and Olleson, *The Law of International Responsibility*, 406-411.

¹⁵⁶ 2007 *Bosnian Genocide*.

¹⁵⁷ See *Ibid.*, para. 231-376. See also International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Summary of the Judgment of 26 February 2007, Summary No. 2007/2, February 26, 2007, 10.

¹⁵⁸ 2007 *Bosnian Genocide*, para. 277, 319, 328, 334, 370-376.

¹⁵⁹ *Ibid.*, para. 291, 295, 297,

¹⁶⁰ *Ibid.*, para. 386-388, 394-395, 413.

¹⁶¹ *Ibid.*, para. 413-415.

¹⁶² *Ibid.*, para. 418-424.

¹⁶³ *Ibid.*, para. 413, 424.

¹⁶⁴ *Ibid.*, para. 438, 448-450.

and to punish genocide contained in Article 1 of the Genocide Convention to assert that States were themselves under an obligation not to commit genocide.¹⁶⁵ The Court recognised that the provision under scrutiny does not expressly compel States to abstain from committing genocide.¹⁶⁶ It nonetheless found such a duty to flow directly from the obligation to prevent genocidal acts, as “[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law”.¹⁶⁷ The proscription was found to apply not only to the perpetration of genocidal acts, but also to those other modes of liability described in Article 3 of the Genocide Convention and reproduced in the founding instruments of the international criminal tribunals (ICC included) analysed in Chapter 2, Paragraph 2, namely conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.¹⁶⁸

These arguments allowed the ICJ to affirm that international law is governed by the principle of “the duality of responsibility”,¹⁶⁹ according to which “[...] the same acts may give rise to both individual criminal liability and state responsibility”.¹⁷⁰ In addressing Serbia’s contention that international law does not contemplate the criminal liability of States, the Court clarified that the responsibility of States for the acts outlawed in Article 3 derives directly from international law, not from international criminal law.¹⁷¹ The responsibility of the State and that of the individual can therefore coexist on the international plane, being that the provisions regarding individual accountability in no way exclude the distinct obligations binding on States not to commit genocide or the other acts described in Article 3 of the Genocide Convention.¹⁷² The Court accordingly concluded that “[...] if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.”¹⁷³ As the passage makes clear, States’ duty not to commit

¹⁶⁵ 2007 *Bosnian Genocide*, para. 167-168; Asuncion, “Pulling the Stops on Genocide: The State Or the Individual?”, 1203.

¹⁶⁶ 2007 *Bosnian Genocide*, para. 166.

¹⁶⁷ *Ibid.*

¹⁶⁸ See Article 3 of the Genocide Convention.

¹⁶⁹ 2007 *Bosnian Genocide*, para. 172.

¹⁷⁰ Cassese, “On the Use of Criminal Law Notions in Determining State Responsibility for Genocide”, 877.

¹⁷¹ *Ibid.*, para. 170.

¹⁷² *Ibid.*, para. 174. In *ibid.*, para. 173, the ICJ noted that, in dealing with the criminal liability of individuals, Article 25 (4) of the ICC Statute provides that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”; Article 58 of the Draft Articles in turn makes safe the provisions dealing with individual criminal responsibility: the Court relied on these provisions to assert the principle of the dual responsibility of States and individuals under international law.

¹⁷³ *Ibid.*, para. 179.

genocide was specifically put in relation with the conduct of the organs or persons whose acts are imputable to the State,¹⁷⁴ the underlying reasoning being that a State can be held to have perpetrated the genocidal acts materially carried out by its organs or agents based on the international norms of attribution.

What is peculiar about the ICJ's decision is that, having relied on the norms of attribution to assert that States can be responsible for the commission of genocide and the other acts proscribed by the Genocide Convention, the Court then retained that *dolus specialis* or specific intent also had to be "convincingly shown" for the State to incur in the corresponding international responsibility.¹⁷⁵ For example, in answer to Bosnia's contention that Serbia had perpetrated the genocide of the Bosnian Muslims in the territory of Bosnia and Herzegovina, the Court found that "[...] the Applicant has not established the existence of that intent on the part of the Respondent, [...]".¹⁷⁶ In doing so, the Court identified the two alternative grounds by which to ascertain the subsistence of a State's *dolus specialis*:¹⁷⁷ upon dismissing that Serbia could be held responsible for the commission of genocide, the Court made clear that "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."¹⁷⁸ The affirmation makes clear that for a State's criminal intent to be convincingly shown, it must in the first place be demonstrated that the genocidal acts were the product of a plan to destroy the protected group. If the evidence does not suffice to reveal the existence of such a policy, the genocidal intent may be inferred from the factual circumstances. These will have to uncover a pattern of behaviour of such a nature that it unequivocally points to the subsistence of the destructive intention.¹⁷⁹

This standard of proof was further elaborated on by the ICJ in the 2015 *Croatia v Serbia* judgment, concerning the two States' reciprocal claims as to the other's responsibility for the commission of genocide in the context of the 1991 to 1995 Croatian War of Independence.¹⁸⁰ The Court explained that the possibility of inferring *dolus specialis* on a factual basis revolved around

¹⁷⁴ 2007 *Bosnian Genocide*, para. 167: "The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them."

¹⁷⁵ *Ibid.*, para. 373.

¹⁷⁶ *Ibid.*, para. 376.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, para. 373.

¹⁷⁹ *Ibid.*

¹⁸⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, p. 3 ("*Croatia v Serbia*"). See also Federica Paddeu, "Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia." *Cambridge Law Journal* 74, no. 2 (2015): 198-199.

the notion of “reasonableness”, which required the pattern of conduct to be such that the genocidal intent “[...] is the only inference that could reasonably be drawn from the acts in question.”¹⁸¹ The particularly high standard is justified by the gravity of the charges, which must be supported by “evidence that is fully conclusive” in order for the genocidal intent to attach to the State.¹⁸²

The ICJ’s reference to *dolus specialis* as a ground by which to establish State responsibility for the commission of genocide or the other acts proscribed in Article 3 of the Genocide Convention may raise some perplexity, not least because the Court’s decision was premised on the argument that “State responsibility and individual criminal responsibility are governed by different legal regimes [...]”¹⁸³ and that States can only be held accountable for their own conduct.¹⁸⁴ Whilst the application of the international norms of attribution is coherent with this assumption, the Court’s subsequent focus on the *mens rea* element for the purpose of proving genocide merges notions of international criminal law with the international norms usually applicable to the responsibility of States. The difficulty for some lies with applying international criminal law norms specifically thought out for individuals to legal persons; as has been remarked, “[w]here state responsibility is engaged, this entails finding specific intent in an inanimate entity.”¹⁸⁵ These commentators believe that the international responsibility of the State for genocide should be verified on the basis of the traditional notion of internationally wrongful act, which in the case of genocide takes the form of a genocidal policy hinging on “a pattern of widespread and systematic violence against a given group”;¹⁸⁶ proof of genocidal intent, on the other hand, would not be necessary.¹⁸⁷ Others are of the opinion that States can be responsible for crimes at the international level on the same grounds as individuals.¹⁸⁸ Insofar as the ICJ applies the *dolus specialis* criterion alongside that of the manifest genocidal policy of the State, both standards are relevant in establishing whether

¹⁸¹ *Croatia v Serbia*, para. 148. See also Peter Tzeng, “Proving Genocide: The High Standards of the International Court of Justice” *Yale Journal of International Law* 40, no. 2 (2015): 421; Hemi Mistry, “The International Court of Justice’s Judgment in the Final Balkans Genocide Convention Case,” *Human Rights Law Review* 16, no. 2 (2016): 360-361.

¹⁸² 2007 *Bosnian Genocide*, para. 209: “[t]he Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive [...]. The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts”.

¹⁸³ *Croatia v. Serbia*, para. 129.

¹⁸⁴ *Ibid.* See also 2007 *Bosnian Genocide*, para. 172.

¹⁸⁵ Asuncion, “Pulling the Stops on Genocide: The State Or the Individual?”, 1211.

¹⁸⁶ Gaeta, “On What Conditions Can a State Be Held Responsible for Genocide?”, 643. See also Pemmaraju Sreeniwasa Rao, “International Crimes and State Responsibility” in Schachter and Ragazzi, *International Responsibility Today: Essays in Memory of Oscar Schachter*, 70.

¹⁸⁷ Gaeta, “On What Conditions Can a State Be Held Responsible for Genocide?”, 643.

¹⁸⁸ See Antônio Augusto Cançado Trindade, “Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited” in Ragazzi, *International Responsibility Today*, 259.

Myanmar can be considered responsible for genocide at the international level alongside those individuals who materially perpetrated the international crime.

Now that the conditions for a State to incur in a breach of the Genocide Convention and the consequences arising therefrom have been illustrated, it is necessary to examine the findings of the IIFFM, and whether they give credibility to the contention of Myanmar's responsibility for genocidal acts.

4. The Relevance of the IIFFM's Findings for the Purpose of Ascertaining Myanmar's Responsibility for Genocide.

In the IIFFM's 2018 Report, the Mission came to the conclusion that "[t]he human rights violations and abuses, as well as crimes under international law, outlined in this report give rise both to State responsibility and to individual criminal responsibility".¹⁸⁹ In the 2019 Report, the Mission went so far as to assert that Myanmar had committed genocide, thus breaching the corresponding peremptory proscription laid down in the Genocide Convention.¹⁹⁰ The Reports place significant emphasis on the concerted nature of the criminal actions; they also point to State authorities and individuals otherwise connected with the government as the central figures behind the 2016 and 2017 clearance campaigns. These factors represent useful indicators of State involvement: they will therefore serve as a measure by which to ascertain whether Myanmar can be considered responsible for committing genocide and any of the other acts proscribed by the Genocide Convention, or in breach of the more general obligations to prevent and punish genocide.

The first element which needs to be taken into account when assessing whether the genocidal acts allegedly perpetrated by the Tatmadaw and other individuals can give rise to Myanmar's responsibility is whether the conduct in question can be imputed to the State. As has been mentioned, attribution presupposes that the individuals physically carrying out the crimes are either organs of State or entities exercising elements of governmental authority, or other individuals acting under the State's direction or control. In evaluating the subsistence of individual criminal liability the IIFFM found that the crimes taking place in Myanmar were mostly perpetrated by the Tatmadaw; having headed the "clearance operations", the forces were identified

¹⁸⁹ Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (release date 18 September 2018), para. 1518 ("IIFFM 2018 Report").

¹⁹⁰ Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (release date: 16 September 2019), para. 221, 226 (IIFFM 2019 Report").

by the Mission as those bearing the “greatest responsibility” for the criminal actions in which such operations consisted.¹⁹¹ The question whether these forces’ conduct can be attributed to Myanmar is easily answered in the affirmative when one considers that the Tatmadaw make up the country’s military; as the national defence services, they are identified by the State’s Constitution as “the main armed force for the Defence of the Union”.¹⁹² The fact that the Tatmadaw are described by constitutional provisions as the principal armed force within Myanmar is a clear indication of the forces’ nature of State organ under the State’s domestic law. This is especially true in light of the official duties carried out by the national military forces of any one State ; as has been noted, “[t]he performance of security or military functions is everywhere considered to be a State function.”¹⁹³ In examining the international parameters of legal attribution, the IIFFM expressly found the Tatmadaw forces to be State organs.¹⁹⁴

The qualification of the Tatmadaw as State organs entails that the actions carried out by the members of the military in Rakhine State is to be considered conduct of Myanmar for the purpose of determining the State’s ensuing international responsibility. The consideration that the crimes constitute *ultra vires* acts is irrelevant, being that the Tatmadaw acted in their official capacity in carrying out the “clearance operations”; as has been illustrated when analysing the Draft Articles, the conduct of a State organ acting in their official capacity is imputed to the State even if it is carried out exceeding or in contravention of State orders. The Tatmadaw’s criminal actions can therefore certainly be ascribed to Myanmar.

In its 2018 Report, the IIFFM identified other forces or police bodies as also having participated in the criminal actions against the Rohingya. Reference was made to the Western Regional Military Command, the Light Infantry Divisions (“LIDs”), the Myanmar Police Force, the Border Guard Police, and the *Lon Htein*.¹⁹⁵ Some of the abovesaid forces are considered internal sub-units of the Tatmadaw; the Western Regional Military Command, for example, is that unit of the military forces which is responsible for the Rakhine State region of Myanmar.¹⁹⁶ Whereas the LIDs are not deployed on a permanent basis, they nonetheless respond directly to the Commander in Chief of the Tatmadaw army and can therefore be seen as a further branch of the military’s internal

¹⁹¹ IIFFM 2018 Report, para. 1245.

¹⁹² Chapter 7, section 337 of the 2008 Constitution of Myanmar, available at: https://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf. The Tatmadaw are referred to in the Constitution as “Defence Services”, see also IIFFM 2018 Report, para.1522.

¹⁹³ Kolb, *The International Law of State Responsibility: An Introduction*, 75.

¹⁹⁴ Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 222 (“IIFFM 2019 Report”).

¹⁹⁵ IIFFM 2018 Report, para. 1248-1256.

¹⁹⁶ *Ibid.*, para. 1248.

structure.¹⁹⁷ The fact that these forces form part of the Tatmadaw means that their criminally relevant conduct can be imputed to Myanmar on the same terms as the military's central unit.

The Myanmar Police Force, the Border Guard Police and the *Lot Htein*, on the other hand, have been described by the Mission as forming part of a separate organisation from the Tatmadaw.¹⁹⁸ This is not to say, however, that their actions cannot be attributed to Myanmar. As the national police, these bodies necessarily form part of the State's apparatus, as is demonstrated by the fact that the Myanmar Police Force reports to the Ministry of Home Affairs, and that for their part both the Border Guard Police and the *Lot Htein* are internal subdivisions of the Myanmar Police Force.¹⁹⁹ What is more, the units were found to have participated in the "clearance operations" in coordination with and under the direction of the Tatmadaw. The IIFFM described the relationship between the military and the subunits as one of "effective control", with the police units placed under the direction of the Tatmadaw's territorially competent subdivision.²⁰⁰ The pattern of conduct and the coordinated nature of its execution was seen by the Mission as indicative of the "effective control of a single unified command".²⁰¹ The Tatmadaw's influence over the actions carried out by these separate police units entails that the conduct of the latter can also engage the responsibility of the Myanmar, considering that under the rules of attribution State responsibility may also derive from any unlawful action over which it (meaning its organs) has effective control.

Other ethnically Rakhine and Buddhist individuals were also found to have perpetrated genocidal acts against members of the Rohingya group;²⁰² whether or not such conduct may be attributed to the State of Myanmar will have to be ascertained in light of the "effective control" criterion delineated by the ICJ.²⁰³ In recounting the nature of their actions, the IIFFM found that the civilian perpetrators "[...] acted alongside, complementary to, and usually in tandem with, the Tatmadaw and other security forces";²⁰⁴ the Tatmadaw also handed them the weaponry needed to carry out the criminal conduct.²⁰⁵ The existing links between the civilian perpetrators and the military, and the organised nature of the crimes which were then committed by the former led the Mission to conclude that the civilians' participation in the "clearance operations" "[...] was

¹⁹⁷ See *ibid.*, para. 1525.

¹⁹⁸ *Ibid.*, para. 1534

¹⁹⁹ *Ibid.*, para. 1256, 1534.

²⁰⁰ *Ibid.*, para. 1534.

²⁰¹ *Ibid.*, para. 1536.

²⁰² *Ibid.*, para. 380-391.

²⁰³ See Paragraphs 1 and 3.3 of this Chapter.

²⁰⁴ *Ibid.*, para. 1258.

²⁰⁵ *Ibid.*

planned, coordinated and implemented under the command and control of the Tatmadaw”.²⁰⁶ The proceedings instituted against Myanmar by the Gambia may have supplied the ICJ with the occasion to shed light on whether this connection integrates the “effective control” required to impute the civilians’ conduct to Myanmar.

The grounds of attribution described in the IIFFM’s Reports are such that the crimes carried out by the Tatmadaw and the other security forces, and possibly even that of the implicated individuals, can realistically be ascribed to Myanmar. This includes the genocidal acts that the Mission found to have been perpetrated against the Rohingya, and that have formed the object of Chapter 2, Paragraph 4 of this thesis. As has been seen, for genocide to be attributed to a State it is necessary that the objective element be accompanied by the special intent to destroy the protected group against which the prohibited acts are perpetrated. When examining State responsibility for the commission of genocide or of any other act proscribed under Article 3 of the Genocide Convention, the ICJ clarified that the State’s *dolus specialis* can be established on the basis of either an plan or policy of destruction, or of a pattern of conduct such as to only point to the existence of genocidal intent. The IIFFM’s reports represent the means by which to carry out this assessment.

The existence of a plan for the destruction of the Rohingya and their erasure from the territory of Myanmar must be assessed against the backdrop of the long-standing persecution of the Rohingya within Myanmar. When examining the policies adopted toward the minority, the IIFFM found that the historically recurring human rights breaches were connected with a “State and military policy”.²⁰⁷ The Rohingya’s exposure to the deprivation of their human rights was described by the Mission as the result of “State policies and practices implemented over decades, steadily marginalising the Rohingya and eroding their enjoyment of human rights”.²⁰⁸ These policies revolved around laws that undermined the Rohingya’s legal status, and that were implemented in such a manner that they effectively deprived the Rohingya of the citizenship of Myanmar.²⁰⁹ As has already been mentioned, the 1982’s Citizenship law and its subsequent application led to the denial of citizenship for the minority members, and is therefore emblematic of the State’s attempt “[...] to implement a racist and exclusionary vision”.²¹⁰

²⁰⁶ Ibid.

²⁰⁷ IIFFM 2018 report, para. 97.

²⁰⁸ Ibid., para. 458.

²⁰⁹ See *ibid.*, para. 469-488.

²¹⁰ Ibid., para. 497.

The severe restrictions of movement, and the Rohingya's arbitrary confinement in villages or displacement camps surrounded by barbed wire and military posts, were also identified by the Mission as being part of a discriminatory plan intended to isolate the Rohingya from the rest of the population.²¹¹ A similar consideration was made with regards to the restrictions on food and livelihood, and the impediment to healthcare.²¹² All of these measures were seen as manifestations of a wider governmental policy, thus amounting to a "State sanctioned and institutionalised system of oppression".²¹³ Significantly, the IIFFM found that these long-standing measures, cumulatively taken, could be indicative of the existence of a genocidal plan; as the Mission affirmed, the "clearance operations" "[...] are only one piece of a larger picture".²¹⁴ The violence perpetrated against the Rohingya in 2016 and 2017 was thus specifically put in relation with this policy, and can be seen as the escalation of an already existing system of oppression.²¹⁵

Turning to the "clearance operations" themselves, in Chapter 2 it has been noted that the genocidal intent of the conduct carried out by the Tatmadaw and other forces during the "clearance operations" was verified by the IIFFM by recurring to a series of factual pointers. Among these was the existence of an "organised plan of destruction". The Mission found that the crimes were perpetrated with a *modus operandi* that "was consistent throughout":²¹⁶ the level of coordination, the timing, the coherent manner in which the criminal actions were carried out was such that "it could not have occurred in the absence of significant levels of forethought and organisation".²¹⁷ These factors, along with the participations of all levels of the Tatmadaw's military structure, led the Mission to conclude that there existed a genocidal plan for the destruction of the Rohingya.²¹⁸ The IIFFM's 2018 Report therefore seems to validate an assertion as to the subsistence of the special intent which the ICJ considers necessary for establishing a State's commission of genocide. The 2018 Report however did not explicitly address the issue of Myanmar's responsibility for the commission of genocide; it merely mentioned the subsistence of State responsibility,²¹⁹ without specifying the matter further, and otherwise addressed the grounds for individual criminal liability.

The issue of whether Myanmar could be said to have committed genocide or the other acts prohibited under Article 3 of the Genocide Convention was instead addressed by the Mission in its 2019 Report. An important observation is that the Report chiefly deals with the subsistence of

²¹¹ Ibid., para. 500-517.

²¹² Ibid., para. 568.

²¹³ IIFFM 2018 Report, para. 748.

²¹⁴ Ibid., para. 1428.

²¹⁵ Ibid., para. 1394.

²¹⁶ Ibid., para. 1429.

²¹⁷ Ibid.

²¹⁸ Ibid., para. 1430.

²¹⁹ Ibid., para. 1518.

individual and State responsibility for the facts occurring in Myanmar *after* the “clearance operations”.²²⁰ Whilst neither the “clearance operations” themselves nor the events leading up to them form the primary focus of the 2019 Report, they were both explicitly relied upon to infer Myanmar’s genocidal intent.²²¹ The Mission thereby confirmed that the 1982 Citizenship Law and the subsequent deprivation of the Rohingya’s national identity are indicative of the Government’s intent to destroy the minority.²²² The ongoing restrictions on movement, with the denial of humanitarian aid and livelihoods which it entailed, was also identified as another pointer of the State’s genocidal intent.²²³

With regards to the 2017 “clearance operations”, the Mission found that the “vastness of the State’s involvement is inescapable” and that the operations themselves were both pre-planned and methodically executed.²²⁴ In a regrettably succinct manner, the Mission listed the “extreme brutality of the attacks”, the organised nature of the ensuing destruction, and the scale of the sexual violence engaged in by the perpetrators, as indicators of genocidal intent along with other more general pointers such as the hate speech and discriminatory policies, and Myanmar’s failure to punish the violations of human rights and humanitarian law.²²⁵ What is striking about the 2019 Report is that it stops short of affirming the existence of a genocidal plan imputable to the State; the Mission relied on the mentioned indicators merely to establish the existence of “[...] a pattern of conduct on the part of the State to destroy the Rohingya, in whole or in part, as a group”.²²⁶ Why the IIFFM chose not to consider the plausibility of a general plan of destruction for the purposes of establishing genocidal intent is not clear, especially in light of the findings of the same Mission in the report issued a year earlier. From a practical perspective, however, these differences are of little importance, being that both a general plan of destruction and a pattern of conduct constitute valid grounds by which to infer the specific intent of the State. The subjective element, coupled with the attribution of the conduct of the perpetrators to the State, is conducive to the affirmation of Myanmar’s responsibility for the commission of genocide.

In the 2019 Report, the IIFFM also found Myanmar to have contravened the obligations to investigate and punish genocide. The Mission found the State to have created a climate of impunity furthered through the destruction of evidence, the failure to reform its laws so as to abrogate their discriminatory provisions, and the absence of any credible effort aimed at investigating and

²²⁰ See IIFFM 2019 Report, para. 27.

²²¹ *Ibid.*, 70-73.

²²² *Ibid.*, para. 106.

²²³ *Ibid.*, para. 152-156, 175.

²²⁴ *Ibid.*, para. 222.

²²⁵ *Ibid.*, para 224.

²²⁶ *Ibid.*, para. 225.

prosecuting the perpetrators.²²⁷ The details of the State’s fallacious attempts at ensuring accountability have been described in Chapter 3; it is therefore unnecessary to illustrate them here. Suffice it to say that the Mission found these efforts “woefully inadequate”,²²⁸ and accordingly contended that Myanmar is also responsible for the failure to investigate and punish genocide.²²⁹

Finally, the IFFM found Myanmar to be in breach of the obligation set down in Article 5 of the Genocide Convention to enact the legislation needed for the punishment of the perpetrators of genocidal acts. The Mission noted that the State’s Penal Code neither contains provisions outlawing genocide,²³⁰ nor does it define and proscribe the defining traits of any of genocide’s underlying acts.²³¹ It accordingly established that Myanmar “[...] is failing to enact legislation that gives effect to the Genocide Convention”,²³² and that this in turn implied the infringement of the obligation to lay down effective penalties for the perpetrators of the prohibited genocidal acts.²³³

As the conducted analysis makes clear, the Mission’s 2018 and 2019 findings point to Myanmar’s responsibility both for the commission of genocide, and for the contravention of the obligation to punish genocide through the enactment of the necessary legislation, and the investigation and prosecution of the crime’s perpetrators. These findings were relied upon by The Gambia to file a lawsuit against Myanmar with the ICJ, contending the respondent State’s breach of the obligations set forth in the Genocide Convention. The following Paragraph seeks to illustrate the arguments put forward by The Gambia in order to justify its application.

5. The Gambia’s Application against Myanmar for the Alleged Breach of the Genocide Convention

On November 11, 2019 the Republic of The Gambia (hereon in, “The Gambia”) filed an application against Myanmar with the International Court of Justice, thus instituting proceedings against the Respondent State for the alleged infringement of its obligations under the Genocide Convention.²³⁴

²²⁷ Ibid, para. 226, 231-232.

²²⁸ Ibid., para. 230.

²²⁹ Ibid., para. 233.

²³⁰ Ibid., para. 234.

²³¹ Ibid., para. 236.

²³² Ibid., para. 236.

²³³ Ibid.

²³⁴ The Gambia Application.

In order to establish the International Court of Justice’s jurisdiction over the dispute, The Gambia called attention to the fact that both States party to the dispute are Members of the United Nations;²³⁵ the ICJ being an organ of the UN,²³⁶ both States are bound by the Court’s Statute, Article 36 of which provides that the Court’s jurisdiction covers “all matters specially provided for [...] in treaties and conventions in force”.²³⁷ The Applicant also contended that both States were parties to the Genocide Convention,²³⁸ Article 9 of which provides that disputes arising between the States parties to the Genocide Convention regarding the interpretation and respect of the Convention’s terms, as well as those concerning State responsibility for genocide, are to be submitted to the ICJ upon request by a State party to the dispute.²³⁹ It noted that neither Myanmar nor The Gambia had entered reservations to this Article.²⁴⁰

As proof of the existence of a dispute between the two States regarding the application of the Genocide Convention and Myanmar’s obligation under the Convention’s terms, The Gambia claimed that it had “[...] made clear to Myanmar that its actions constitute a clear violation of its obligation under the Convention”²⁴¹ but that “[...] Myanmar has rejected and opposed any suggestions that it has violated the Genocide Convention.”²⁴² As supporting evidence, the Applicant recalled a series of occasions in which it had denounced Myanmar’s responsibility for genocide, mentioning, *inter alia*, the request made by way of Organisation of Islamic Cooperation (“OIC) resolution No. 4/46-MM that Myanmar comply with its international obligations and desist from genocidal acts against the Rohingya,²⁴³ the statement rendered on May 31, 2019 in occasion of the 14th OIC Summit Conference regarding the need to hold the perpetrators of the Rohingya genocide accountable through international means,²⁴⁴ and a *note verbal* delivered to Myanmar’s Permanent Mission to the UN expressing concern over the latter State’s breach of the Genocide Convention.²⁴⁵ It also drew attention to the fact that, in occasion of the UN General Assembly’s 74th session, the Vice President of the Gambia had announced the State’s willingness to “lead the concerted efforts for taking the Rohingya issue to the International Court of Justice”,²⁴⁶ and that

²³⁵ Ibid., para. 16.

²³⁶ Article 7 of the UN Charter; Conforti *Diritto Internazionale*, 155.

²³⁷ Statute of the International Court of Justice, April 18, 1946, available at: <https://www.icj-cij.org/en/statute>.

²³⁸ Ibid., para. 17-19.

²³⁹ Article IX of the Genocide Convention.

²⁴⁰ The Gambia Application, para.19.

²⁴¹ Ibid., para. 20.

²⁴² Ibid.

²⁴³ Ibid., para. 21. See also the Organisation of Islamic Cooperation Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL, 1-2 March 2019, 14-25.

²⁴⁴ The Gambia Application, para. 21.

²⁴⁵ Ibid.

²⁴⁶ UN General Assembly, 74th sess., 8th plen. mtg., UN GAOR, UN Doc. A/74/PV.8, September 26, 2019, 31. See also The Gambia Application, para. 21.

Myanmar's response in the same session was to the effect that the IIFFM's findings were "biased and flawed".²⁴⁷ The Applicant lamented Myanmar's denial of responsibility, and held its criticism of the IIFFM's reports, together with the absence of any reply on its part to The Gambia's *note verbal*, were proof of the subsistence of a dispute regarding the interpretation and application of, and the compliance with, the Genocide Convention.²⁴⁸

As has been mentioned, the contention that Myanmar was responsible for genocide was put forth by resorting to the IIFFM's findings. Relying on this factual evidence, the Gambia affirmed that the Rohingya's exclusion from Myanmar's national races, and subsequent denial of citizenship, were part of a wider discriminatory practice that also featured the curtailment of births within the Rohingya group, the restrictions of movement and confinement in displacement camps, and a State-propagated hate rhetoric directed against the minority. The long-standing persecution of the Rohingya was used as a first indicator of genocidal intent.

The Gambia then described the 2016 and 2017 "clearance operations", in which "Myanmar forces systematically shot, killed, forcibly disappeared, raped, gang raped, sexually assaulted, detained, beat and tortured Rohingya civilians, and burned down and destroyed Rohingya homes, mosques, madrassas, shops and Qu'rans".²⁴⁹ The fact that the lawsuit is based on the IIFFM's Reports makes a detailed analysis of the evidence referred to by The Gambia superfluous, being as the findings of the Mission have already been illustrated in the pertinent Paragraph of this Chapter. What is relevant is that the State called attention to the mass executions, the scale of the sexual violence and methodical destruction of Rohingya villages to contend that genocide had occurred in Myanmar and that it was imputable to the State.

The Gambia in fact asserted that the acts perpetrated by the Tatmadaw forces against the Rohingya in the context of the 2016 and 2017 "clearance operations" were of genocidal nature, in that they were intended to destroy the Rohingya minority either in whole or in part.²⁵⁰ It relied upon this affirmation to charge the Respondent State with the *commission* of the genocide, through the contention that "[t]hese acts are all attributable to Myanmar, which is thus responsible for committing genocide". It further held that Myanmar was to be considered responsible for other acts outlawed in Article 3, including "[...] attempting to commit genocide; conspiring to commit

²⁴⁷ Ibid. See also the Republic of the Union of Myanmar, State Counsellor Office, U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Leader of Myanmar Delegation to the 74th Session of the United Nations General Assembly Delivers Statements at High-Level General Debate, September 29, 2019, at 11, <https://www.statecounsellor.gov.mm/en/node/2551>.

²⁴⁸ The Gambia Application, para. 22-23.

²⁴⁹ Ibid., para. 48.

²⁵⁰ The Gambia Application, para. 2.

genocide; inciting genocide [and] complicity in genocide.”²⁵¹, as well as for the failure to prevent and to punish genocide.²⁵² Having recalled the duty to prevent genocide under Article I of the Convention, and that of punishing perpetrators set down in Articles 4 to 6, the State condemned Myanmar’s failure to enact the necessary legislation to implement the Genocide Convention at the domestic level and provide penalties for those found guilty of genocidal acts.²⁵³ The lawsuit merely lays down the alleged contraventions, without specifically putting them in relation to the factual evidence on which the contentions are based; these links will presumably be examined by the ICJ when addressing the merits of the dispute. It is nonetheless noteworthy that The Gambia should have included Myanmar’s commission of genocide among the breaches, as the allegation provides the Court with another opportunity in which to test the subsistence of genocide of State.

Having claimed that Myanmar is in breach of the Genocide Convention on all the abovementioned grounds, and called for a pronouncement of this nature by the ICJ, the Gambia asked the Court to declare that the Respondent was under an obligation to end the wrongful conduct and comply with the Genocide Convention, as well as to guarantee that the perpetrators of genocidal acts are prosecuted by a competent national or international penal tribunal.²⁵⁴ It further requested an assertion by the Court as to Myanmar’s duty to “perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group [...]” and offer guarantees of non-repetition of the alleged contraventions of the Convention.²⁵⁵ The Gambia’s requests refer to the secondary obligations arising from the commission of an internationally wrongful act, and must therefore be read in light of the relevant provisions of the Draft Articles. Worthy of notice is the fact that Myanmar’s obligation of making reparation was advanced by the Applicant in the interest of the affected Rohingya community, as it amounts to a first manifestation of the right of non-injured States to claim international responsibility in the interest of the individuals injured by the infringement of *erga omnes* obligations.

The whole of The Gambia’s Application in fact revolves around the nature of the Genocide Convention’s provisions. In justifying the advanced claims, the State expressly referred to the Court’s assertion that the States parties to the Convention “have, one and all, a *common interest*” to safeguard the *erga omnes* rights provide for therein,²⁵⁶ and specified that through the application, The Gambia “seeks to protect the rights of all members of the Rohingya group who

²⁵¹ Ibid, para. 2.

²⁵² Ibid.

²⁵³ Ibid, para. 111-112.

²⁵⁴ Ibid., para. 112.

²⁵⁵ Ibid.

²⁵⁶ *Reservations to the Genocide Convention*, 23.

are in the territory of Myanmar [...] from the genocidal acts prohibited under the Convention”.²⁵⁷ The State thereby recalled the principle advanced by the ICJ in *Belgium v Senegal* that “the common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party” and specified that this reasoning “applies *mutatis mutandis* to the Genocide Convention”, with the consequence that The Gambia had a legal entitlement to counter Myanmar’s breach of its *erga omnes* obligations.²⁵⁸

The Gambia then went on to request that the ICJ issue an order of provisional measures directed at Myanmar for the purpose of impeding the perpetuation of the genocidal conduct. Its request was based on Article 41 of the ICJ Statute, pursuant to which the Court can indicate the provisional measures which it deems necessary “to preserve the rights of either party”.²⁵⁹ The provision reveals the purpose of provisional measures, which is that of protecting the rights that form the object of the judicial proceedings during the time needed for the Court to issue the judgment on the merits of the case.²⁶⁰ As has been noted, the issuance of a provisional measures order seeks to impede any conduct that would impair the rights for which judicial remedy is sought, thereby rendering the final judgment ineffective.²⁶¹

Other conditions for the issuance of provisional measures are laid down in the ICJ’s Rules of Court. Pursuant to Article 73(1) the Rules, a party to the ICJ Statute may make a request for a provisional measures order “during the course of the proceedings in the case in connection with which the request is made”.²⁶² The provision sets down two distinct conditions: the first is that the request is made in the context of the proceedings instituted before the ICJ, meaning that the Court must already have been seised of the dispute in relation to which the provisional measures are requested;²⁶³ the second is that the request is pertinent to the merits of the dispute.²⁶⁴ The correlation with the object of the main proceedings in turn presupposes that the ICJ enjoys *prima*

²⁵⁷ Ibid., para. 126.

²⁵⁸ Ibid., para. 124-125.

²⁵⁹ Article 41 of the ICJ Statute.

²⁶⁰ Rosenne Shabtai. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*. Oxford: Oxford University Press, 2012. See also Roberto Virzo, “La Corte Internazionale di Giustizia e l’Incompatibilità con Fini Umanitari di Talune Sanzioni Economiche Unilaterali” *Ordine internazionale e diritti umani* (2019): 302-303.

²⁶¹ See Inna Uchkunova, “Provisional Measures before the International Court of Justice” *The Law and Practice of International Courts and Tribunals* 12 (2013): 392.

²⁶² Article 73(1) of the ICJ Rules of Court, April 14, 1978 (entered into force on July 1, 1978) (“Rules of Court”), <https://www.icj-cij.org/en/rules>.

²⁶³ Shabtai, *Provisional Measures in International Law*, 10.

²⁶⁴ Ibid.

facie jurisdiction over the case,²⁶⁵ although at this stage the assessment on jurisdiction need be neither exhaustive nor final, and translates to checking that the jurisdiction is not patently lacking.²⁶⁶

The rights that form the object of the request for provisional measures must be “plausible”. This requirement was explicitly indicated by the Court in the *Belgium v Senegal* case, concerning Belgium’s allegation that the respondent State was under a duty to either prosecute or extradite the Chadian President Hisséne Habré, accused of gross human rights violations perpetrated during his dictatorship, and who had since found refuge in Senegalese territory.²⁶⁷ The Court clarified that for a provisional measures order to be issued it is not necessary “establish definitively the existence of the rights claimed [...]”, as long as they “appear to be plausible”.²⁶⁸ Plausibility subsists if the rights that form the object of the applicant’s claim are supported by a plausible legal basis, and if the claim itself is credible (meaning that the rights upheld by way of the lawsuit probably subsist in fact).²⁶⁹ In other words, the claim brought before the Court must have some probability of success for the provisional measures to be granted.²⁷⁰

Article 73(2) provides that the party asking for provisional measures must indicate the measures requested, the reasons for the requests, and the consequences that may derive from their denial.²⁷¹ The requirement that the party illustrate the consequences of a negation of the requested provisional measures has been interpreted as setting down the condition of “urgency”. In *Belgium v. Senegal*, the Court explained that the urgency standard is met if “there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision”.²⁷² The damage which the provisional measures aim to avoid must be “irreparable” meaning that it may not be solved or undone by way of the ordinary means of reparation. The requirement that it also be imminent refers to the immediacy of the risk, which can only be avoided by way of an interim decision.²⁷³ On the other hand, the indication of provisional measures does not presuppose a judicial finding on the existence of the alleged contravention of international law; as made clear in *Bosnian Genocide*, the Court must simply verify whether under the circumstances,

²⁶⁵ Cameron Miles, “Provisional Measures and the ‘New’ Plausibility in the Jurisprudence of the International Court of Justice” *British Yearbook of International Law* (2018), 1.

²⁶⁶ Shabtai, *Provisional Measures in International Law*, 71.

²⁶⁷ Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 139, at para. 57 (“*Belgium v. Senegal* Provisional Measures”).

²⁶⁸ *Ibid.*, para. 60. The ICJ found that the rights could be extracted from the Convention against Torture and that they could therefore be considered plausible.

²⁶⁹ Miles, “Provisional Measures and the ‘New’ Plausibility”, 3.

²⁷⁰ Uchkunova, “Provisional Measures before the International Court of Justice”, 397.

²⁷¹ Para. 73(2) of the Rules of Court.

²⁷² *Belgium v. Senegal* Provisional Measures, para. 62.

²⁷³ See Uchkunova, “Provisional Measures before the International Court of Justice”, 415.

provisional measures are needed in order to protect the rights that form the object of the main proceedings,²⁷⁴ without having to make a conclusive judgment on the facts or their imputability.²⁷⁵

Relying on these provisions, the Gambia asked the Court to issue a provisional measures order indicating that Myanmar: adopt measures aimed at preventing genocidal acts against the Rohingya group; ensure that the military and other units placed under its control or direction abstain from committing genocide or any of the other acts proscribed under Article 3 of the Genocide Convention against the Rohingya; refrain from destroying or rendering inaccessible to evidentiary material concerning the object of the proceedings; avoid, along with the Gambia, any conduct that may aggravate the dispute between the two States, and – together with the Gambia – provide the Court with a report concerning the measures adopted in compliance with the requested order.²⁷⁶ To these, the Applicant later added the provisional measure that Myanmar “grant access to, and cooperate with” the UN bodies investigating into the alleged genocide of the Rohingya.²⁷⁷

In order to substantiate its request, the Gambia contended that the genocide perpetrated against the Rohingya by Myanmar “is continuing”²⁷⁸ and that the State “has no intention of ending these genocidal acts and continues to pursue the destruction of the [Rohingya] group within its territory”.²⁷⁹ These circumstances were identified by The Gambia as placing the Rohingya under a serious risk of renewed acts of genocide,²⁸⁰ especially in light of the Respondent State’s active demolition of the evidence of the perpetrated crimes.²⁸¹

Addressing the condition for a provisional measures order that the Court have *prima facie* jurisdiction over the dispute, The Gambia reiterated that both States parties to the dispute are members of the UN, of which the ICJ is an organ, and that Article 36 of the ICJ Statute provides for the jurisdiction of the Court over matters covered by the UN Charter. It also recalled that both States are parties to the Genocide Convention, Article 9 of which endows the ICJ with jurisdiction over the disputes regarding its interpretation and application, and that neither party has entered reservations to the abovesaid provision.

With regards to the plausibility of the rights concerned, The Gambia made clear that the Court “does not need to establish definitively” the existence of the Rohingya’s rights under the Genocide

²⁷⁴ 1993 Provisional Measures Order, para. 46.

²⁷⁵ *Ibid.*, para. 44.

²⁷⁶ The Gambia Application, para. 132.

²⁷⁷ 2020 Provisional Measures Order, para. 10, 12.

²⁷⁸ The Gambia Application, para. 116.

²⁷⁹ *Ibid.*, para. 117.

²⁸⁰ *Ibid.*, para. 117-118.

²⁸¹ *Ibid.*, para. 118.

Convention, it being sufficient that the rights could be considered “grounded in a possible interpretation of the Convention”.²⁸² Significantly, The Gambia also indicated the *erga omnes partes* rights among the rights for which it sought protection; the addition confirms the entitlement of any State to act in furtherance of *erga omnes* provisions, even if it did not suffer any direct injury as a result of their contravention.²⁸³

Turning to address the requirement of an imminent risk of irreparable damage, the Applicant noted that “[w]here past violations have occurred, the Court has found provisional measures appropriate when it is “not inconceivable” that they might occur again”.²⁸⁴ Applying this parameter to the situation in Myanmar, The Gambia noted that the Rohingya face a grave threat of future genocidal acts due to Myanmar’s ongoing attempts at destroying the minority, and that the continuing brutalities place the Rohingya under a risk of “death, torture, rape, starvation and other deliberate actions aimed at their collective destruction, in whole or in part”.²⁸⁵ Referring to the IIFFM’s finding that “the Government continues to harbour genocidal intent [...]” as proof of the Rohingya’s imperilled existence,²⁸⁶ The Gambia reaffirmed the urgency of the situation, which “[...] literally cries out for the Court’s protection.”²⁸⁷

The Gambia’s request for provisional measures order was addressed by the ICJ in the corresponding Order issued on January 23, 2020. In the Order, the Court examined whether the preconditions for the indication of provisional measures had been satisfied in the terms indicated by the Applicant. An analysis of the Order will therefore shed light on the subsistence of said conditions in the Myanmar situation, as well as giving a first insight into the probability that The Gambia’s claim as to Myanmar’s international responsibility for genocide be met with success. It will therefore form the object of the following Paragraph.

6. The Significance of the ICJ’s Order for Provisional Measures

In the Provisional Measures Order, the ICJ examined whether the conditions for the indication of the provisional measures illustrated by The Gambia could be considered subsistent in relation to the Myanmar situation. The first of the tested grounds was that of the Court’s *prima facie* jurisdiction. After having recalled that the provisions forming of the object of the claim must

²⁸² Ibid., para. 126.

²⁸³ Ibid., para. 127.

²⁸⁴ Ibid., para. 130.

²⁸⁵ Ibid., para. 131.

²⁸⁶ IIFFM 2019 Report, para. 140.

²⁸⁷ The Gambia Application, para. 131.

appear to provide the Court with jurisdiction on the merits of the case, without the finding having to be conclusive,²⁸⁸ the Court held that the provisions relied on by The Gambia, namely Article 36 of the ICJ Statute and Article 9 of the Genocide Convention, provide a *prima facie* basis for the Court's jurisdiction.²⁸⁹ In particular, Article 9 of the Convention endowed the Court with jurisdiction over disputes concerning the compliance with the Convention's obligations; whilst both parties to the dispute had ratified the Convention, neither one had entered reservations to the Article which would obstruct proceedings before the Court.²⁹⁰ Addressing Myanmar's claim that the ICJ lacked jurisdiction on account to the State's reservations to Article 8 of the Genocide Convention, the Court noted that the provision in question did not regard the settlement of disputes, but rather referred to the "action" which the UN organs could discretionally take to prevent and suppress genocidal conduct. The elucidation enabled the Court to conclude that the reservations entered by Myanmar to Article 8 left the grounds for the Court's jurisdiction over the disputed unaffected and "[...] does not appear to deprive The Gambia of the possibility to seise the Court of a dispute with Myanmar under Article IX of the Convention".²⁹¹

Having identified the apparent legal basis for the Court's jurisdiction, the ICJ turned to assess whether a dispute between The Gambia and Myanmar could be said to exist in the terms described in Article 9 of the Genocide Convention. As has been mentioned, the provision establishes the Court's jurisdiction over disputes concerning the parties' application of the Convention; the *prima facie* jurisdiction was dependent on the subsistence of a dispute concerning Myanmar's fulfilment of the Convention.²⁹² The ICJ clarified that a dispute can be said to exist if the States "hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations".²⁹³ In answer to Myanmar's contention that there was no dispute between the two States because The Gambia had merely acted as a "proxy" of the Organisation of Islamic Countries and in the organisation's interest, the Court observed that "[...] the Applicant instituted proceedings in its own name" and that the assistance lent by other States or organisations did not in itself exclude the existence of a dispute between the two States party to the proceedings.²⁹⁴ The Court also found that The Gambia's statement at the 74th session of the UN General Assembly that it would lead concerted efforts to take the Rohingya issue to the International Court of Justice", read in combination with Myanmar's response during the same

²⁸⁸ 2020 Provisional Measures Order, para. 16.

²⁸⁹ *Ibid.*, para. 17.

²⁹⁰ *Ibid.*, para. 18-19.

²⁹¹ *Ibid.*, para. 35-37.

²⁹² *Ibid.*, para. 20.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*, para. 25.

session that the IIFFM’s findings were “biased and flawed”, was indicative of the subsistence of a “divergence of views” on the facts involving the Rohingya minority alleged to have taken place in Myanmar.²⁹⁵ In doing so, the ICJ drew attention to the fact that the divergent positions of States such as may integrate a dispute can be inferred from the concerned States’ conduct, without there being a need for their express acknowledgment.²⁹⁶ For the same reason, the Court rejected Myanmar’s argument that its failure to respond to The Gambia’s invitation in the 2019 *note verbale* that the Respondent fulfil its obligations under the Genocide Convention could not in itself prove that there was a dispute between the two States. Recalling the principle whereby “the existence of a dispute may be inferred from a failure of State to respond to a claim in circumstances where a response is called for”, the Court affirmed that the seriousness of the allegations made in the Gambia’s *note verbale* was such as to render Myanmar’s silence suggestive of a dispute between the two States.²⁹⁷

As for whether the object of the dispute fell within the scope of the Genocide Convention, the Court noted that the Gambia’s allegations concerned Myanmar’s responsibility for the *commission* of the genocidal acts perpetrated against the Rohingya community, and for the failure to prevent and punish genocide; Myanmar on the other hand had denied the alleged breaches of the Genocide Convention. The Court found that “at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention”.²⁹⁸

These considerations, cumulatively taken, led the ICJ to affirm that there appeared to be a dispute between The Gambia and Myanmar regarding the Genocide Convention’s application and fulfilment, and that this dispute fell *prima facie* within the Court’s jurisdiction.²⁹⁹

The ICJ then turned to assess whether The Gambia had standing to bring a case before the Court. The Court recalled Myanmar’s position that, whilst the Applicant had an interest in the other State’s compliance with Genocide Convention’s provisions, this interest did not amount to a legal entitlement to bring proceedings before the ICJ, seeing as The Gambia had not been “specially affected” by the alleged contraventions.³⁰⁰ The Court, however, remarked that “[i]n view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not

²⁹⁵ Ibid., para. 27.

²⁹⁶ Ibid, citing Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 275, para. 89.

²⁹⁷ Ibid., para. 28.

²⁹⁸ Ibid., para. 30.

²⁹⁹ Ibid., para. 31, 37.

³⁰⁰ Ibid, para. 39.

enjoy impunity”³⁰¹ and that this in turn meant that “[...] any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end”.³⁰² The Court therefore confirmed The Gambia’s argument that the nature of the Genocide Convention’s provisions enabled all States parties to react to their breaches, regardless whether or not they are directly affected by the contravention. It accordingly established The Gambia’s “*prima facie* standing” to seise the Court of the dispute with Myanmar.³⁰³

As for the plausibility of the rights forming the object of The Gambia’s claim, the ICJ reproduced Myanmar’s argument that for a claim regarding the Genocide Convention to be plausible, it must provide proof of the requisite genocidal intent.³⁰⁴ According to the Respondent, genocidal intent could be plausible determined only if it were “the only inference that can be drawn from the acts alleged and evidence submitted by the Applicant”; the fact that inferences other than that of genocidal intent could be drawn from the allegations and evidence presented by The Gambia meant that its claim could not be considered plausible.³⁰⁵ The Court dismissed this argument, holding that, given the preliminary stage of proceedings, reasonable evidence of the specific intent proper to genocide was not necessary for the purposes of ascertaining the plausibility of the rights claimed by The Gambia.³⁰⁶ The preoccupation for the human rights abuses expressed by the UN General Assembly, and the Mission’s finding that international crimes, including genocide, had credibly taken place in Myanmar, were held by the Court to be sufficient grounds for asserting said rights’ plausibility.³⁰⁷

The ICJ also found that the provisional measures asked for by The Gambia bore a connection with the rights forming the object of the main proceedings. The request that Myanmar cease forthwith any genocidal act or other act similarly proscribed under Article 3 of the Genocide Convention against the Rohingya minority was found to be intrinsically connected with the rights for which The Gambia sought protection, as were the provisional measures that Myanmar ensure that the military and other security forces within Myanmar refrain from committing genocide, and take steps aimed at preventing the further destruction of evidence relevant to the proceedings.³⁰⁸

³⁰¹ Ibid., para. 41.

³⁰² Ibid.

³⁰³ Ibid. See also Andrew Boyle, “ICJ Orders Preliminary Relief in Myanmar Genocide Case” *Just Security* (blog), January 28, 2020.

³⁰⁴ 2020 Provisional Measures Order, para. 47.

³⁰⁵ Ibid.

³⁰⁶ Ibid., para. 56.

³⁰⁷ Ibid., 53-56.

³⁰⁸ See *ibid.*, para. 61.

With regard to the measures that the two parties avoid such conduct as would aggravate the dispute, and present the ICJ with periodic reports concerning the steps taken to comply with the a possible provisional measures order, the Court found that the issue of their probable link to the object of the main proceedings “does not arise” as the provisional measures in question merely sought to avoid an aggravation or complication of the existing dispute.³⁰⁹ On the other hand, the Court decided that the indication of the sixth provisional measure requested by the Gambia – namely, that Myanmar grant access to the investigative bodies dealing with findings of genocide – was unnecessary under the circumstances.³¹⁰

Lastly, the Court addressed whether the “urgency” condition for the issuance of a provisional measures order was satisfied in the case at hand. Having made clear that the satisfaction of this criterion does not require a definitive decision on the controverted facts,³¹¹ the Court considered Myanmar’s denial of a situation of urgency and its assertion that it was negotiating the Rohingya’s repatriation with Myanmar and undertaking to bring stability to Rakhine State, even through the prosecution those responsible for the perpetrated crimes.³¹² It then remarked that the rights of the Rohingya protected by the Genocide Convention, particularly the right to existence, are such that their infringement is likely to cause irreparable harm.³¹³ Noting that the IIFFM findings concerned conduct “[...] capable of affecting their right to existence under the Genocide Convention”,³¹⁴ the Court affirmed that “[...] the Rohingya in Myanmar remain extremely vulnerable” in light of the persistent risk of genocide identified in the Mission’s 2019 Report.³¹⁵ Whilst it recognised Myanmar’s efforts at the repatriation of Rohingya and the State’s worded commitment to bring about stability in the affected areas, it held that such steps did not in themselves suffice to remove the serious risk of irreparable damage being caused to the rights of the Rohingya under the Genocide Convention.³¹⁶ The Court therefore asserted that the situation in Myanmar fulfilled the condition of “urgency” presupposed by a Provisional Measures Order.

Having found that all the conditions for the indication of provisional measures had been satisfied, the ICJ confirmed four of the six provisional measures requested by The Gambia. In particular, the Court asked that Myanmar prevent the further perpetration of genocide against the Rohingya; ensure that the Tatmadaw and other security forces abstain from committing genocidal

³⁰⁹ Ibid.

³¹⁰ Ibid., para. 62.

³¹¹ Ibid., para. 66.

³¹² Ibid., para. 68.

³¹³ Ibid., para. 70.

³¹⁴ Ibid., para. 71.

³¹⁵ Ibid., para 72.

³¹⁶ Ibid., para. 73.

acts against the minority; impede the destruction of evidence regarding the object of the proceedings; and present the Court with periodical reports as to the measures adopted in compliance with the Order.³¹⁷ On the other hand, the Court did not indicate that the parties to the dispute refrain from conduct such as would aggravate the existing dispute,³¹⁸ and neither did it demand that Myanmar grant access to the UN bodies investigating into the alleged genocidal acts.³¹⁹ The decision not to indicate these provisional measures was accompanied by little explanation: the Court merely stated that it held such measures to be “unnecessary” under the circumstances.³²⁰ It is unfortunate that the Court should not have ordered Myanmar to grant access to the UN bodies gathering evidence for genocide, as this may forestall the process of demonstrating the subsistence of this international crime, especially considering Myanmar’s continued denial of responsibility and its obstruction of the past investigative initiatives.³²¹

The significance of the ICJ’s 2020 Order is twofold. From a practical perspective, the provisional measures may act as an immediate buffer against the further perpetration of genocide, thus effectively protecting the rights of the Rohingya under the Genocide Convention for the duration of the judicial proceedings. This is not only due to the inherently deterrent effect of the ICJ’s involvement in the Myanmar situation, which might also amplify the attention of the international community; the impediment of future genocidal acts chiefly derives from the obligatory nature of the provisional measures orders issued by the Court. As clarified in the *La Grand* case, the aim underlying the indication of provisional measures is that of guaranteeing the final judgment’s efficacy, which would be compromised if the rights forming the object of the disputes were not safeguarded pending proceedings; this objective can only be reached if the interim measures issued by the Court are binding on the State to which they are addressed.³²² The mandatory nature of provisional measures is confirmed by Article 94 of the UN Charter, pursuant to which all UN member States “undertake to comply with the decision of the International Court

³¹⁷ *Ibid.*, para. 76-82.

³¹⁸ *Ibid.*, para. 83.

³¹⁹ *Ibid.*, para. 62.

³²⁰ See Boyle, “ICJ Orders Preliminary Relied in Myanmar Genocide Case”.

³²¹ Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (release date 18 September 2018) para. 24; See IIFFM 2019 Report, para. 222.

³²² *La Grand* (Germany v. United States of America), Judgment, I. C. J. Reports 2001, p. 466, para. 102: “The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.”

of Justice in any case to which it is a party”.³²³ What this entails in terms of reacting to a State’s non-compliance, however, is unclear; whilst Article 94(2) enables the UN Security Council to adopt enforcement measures aimed at ensuring the efficacy of the Court’s decisions, the provision only refers to *judgments*, whereas provisional measures are indicated by way of an *order*. The exclusion has been interpreted by some as entailing that provisional measures fall outside the scope of the provision, and are therefore not enforceable by way of a Security Council resolution.³²⁴ Even those who believe that the Security Council can react to a State’s failure to comply with an interim order of the Court underline the scant probability of such an occurrence, given the Security Council members’ recurrent practice of vetoing the proposed enforcement measures.³²⁵ As to the ICJ itself, the eventuality of a finding of Myanmar’s non-compliance with the 2020 Order may be of little practical importance. As has been pointed out, the ICJ tends to consider States’ breaches of its interim orders in conjunction with the international wrongdoing that forms the object of the merits of the case, thereby denying reparation to those injured by the former contravention.³²⁶ This was the case in *Bosnia v. Serbia*, where the ICJ’s finding that Serbia had disregarded some of the provisional measures indicated in its 1993 Order did not lead to an order of compensation.³²⁷ The uncertainties concerning the enforcement of the Provisional Measures raises doubts as to the extent of their efficacy in impeding further genocidal conduct, and arguably leaves Myanmar with a large measure of discretion as to their application.

The Provisional Measures Order also has a symbolic or prospective significance. In the first place, it confirms that non-injured States can take action against the breach of an *erga omnes* obligation, and that such action may take the form of judicial proceedings before the ICJ. In fact, the 2020 decision represents the first instance in which the Court established this principle specifically in relation to the breaches of the Genocide Convention, and therefore makes clarity as to the standing before the Court of States not directly affected by the wrongdoing.³²⁸ Secondly, the Order may shed light on the outcome of the dispute. The Court’s affirmation that genocide appears

³²³ Article 94 of the UN Charter.

³²⁴ Uzay Yasar Aysev and Wayne Jordash QC, “Seeing Through Myanmar’s Fog: ICJ Instigates Provisional Measures” *UK Human Rights Blog* (blog), January 31, 2020.

³²⁵ Boyle, “ICJ Orders Preliminary Relied in Myanmar Genocide Case”.

³²⁶ Aysev and Jordash QC, “Seeing Through Myanmar’s Fog”.

³²⁷ *Ibid*; 2007 *Bosnian Genocide*, para. 469: “The Court however considers that, for purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court’s Orders indicating provisional measures”.

³²⁸ Shannon Raj Singh, “Standing on “Shared Values”: The ICJ’s Myanmar Decision and its Implications for Atrocity Prevention” *Opinio Juris* (blog) January 29, 2020. The principle of non-injured State’s standing had previously been affirmed by the Court in relation to the Convention against Torture.

to have been committed in Myanmar raises hopes as to a future declaration of the State's responsibility for genocidal acts or for the other acts proscribed by Article 3 of the Genocide Convention, as well as for the failure to prevent and punish genocide. The Gambia's Application further provides the Court with the occasion to make an unprecedented finding on the Respondent's *commission* of genocide, thereby putting its argument that States can commit genocidal acts into practice. However, it has been noted that the probabilities of this occurring are menial, given the elevated standard of proof needed for a finding on State-perpetrated genocide.³²⁹ Whilst the standard for the indication of provisional measures is that of the *prima facie* plausibility of the contended rights' existence and of the imminent risk of their irreparable damage, a declaration that Myanmar has committed genocide presupposes that the genocide, replete with the specific genocidal intent, is *the only possible inference* that can be drawn from the factual evidence at the ICJ's disposal. As has been seen, The Gambia relied on the findings of the IIFFM for the purpose of alleging Myanmar's perpetration of genocide; the probability that the ICJ hands down a judgment to this effect therefore depends on whether at least some of the facts emerging from the 2018 and 2019 point only to genocide. Myanmar has already challenged such a conclusion, arguing that the facts taking place on its territory may integrate crimes other than genocide;³³⁰ if this were the case, the requisite *dolus specialis* might not be "reasonably inferred", the which in turn would preclude a pronouncement on the Respondent's commission of genocide. It remains to be seen whether the Court will follow Myanmar's position, or whether it will instead find the facts reported by the IIFFM to reveal Myanmar's genocidal intent, thereby holding the State accountable even for this contentious form of international responsibility.

Concluding Remarks

This Chapter has addressed the question whether Myanmar can be considered responsible for the alleged genocide of the Rohingya. In order to do so, it has illustrated the preconditions for State responsibility and the consequences arising from the ascertained breach of an international obligation, to then contemplate the peculiarities of the international responsibility deriving from the contravention of *erga omnes* obligations. Attention has been given to the *erga omnes* character of the Genocide Convention's provision, and what this entails in terms of the entitlement to react to their infringement; the ICJ's pronouncement that all States have a "common interest" on safeguarding the rights contained in the Genocide Convention has been relied on to affirm the

³²⁹ Milanovic, "ICJ Indicates Provisional Measures in the Myanmar Genocide Case".

³³⁰ 2020 Provisional Measures Order, para. 47-48.

right of non-injured States to seise the Court with proceedings concerning the alleged breach of the Convention's provisions. The Chapter has then analysed the conditions for States to commit genocide, and the difficulties of proving genocidal intent of States given the high standards set by the ICJ in the *Bosnian Genocide* and *Croatia v Serbia* cases. These considerations on the legal framework of the international responsibility of States has been weighed against the IIFFM's 2018 and 2019 Reports, in order to see whether the Mission's findings could substantiate a claim as to the State's involvement in the genocidal acts allegedly perpetrated against the Rohingya. The findings were relied on by The Gambia to file an Application with the Court to the effect that Myanmar was responsible for committing genocide and the other acts proscribed by the Genocide Convention, as well as for the failure to prevent and to punish genocide; the Application was therefore put in relation to this factual basis so as to better understand the allegations put forward by The Gambia. Lastly, the Chapter examined the contents of the ICJ's 2020 Provisional Measures Order, in which the Court indicated four of the six provisional measures requested by the Applicant; the significance of the Order was assessed both from a practical perspective, as impeding the aggravation of the Myanmar situation pending the dispute, and in prospective terms, as a possible indication of the outcome of the judicial proceedings.

Having examined the plausibility of the subsistence of both individual criminal liability and State responsibility for the crimes perpetrated in Myanmar, the thesis now turns to address the repercussions of the criminal conduct on Myanmar's efforts at repatriating the Rohingya, in light of the relevant norms of international refugee law.

Chapter V: Assessing the Legality of the Repatriation Agreements

In the Introduction to this thesis, it was briefly mentioned that the Government of Bangladesh and that of Myanmar have undertaken efforts to repatriate the Rohingya refugees from the former to the latter State. As has been noted in Chapter I, the fact that the Rohingya in Bangladesh qualify as refugees has important implications with regards to the ongoing attempts at repatriation. Under international law, refugees cannot be sent back to those countries where they face a serious risk of persecution; the principle is commonly known as *non-refoulement*, and has acquired the standing of customary international law. This Chapter seeks to assess the lawfulness of the repatriation efforts carried out by the two States in light of the principle of *non-refoulement*, and illustrate the other conditions that need be met in order for the Rohingya's return to be compatible with international law. A description of the repatriation procedures initiated by Bangladesh and Myanmar represents the starting point to this assessment.

1. The Repatriation Agreements

The “clearance operations” against the Rohingya allegedly ended around September 2017. This is not to say that the violence and persecution perpetrated against the minority terminated that month, as copious evidence to the contrary has been collected and exposed by the IFFM in its 2018 and 2019 Reports.¹ The “clearance operations”, however, represented a full-fledged repression of the ARSA protests, and can therefore be circumscribed within a well-defined timeframe. On November 23, 2017, the Governments of Bangladesh and Myanmar drafted and signed a memorandum of understanding (“MoU”) for the commencement of the repatriation process.² The proclaimed aim was that of repatriating the 912,852 Rohingya refugees situated in Bangladesh, 743,016 of whom had fled Myanmar as a result of the 2017 “clearance operations”.³ In order to carry out the objectives set down in the MoU, the two States instituted a Joint Working Group on repatriation (also, the “JWG” or the “Group”), composed of delegates of the two States.⁴

¹ Independent International Fact-Finding Mission, Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (release date: 16 September 2019), para. 1-9 (“IIFFM 2019 Report”). See also Independent International Fact-Finding Mission, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (release date 18 September 2018) para. 1193-1204 (“IIFFM 2018 Report”).

² IIFFM 2019 Report, para. 195.

³ Ibid.

⁴ Ibid. See also Sheikh Shahariar Zaman, “Rohingya Repatriation: Joint Working Group Formed, Repatriation Process to Begin by January 23”, *Dhaka Tribune*, December 19, 2017.

According to the Mission, at the time of writing the Group had met four times making little headway in terms of organising the Rohingya refugees' return.⁵

In April of the following year, Bangladesh signed a separate MoU with the UN High Commissioner for Refugees (hereinafter, the "UNHCR") setting up a framework of collaboration "for the voluntary, safe and dignified returns of refugees once conditions in Myanmar are conducive".⁶ Overseeing the implementation of the arrangement was a verification team which collected information in a shared database for protection and documentation purposes.⁷ Significantly, upon describing the MoU, the UNHCR emphasised that it "does not believe that current conditions in Rakhine State are currently conducive to returns".⁸

Myanmar also signed a tripartite MoU with the UNHCR and the UN Development Programme (or "UNDP") aimed at bringing about adequate conditions for the displaced Rohingya to return to Myanmar.⁹ The agreement, which was renewed in May 2019, included the commitment on the part of Myanmar to grant the two UN agencies access to Rakhine State, in order for them to verify whether the situation in the area was conducive to a safe and dignified return of the Rohingya refugees.¹⁰ The creation of procedures for the recognition of the Rohingya's citizenship and human rights was also included among the recommendations addressed at the signatory State.¹¹ In much the same way as the April MoU between Bangladesh and the UNCHR, the tripartite agreement specified that "the conditions are not conducive for voluntary return yet".¹²

Following said MoU, the UNHCR and UNDP began carrying out 35 so-called "quick impact projects" consisting of dialogue with the resident population and the promotion of social cohesion in Rakhine State.¹³ However, according to the IIFFM's 2019 findings, Myanmar's restrictions to the two agencies' presence in the affected region impeded a cohesive assessment of the subsisting

⁵ IIFFM 2019 Report, para. 195.

⁶ UNHCR, Operational Update: Bangladesh, 5 April – 20 April 2018 ("April 2018 Operational Update"), 1, <https://data2.unhcr.org/en/documents/details/63289>.

⁷ IIFFM 2019 Report, para. 196.

⁸ April 2018 Operational Update, 1.

⁹ "UNHCR and UNDP Sign a Memorandum of Understanding (MOU) with Myanmar to Support the Creation of Conditions for the Return of Refugees from Bangladesh" *UNDP* Press Release, June 6, 2018, <https://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2018/unhcr-undp-sign-mou-myanmar.html>.

¹⁰ "UNHCR and UNDP agree on text of MoU with Myanmar to support the creation of conditions for the return of Rohingya refugees" *UNHCR* Press Release, May 31, 2018, <https://www.unhcr.org/news/press/2018/5/5b0fff7b4/unhcr-undp-agree-text-mou-myanmar-support-creation-conditions-return-rohingya.html>.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ "Government Approves Community-based Projects in Rakhine State" *UNDP* Press Release, December 16, 2018, <https://www.mm.undp.org/content/myanmar/en/home/presscenter/pressreleases/2018/government-approves-community-based-projects-in-rakhine-state.html>.

conditions,¹⁴ as is also testified by the agencies' reiterated requests for unrestricted access to all parts of Rakhine State.¹⁵ The hostilities between the Tatmadaw and the Arakan Army in the region brought about an intensification of restrictions such as effectively halted the UNHCR and UNDP's activities for a three-month period.¹⁶ The projects were only resumed in March 2019, as a result of a four-week authorisation of the Myanmar Government, but were geographically limited to the Maungdaw and Buthidaung townships.¹⁷

The Government of Myanmar also stated that, for the purposes of facilitating the repatriation process and implementing the correlated agreements, it had commenced certain infrastructural projects with the creation of centres and sites for the reception of returning refugees.¹⁸ According to the IIFFM, the communication did not lead to any assessment of the sites' adequacy on the part of the two UN agencies.¹⁹ However, the ASEAN's Emergency Response and Action Team (or "ERAT") was allowed to conduct a first inspection of the Reception and Transit Centres and the sites indicated by the Myanmar Government,²⁰ and found that "[b]ased on this current capacity, the repatriation process can only be completed in 6 years for a total number of 500,000 displaced persons".²¹ The findings of the ERAT reveal that the infrastructural projects are as yet insufficient for the successful repatriation of the nearly 1 million refugees currently in Bangladesh.

Notwithstanding the concomitant agreements described above, the IIFFM found that the Rohingya refugees were reluctant to return to Myanmar, as they were cognisant of the human rights deprivations subsisting in their home State and recognised that conditions there were not conducive to a safe and dignified return.²² The refugees conditioned their repatriation on the recognition of citizenship and human rights by the Myanmar authorities, which they believed were still lacking in their home State.²³

After the third meeting of the JWG, Bangladesh and Myanmar communicated that the repatriation of the Rohingya to the latter State would begin around mid-November 2018.²⁴ 485 families were accordingly selected for repatriation, and Bangladesh requested that the UNHCR

¹⁴ IIFFM 2019 Report, para. 198.

¹⁵ *Ibid.*; "Government Approves Community-based Projects in Rakhine State", *UNDP* Press Release.

¹⁶ IIFFM 2019 Report, para. 198.

¹⁷ *Ibid.*, para. 198.

¹⁸ *Ibid.*, para. 199.

¹⁹ *Ibid.*

²⁰ *Ibid.*, para. 200.

²¹ ASEAN, Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar, Executive Summary para. 27, https://asean.org/?static_post=preliminary-needs-assessment-repatriation-rakhine-state-myanmar.

²² IIFFM 2019 Report, para. 201.

²³ *Ibid.*

²⁴ *Ibid.*, para. 206.

undertake an assessment on the individuals' willingness to return to Myanmar.²⁵ The agency found that none of the concerned refugees were willing to return to their home State.²⁶ It also noted that the conditions needed for the "voluntary, safe and dignified, and sustainable return of the refugees from Bangladesh" had not yet been met.²⁷ When addressed by the agency, the Rohingya manifested their dissent towards plans of repatriation by way of chants, spontaneous protests, and even threats of (and isolated attempts at) suicide.²⁸ As a result of the UNHCR's findings, Bangladesh decided to suspend the repatriation programme.²⁹

Renewed efforts at repatriation were taken up in May 2019, but the fourth meeting of the JWG which took place that month did not lead to any concrete agreement on the timeframe for the return of Rohingya refugees. On that occasion, the Bangladeshi delegates invited Myanmar to send a team of Burmese officials to the refugee camps in Bangladesh to inform the displaced Rohingya of the conditions in their home country, at the same time stressing the need that their rights be guaranteed in order for repatriation to take place.³⁰ The Government of Myanmar accordingly sent a delegation of 19 members headed by the Permanent Secretary of the Ministry of Foreign Affairs, Myint Thu, to Cox's Bazar to meet with the Rohingya refugees and talk to them about the possibilities of return.³¹ The refugees addressed by the delegation indicated the recognition of citizenship and human rights as preconditions for their return, a position backed by the Bangladeshi government.³² Following the meeting, 3,450 refugees were cleared for repatriation from a list of 22,000 refugees drawn up by Bangladesh, and it was decided that the first group would return to Myanmar on August 22, 2019.³³ Notwithstanding these technical arrangements, the UNHCR found that the selected families had neither agreed to the plan for repatriation, nor expressed a willingness to return to Myanmar.³⁴

²⁵ Ibid., para. 207. See also UNHCR, Operational Update: Bangladesh, 1 – 15 November 2018 ("November 2018 Operational Update"), 2.

²⁶ November 2018 Operational Update, 2.

²⁷ Ibid.

²⁸ IIFFM 2019 Report, para. 207.

²⁹ Ibid.

³⁰ Humayun Kabir Bhuiyan, "Rohingya Repatriation: 4th JWG Meeting in Naypyidaw Ends Without Any Breakthrough" *Dhaka Tribune*, May 3, 2019, <https://www.dhakatribune.com/bangladesh/rohingya-crisis/2019/05/03/rohingya-repatriation-4th-jwg-meeting-in-naypyidaw-ends-without-any-breakthrough>.

³¹ IIFFM 2019 Report, para. 208.

³² Ibid, para. 208.

³³ Thu Thu Aung, Poppy McPherson and Ruma Paul, "Exclusive: Myanmar, Bangladesh Agree to Start Rohingya Repatriation Next Week", *Reuters*, 15 August 2019, <https://www.reuters.com/article/us-myanmar-rohingya-exclusive/exclusive-myanmar-bangladesh-agree-to-start-rohingya-repatriation-next-week-idUSKCN1V51O5>.

³⁴ Hannah-Ellis Petersen and Shaikh Azizur Rahman, "Rohingya Refugees Refuse to Return to Myanmar without Rights Guarantees" *The Guardian*, August 21, 2019. <https://www.theguardian.com/world/2019/aug/21/not-without-our-rights-rohingya-refugees-refuse-to-return-to-myanmar>. See also "UNHCR Statement on Voluntary Repatriation to Myanmar", *UNHCR Press Release*, August 22, 2019, <https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar.html>.

The attempts to repatriate the Rohingya raise questions as to the conformity with international law of their possible implementation. At the time of writing, the Rohingya refugees' dissent has always acted as a barrier to the execution of the repatriation agreements concluded between Bangladesh and Myanmar, thus rendering the issue merely theoretical in character. This is also due to the UNHCR and UNDP's involvement in the repatriation procedures, coupled with the Bangladeshi government's commitment to ensuring a safe, dignified and voluntary return of refugees to Myanmar. However, the reiteration of the repatriation agreements mandates an illustration of the conditions which need be met in order for the return of refugees in general, and the Rohingya in particular, to be in conformity with international law. The risk that the refugees' repatriation occur in the absence of such requirements is all the more real when one considers that the recent history of Myanmar saw repeated cycles of Rohingya displacement followed by their involuntary repatriation. This aspect was highlighted by the IIFFM which, in its 2019 Report, drew attention to the 1977 and 1992 violence against the Rohingya and their subsequent displacement, noting how the ensuing repatriation of the refugees from Bangladesh had been tainted by "coercive tactics" and intimidation.³⁵ What is more, the preceding Chapters have illustrated that the situation in Myanmar is still characterised by the extensive human rights violations and persecution of the Rohingya community.³⁶ It is therefore important to consider to what extent these elements are compatible with the repatriation efforts undertaken by Bangladesh and Myanmar, and whether such efforts can coexist with the principle of *non-refoulement*. This assessment will form the object of the following Paragraph.

2. The Implications of International Refugee Law for the Legality of the Repatriation Agreements

Under international law, refugees can only be returned to their country of origin if their return would not place their life and liberty at risk, or bring about a concrete risk of persecution. What is more, the UNHCR's Statute mandates that the repatriation process must be voluntary, meaning that refugees cannot be coerced into returning to their home countries against their will. This is especially true when the States in question do not present the stability and human rights guarantees required for the removal of refugee status. The refugees' return must also be safe, both in terms of the physical safety of the returnees *en route*, and from the point of view of the protection of their

³⁵ IIFFM 2019 Report, para. 203-205.

³⁶ *Ibid.*, para. 1-9. See also IIFFM 2018 Report, para. 1193-1204.

human rights upon arrival in their country of origin. All of these requirements will be analysed below, in order to verify whether they can be said to subsist in the case of the Rohingya.

2.1. The Prohibition of Refoulement

It is a principle of international law that refugees cannot be sent back to those territories where they would have reason to fear persecution. This principle is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees (hereon in, the “Geneva Convention”), which provides that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”³⁷ The reasons for persecution indicated in the provision replicate those set down in Article 1 for the purpose of defining refugees under international law; as has been analysed in Chapter 1 of this work, refugees are persons situated outside their country of nationality and that, owing to a well-founded fear of facing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, are unwilling to avail themselves of said country’s protection.³⁸ The parallelism between the two Articles is indicative of the fact that the protection from *refoulement* is afforded to those persons that qualify as refugees in the terms described under Article 1 of the Geneva Convention. On the other hand, the administrative recognition of a person’s status of refugee is irrelevant for the purposes of protection being that the qualification as a refugee is a question of fact independent of any formal recognition.³⁹ This means that the principle of *non-refoulement* applies even to those refugees that satisfy the conditions set down under Article 1 of the Geneva Convention but who have not as yet been recognised as refugees by the competent national bodies.

The term *refoulement* referred to in Article 33 includes “any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions”, and non-admission at the border [...]”,⁴⁰ as is made clear by the words “return (“refouler”) in any manner whatsoever” contained in the provision.⁴¹ The prohibition refers not only to the repatriation of refugees to their

³⁷ Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137 (entered into force April 22, 1954) (“1951 Geneva Convention”).

³⁸ See Article 1(A)(2) of the 1951 Geneva Convention. See also James C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge [etc.]: Cambridge University press, 2005, 304-5.

³⁹ UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (January 26, 2007), para. 6 (“UNHCR *Non-Refoulement* Advisory Opinion”, <https://www.unhcr.org>).

⁴⁰ *Ibid.*, para. 7.

⁴¹ Article 33 of the 1951 Geneva Convention. See also Federico Lenzerini, “Il Principio del Non-Refoulement dopo la Sentenza Hirsi della Corte Europea dei Diritti dell’Uomo” *Rivista di Diritto Internazionale* 3 (2012): 724.

country of origin; it also impedes the forced removal of refugees to any country where they would reasonably face persecution.⁴² The principle applies to all State organs and is not subject to geographical restrictions, it being applicable in any place over which the State enjoys jurisdiction.⁴³

Refoulement differs from the “expulsion” of refugees mentioned in the same Article in that the latter term typically presupposes a judicial decision or an administrative order, that is to say, a formal decision accounting for the removal of the refugee from national territory.⁴⁴ What is more, expulsion is usually employed against those persons that have perpetrated some offence under the State’s domestic law or that represent a burden to the country’s finances.⁴⁵

The only limitation to the protection afforded refugees under Article 33(1) is that set down in the subsequent paragraph of the same Article, which excludes from its scope of application “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.⁴⁶ The provision indicates two reasons for which a refugee may not be granted the protection set down in the first paragraph: the first is that the individual represents a threat to the security of the country in which he or she is located; the second is that the individual has been convicted – by a judgment which it is not possible to appeal – of a crime serious enough that the individual constitutes a danger to the country in question.⁴⁷ It is left to States to decide whether the refugee can be considered dangerous and can therefore be expelled. However, for one thing the decision in question must be individualised, meaning that the provision cannot justify collective expulsions based on security reasons.⁴⁸ For another, even if the refugee is considered a danger to national security, the removal cannot entail sending the individual to those countries where he or she faces a credible risk of persecution.⁴⁹

The principle of *non-refoulement* is considered a “non-derogable component of international refugee protection”,⁵⁰ as is demonstrated by the fact that Article 42(1) of the Geneva Convention

⁴² Guy Goodwin-Gill, *The International Law of Refugee Protection* vol.1, Oxford: Oxford University press, 2014 (published online in August 2014), 5.

⁴³ UNHCR *Non-Refoulement* Advisory Opinion, para. 9.

⁴⁴ Para. 2 of the commentary to Article 33 of the Geneva Convention, in Division of International Protection of the United Nations High Commissioner for Refugees, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37* (October 1, 1997) (“Commentary to Article 33”), <https://www.unhcr.org/search?query=commentary%20to%20the%201951%20geneva%20convention>.

⁴⁵ *Ibid.*, para. 2.

⁴⁶ Article 33(2) of the 1951 Geneva Convention.

⁴⁷ *Commentary to Article 33*, para. 7.

⁴⁸ Sir Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion”, January 1st 2003, <https://www.unhcr.org/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html?query=article%2033>.

⁴⁹ UNHCR *Non-Refoulement* Advisory Opinion, para. 10-11. See also Goodwin-Gill, *The International Law of Refugee Protection*, 5.

⁵⁰ *Ibid.*

and Article 7(1) of the 1967 Protocol include Article 33 among those provisions from which no derogation is permitted.⁵¹ The principle, and its non-derogable character, have also been affirmed by various UN General Assembly resolutions,⁵² as well as being reproduced in a plethora of regional instruments:⁵³ the prohibition of *refoulement* has since acquired the standing of customary, if not even peremptory, international law.⁵⁴ This means that it is binding even on those States that have not ratified the Geneva Convention. What is more, a series of domestic and even regional courts have relied on the prohibition in order to decide cases brought before them; some of these decisions will here be analysed in an attempt to shed light on the practical importance of *non-refoulement*, and its implications for the Rohingya situation.

a) The A.M.R.I. v K.E.R. Case

The first case of relevance to the analysis of the *non-refoulement* principle is the *A.M.R.I. v K.E.R.* case, which was brought to the attention of the Court of Appeal for Ontario in 2011.⁵⁵ The case concerned a 13-year-old girl who had fled to her father in Ontario, Canada from Mexico in order to escape her mother's beatings and maltreatment.⁵⁶ The girl's refugee status was then recognised by the Canadian Immigration and Refugee Board (or "IRB").⁵⁷ Having been denied such a status for other reasons, the father moved to Norway, leaving the girl to live with her aunts.⁵⁸ Upon gaining knowledge that the girl was permanently residing in Canada and would not come back, the mother, who had obtained custody of the girl in Mexico, filed a Hague Convention application with the competent Canadian judge alleging the violation of s. 46 of the Children's Law Reform Act (hereinafter, the CLRA), by which the Hague Convention on the Civil Aspects of Child

⁵¹ Article 42(1) of the 1951 Geneva Convention, with reference to reservations to the Convention by States parties, provides that "1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive". The provision is replicated in similar terms in Article 7(1) of the Protocol Relating to the Status of Refugees, January 31, 1967, 606 UNTS 267 (entered into force October 4, 1967) ("1967 Protocol").

⁵² See, for example, Declaration on Territorial Asylum, G.A. Res. A/RES/2312(XXII), U.N. GAOR, 1631st plen. mtg, December 14, 1967, Article 3; Office of the United Nations High Commissioner for Refugees, G.A. Res. 51/75, U.N. GAOR, 51st sess., Agenda Item 105, UN. Doc. A/RES/51/75, February 12, 1997, para. 3.

⁵³ Article 2(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, September 10, 1969, 1001 UNTS 45 (entered into force June 20, 1974); Article 22(8) of the American Convention on Human Rights, November 22, 1969, 1144 UNTS 123 (entered into force July 18, 1978); Article 19(2) of the Charter of Fundamental Rights of the EU, December 18, 2000, Doc. 2000/C 364/01; Article 78(1) of the Treaty for the Functioning of the European Union, December 13, 2007, Doc. 2008/C 115/01 (entered into force December 1, 2009).

⁵⁴ Alice Farmer, "Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection" *Georgetown Immigration Law Journal* 23, no. 1 (2008): 2.

⁵⁵ *A.M.R.I. v K.E.R.*, [2011] ONCA 417 ("*A.M.R.I. v. K.E.R.*").

⁵⁶ *Ibid.*, para. 3-4.

⁵⁷ *Ibid.*, para. 4, 21.

⁵⁸ *Ibid.*, para. 4-5, 22.

Abduction (the “Hague Convention”) had been enacted at the national level.⁵⁹ The Hague Convention sets down a framework for the prompt return of children “wrongfully removed or retained in any Contracting State”,⁶⁰ and to ensure that the custody and access rights are respected in the States parties’ territory.⁶¹ Article 12 of the Convention provides that if, pursuant to an application presented within a one-year timeframe from the removal, the competent administrative or judicial authority ascertains that the child has been wrongfully removed, said authority must issue an order mandating the return of a child.⁶²

In the proceedings instituted by the girl’s mother – which were carried out without ensuring that the father or aunts had the possibility to participate – the judge found the child to be wrongfully retained in Canada and thereby granted the mother’s application.⁶³ The mother was therefore able to take the girl from the local school (with the aid of Canadian police officials) and bring her back to Mexico.⁶⁴ The Hague Convention proceedings, however, had not taken account of the fact that the girl qualified as a refugee precisely because of the beatings she had suffered when under her mother’s custody, and that there was a serious risk that the girl would face similar persecution if once again placed under her mother’s care.⁶⁵ The girl’s father, who had since gained knowledge of the Hague Convention proceedings, accordingly appealed the judge’s decision to the Court of Ontario on the grounds of its alleged breach of s. 115 of the IRPA, by which the principle of *non-refoulement* set forth in Article 33 of the Geneva Convention had been enforced under Canadian law.⁶⁶ He also argued that the s. 46 of the CLRA conflicted with s. 115 of the IRPA, and that – the latter act prevailing under national law on account of its federal character – s. 46 of the CLRA was rendered inoperable under the doctrine of federal paramountcy.⁶⁷

Whilst dismissing the latter argument,⁶⁸ the Court of Appeal acknowledged that the CLRA had to be interpreted and applied in a manner that was compatible with the IRPA and the norms of refugee protection contained therein.⁶⁹ According to the Canadian Court, “[...]the principle of *non-refoulement* is directly implicated where the return of a refugee child under the Hague Convention is sought. Nothing in the IRPA purports to exempt child refugees from the application of s. 115 in

⁵⁹ Ibid., para. 6, 23.

⁶⁰ Article 1(a) of the Hague Convention on Civil Aspects of Child Abduction, October 25, 1980, Hague XXVIII (entered into force December 1, 1983) (“Hague Convention”).

⁶¹ Ibid., Article 1(b).

⁶² Ibid., Article 12.

⁶³ Ibid., para. 7, 38.

⁶⁴ Ibid., para. 39.

⁶⁵ Ibid., para. 91-96, 101.

⁶⁶ Ibid., para. 8, 40.

⁶⁷ Ibid., para. 40. According to the constitutional jurisprudence of the Canadian Supreme Court, provincial legislation that conflicts with norms of federal application is “rendered inoperative to the extent of incompatibility”, *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3, para 69.

⁶⁸ *A.M.R.I. v K.E.R.*, para. 62, 64.

⁶⁹ Ibid., para. 66-68.

a Hague Convention case. Nor does the Hague Convention purport to elevate its mandatory return policy above the principle of non-refoulement”.⁷⁰ The Court noted that s. 13(b) of the Hague Convention allows for the refusal of an order mandating the return of the abducted child if the return would expose the child to physical or mental damage or “otherwise place the child in an intolerable situation”.⁷¹ Similarly, s. 20 allows for a refusal of a return order if the return would contravene the fundamental principles regarding the safeguard of human rights in force in the requested State.⁷² In the Court’s view, such provisions could form the basis for a reading of the Hague Convention (as enacted by the CLRA) that takes account of the principle of *non-refoulement* binding on Canada under s. 115 of the IRPA.⁷³ Applying the legal framework to the case at hand, the Court of Appeal held that the decision of the Hague application judge was flawed in that it had not taken account of the child’s refugee status, and the risk of persecution which she would face if the order of return were issued;⁷⁴ it therefore ordered that a new Hague Convention hearing be held.⁷⁵ The decision is a clear example of the relevance of the principle of *non-refoulement* in the caselaw of domestic courts.

b) The Case of Isaac Dafullah before Egypt’s Council of State

A second judicial decision concerning the application of international refugee law, and which may aid in better understanding the legality issue attaching to the Rohingya repatriation attempts, is the decision of Egypt’s Council of State on the decree issued by the Minister of Interior for the deportation of the Sudanese refugee Isaac Fadl Ahmed Dafullah from Egypt to Sudan.⁷⁶ The individual’s wife Zahra filed an application with the Council of State requesting that the procedure for the deportation of her husband to Sudan be halted and her husband released from the deportation centre where he was currently detained pending the execution of the decree.⁷⁷ Her husband had in fact been arrested and taken to Aswan for deportation,⁷⁸ on account of the fact that he was found without identification documents and was suspected of intending to infiltrate the border to Israel.⁷⁹

⁷⁰ Ibid., para. 67.

⁷¹ Article 13(b) of the Hague Convention.

⁷² Ibid, Art. 20.

⁷³ *A.M.R.I. v. K.E.R.*, para. 68, 71.

⁷⁴ Ibid., para. 91-96, 101.

⁷⁵ Ibid., para. 130.

⁷⁶ Council of State (Administrative Judicial Court), First Constituency, decision of 5 July 2010 Draft of the Rationale and Verdict of 5 July 2010 session (“Egypt Council of State Decision”), https://www.refworld.org/cases,EGY_CS,5270dc8a4.html.

⁷⁷ Ibid., 1.

⁷⁸ Ibid., 1-2.

⁷⁹ Ibid., 8.

The Council of State noted that under national law, aliens can be expelled by the Minister of Interior or the Director of the Passport and Foreign Emigration Administration (collectively, the “Administration”) for illegally entering the country or if otherwise found to lack a valid residence permit.⁸⁰ However, the court also noted that, based on the evidence presented by the applicant, Isaac qualified as a refugee and had obtained the correlated UNHCR ID in 2009, one year prior to the contested events.⁸¹ It further noted that Egypt had ratified the Geneva Convention, Article 33 of which prohibited the expulsion or rejection of refugees to those territories where they would face a concrete threat of persecution on account of their race, religion, nationality, membership of a social group or political opinion, unless the security exceptions indicated in paragraph 2 of the same Article were found to be subsistent.⁸² Having clarified that, under Article 151 of the Egyptian Constitution, the international instruments signed or ratified by Egypt have the force of law in the country,⁸³ and having ascertained that the Administration’s allegations as to Isaac’s attempt to infiltrate to Israel were unfounded,⁸⁴ the Council of State determined that “the execution of the challenged decree of deporting the mentioned refugee may result in jeopardising his liberty and life [...]”⁸⁵ and accordingly halted the decree’s execution.⁸⁶ As is made clear by the Council of State’s reasoning, the principle of *non-refoulement* played a central role in determining the suspension of the refugee’s deportation from Egypt to Sudan, in consideration of the persecution he would presumably have faced upon returning to his home country.

c) The *Hirsi Jamaa and Others v Italy* Case

The third decision that will here be taken into account is not a judgment issued by a domestic court; rather, it was issued by the European Court of Human Rights in the *Hirsi v Italy* case.⁸⁷ Before examining the case and the Court’s judgment, it must be said that the European Court of Human Rights applies a regional system of norms, in the form of the provisions of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁸⁸ The Convention’s regional scope (it only binds Council of Europe member States) means that the judgment is not directly relevant to the Rohingya situation, as Myanmar is not a Council of Europe

⁸⁰ Ibid., 4.

⁸¹ Ibid., 8.

⁸² Ibid., 5, 7-8.

⁸³ Ibid., 7.

⁸⁴ Ibid., 9.

⁸⁵ Ibid.

⁸⁶ Ibid., 10.

⁸⁷ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment, February 23, 2012 (“*Hirsi v. Italy*”).

⁸⁸ See Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS 5 (entered into force September 3, 1953) (the “ECHR”).

member State and is therefore not bound by the ECHR.⁸⁹ However, as will become clear, the Court acknowledged and relied on the general law principle of *non-refoulement* in order to reach a decision; the case therefore confirms the relevance of the principle in determining the legality of refugee rejection or, in the case of the Rohingya, repatriation, under international law.

The proceedings before the Court were instituted by way of an application against Italy lodged in May 2009 by eleven Somali and thirteen Eritrean individuals.⁹⁰ These individuals had left Libya along with 200 other people onboard three vessels,⁹¹ which had then been intercepted on high seas by three ships of the Italian Revenue Police and the Italian coastguard.⁹² The migrants were therefore transferred onto the Italian ships (without ever reaching the Italian mainland) and sent back to Tripoli, where they were handed over to Libyan officials.⁹³ The operation undertaken by the Italian ships was carried out in execution of a 2009 bilateral agreement between Italy and Libya aimed at combating illegal immigration to Italy.⁹⁴ According to the evidence placed at the Court's disposal, the applicants and the other individuals returned to Tripoli were denied any individualised assessment as to whether they qualified as refugees by the Italian authorities.⁹⁵

In considering the norms of international law applicable to the case with which it had been seised, the European Court of Human Rights expressly dwelled on the Geneva Convention, and noted that Article 33 of the Convention prohibited the expulsion or rejection of individuals to those territories where they would face a serious risk of persecution for the reasons mentioned in the provision.⁹⁶ The Court also referred to the UNHCR's Note on International Protection which defines the principle of *non-refoulement* as a "cardinal protection principle" allowing for no derogation, as well as a customary international law rule binding on all States.⁹⁷ Turning to consider whether the principle in question could come into play in the case under scrutiny, the Court noted that the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment ("CPT") had found Italy's policy of sending migrants intercepted on high seas back to Libya to be in breach of the *non-refoulement* obligation binding on Italy.⁹⁸ The Court reproduced the Committee's statement that migrants were denied an individual assessment of their status under the refugee protection framework before being sent

⁸⁹ For a list of States parties to the ECHR, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=TylrlUcs.

⁹⁰ *Hirsi v. Italy*, para. 9.

⁹¹ *Ibid.*

⁹² *Ibid.*, para. 10.

⁹³ *Ibid.*, para. 11.

⁹⁴ *Ibid.*, para. 13, 19.

⁹⁵ *Ibid.*, para. 11, 36.

⁹⁶ *Ibid.*, para. 22.

⁹⁷ *Ibid.*, para. 23.

⁹⁸ *Ibid.*, para. 36.

back to Libya, and that Libya could not be considered a safe country on account of the serious risk of abuse and ill-treatment faced by migrants there.⁹⁹ It found that other international and non-governmental bodies had reached similar conclusions.¹⁰⁰ On the basis of these reports the Court asserted that, notwithstanding Libya's ratification of certain international instruments relevant for refugee protection,¹⁰¹ there existed a serious risk that the individuals returned to Tripoli by the Italian officials would face inhuman and degrading treatment once on Libyan territory;¹⁰² it therefore concluded that Italy was in breach of Article 3 of the ECHR, which proscribes torture, inhuman and degrading treatment.¹⁰³ The rejection of all the passengers of the intercepted boats was also described by the Court as a collective expulsion in breach of Article 4 of the Additional Protocol n. 4 to the ECHR.¹⁰⁴

As has been mentioned, the conclusion reached by the Court is based on the regional framework for the protection of human rights set down in the ECHR. However, the reasoning developed by the Court for the purpose of reaching such a conclusion relied heavily on the principle of *non-refoulement* binding on States under *general* international law; the Court's observation that "it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return" clearly indicates that States are under a duty to verify whether a risk of persecution subsists before sending potential refugees back to their country of origin.¹⁰⁵ The assessment must be carried out by the State regardless of whether there is a request for international protection on the part of the concerned individuals,¹⁰⁶ and even in those cases where the country to which the individual is sent has ratified international human rights instruments, their mere

⁹⁹ Ibid.

¹⁰⁰ Ibid., para. 37-43.

¹⁰¹ Ibid., para. 97. Significantly, Libya has not ratified the 1951 Geneva Convention. For a list of States parties to the Convention, see: <https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

¹⁰² Ibid., para. 123, 125, 136.

¹⁰³ Ibid., para. 137-138.

¹⁰⁴ Article 4 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, September 16, 1963, ETS 46 (entered into force May 2, 1968): "[c]ollective expulsion of aliens is prohibited". However, in the more recent *Khlaifia and others v Italy*, Application no. 16483/12, Judgment, December 15, 2016, the same Court gave a more restrictive interpretation of the prohibition of collective expulsion, concluding to the effect that Italy had not contravened Article 4 of the Additional Protocol n. 4 to the ECHR by returning the Tunisian migrants to their country of origin in the context of the 2011 migration crisis, being that the returned individuals had had the possibility to request international protection to the Italian authorities. As has been noted by Saccucci, the Court's decision has the effect of diminishing the guarantees of an individualised assessment of the potential refugee's situation and the risks he or she faces upon return, in Andrea Saccucci, "Il Divieto di Espulsioni Collettive di Stranieri in Situazioni di Emergenza Migratoria" *Diritti Umani e Diritti Internazionali* 1, no. 1 (2018): 49-51.

¹⁰⁵ Ibid., para. 133. See also Anna Liguori, "La Corte Europea dei Diritti dell'Uomo Condanna L'Italia per i Respingimenti verso la Libia del 2009: Il Caso Hirsi," *Rivista di Diritto Internazionale* 2 (2012): 415, para. 7.

¹⁰⁶ Irimi Papanicolopulu, "Hirsi Jamaa v. Italy" *The American Journal of International Law* 107, no. 3 (2013): 421; Violeta Moreno-Lax, "Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control" *Human Rights Law Review* 12, no. 3 (2012): 583-584.

conclusion being insufficient proof of the rights' effective implementation.¹⁰⁷ In this sense, the prohibition of *refoulement* may be described as a pre-emptive safeguard against the risk of ill-treatment, that effectively complements the prohibition of torture set down in Article 3 of the ECHR by prohibiting the sending back of individuals to those countries where the proscribed maltreatment would in all probability take place.¹⁰⁸ The connection underlying the two proscriptions has often been explained by referring to the concept of *par ricochet* protection, according to which the prohibition of torture and inhuman or degrading treatment not only forbids States from directly engaging in such human rights violations, but also obliges them to abstain from sending individuals to those countries where they could be subjected to the corresponding treatment.¹⁰⁹ As stated by the Court in the *Soering v. Uk* case, the duty not to extradite where there is a risk of torture in the country of destination is inherent in the proscription of torture set forth in Article 3;¹¹⁰ the *Hirsi v. Italy* decision merely applied the same principle to the *rejection* of refugees,¹¹¹ which integrates another of the possible forms by which *refoulement* can occur.

The European Court of Human Right's reasoning was relied on by certain domestic courts in order to counter the policy of sending back potential refugees to those countries where they would risk facing persecution. One such court is the Tribunal of Rome which, in the case no. 22917(2019), had to deal with another instance in which the Italian authorities sent back migrants intercepted on high seas to Libyan territory.¹¹²

d) Case no. 22917 (2019) before the Tribunal of Rome

The applicants were Eritrean nationals which had left Libya in 2009 with the aim of reaching Italy and being granted international protection there.¹¹³ Their motor broke down a few leagues from

¹⁰⁷ *Hirsi v. Italy*, para. 128.

¹⁰⁸ See Lenzerini, "Il Principio del Non-Refoulement dopo la Sentenza Hirsi della Corte Europea dei Diritti dell'Uomo", 725.

¹⁰⁹ See Stefano Zirulia, "I Respingimenti nel Mediterraneo tra Diritto del Mare e Diritti Fondamentali" *AIC Cronache e Dossier* 2(2012): 8. See also Moreno-Lax, "Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control," 582-583.

¹¹⁰ *Soering v. The United Kingdom*, Application no. 14038/88, Judgment, July 7, 1989, para. 89. See also *ibid.*, para. 91: "The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention."

¹¹¹ See, for example, para. 114 of *Hirsi v. Italy*. See also Francesco Messineo, "Yet Another Mala Figura: Italy Breached the Non-Refoulement Obligations by Intercepting Migrants' Boats at Sea, Says ECtHR" *EJIL: Talk!* (blog) February 24, 2012. On the extension of the prohibition of *refoulement* to cases of non-admission, see Hathaway, *The Rights of Refugees Under International Law*, 363.

¹¹² Trib. Roma, prima sez. civ., sent. no. 22917/2019, 28 novembre 2019.

¹¹³ *Ibid.*, 2.

Lampedusa, where they were rescued by the Italian military and transferred to the Italian ship *Orione*.¹¹⁴ Pictures were taken of them onboard the vessel for identification purposes, and they were told that the ship would take them to Italy.¹¹⁵ Instead, they were sent back to Libya and forcibly transferred to a Libyan vessel, despite having already advanced requests for international protection, and having informed the Italian authorities of the danger of persecution and torture they would face on Libyan territory.¹¹⁶

In answer to the applicants' request for a decision mandating the Italian authorities to grant them access for the purposes of verifying the subsistence of their right to international protection, and the correlated claims for compensation,¹¹⁷ the Tribunal of Rome found that the Italian authorities had in fact breached the *non-refoulement* principle set forth in Article 33 of the Geneva Convention.¹¹⁸ In doing so, the judges expressly recalled the *Hirsi v Italy* decision of the European Court of Human Rights, and noted that, read in combination, Article 3 of the ECHR and Article 33 of the Geneva Convention outlaw any form of refusal of persons that would run the risk of torture, inhuman or degrading treatment *as a result of the rejection itself*.¹¹⁹ The Italian authorities' argument that the applicants' rejection was carried out in execution of the 2008 bilateral agreement with Libya was promptly discarded as insufficient grounds for subtracting Italy from its obligations under international law, the principle of *non-refoulement* among them.¹²⁰ According to the Tribunal, such a principle places States under an obligation to verify whether the individuals potentially qualifying as refugees would face persecutory treatment in the country of origin regardless of whether or not such individuals have already presented a request for international protection, especially when the country to which they would be directed features a situation of systematic violation of human rights.¹²¹ The Italian Government was found to have acted in contravention to this duty and was accordingly ordered to grant access to the applicants for international protection purposes.¹²²

Two aspects of the Tribunal's decision are of particular importance with regards to the Rohingya case. The first is the emphasis placed on the Italian government's duty to verify what conditions the intercepted individuals would endure in Libya before engaging in a push-back policy on high seas. In referring back to the European Court of Human Rights' *Hirsi v Italy*

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid., 3.

¹¹⁷ Ibid., 1, 3.

¹¹⁸ See *ibid.*, 10, 11.

¹¹⁹ Ibid, 9.

¹²⁰ Ibid., 10.

¹²¹ Ibid., 9.

¹²² Ibid, 10, 16-17.

judgment, the Tribunal clarified that the verification of the treatment reserved for the individuals upon return is necessary in all those cases where the country to which the individuals are sent back is characterised by a “systematic violation of human rights”.¹²³ As noted in the decision, the copious documentation on the abuses faced by migrants upon returning to Libya was such that Italy should have known the country not to be a safe place for intercepted individuals.¹²⁴ If one considers that the Rohingya have been the victims of conduct integrating international crimes, it becomes clear that the Bangladeshi government’s conclusion of repatriation agreements with Myanmar is in itself at odds with the abovesaid obligation.

The second, crucial, point addressed by the Tribunal is that the bilateral agreement between Italy and Libya for the purposes of combating illegal migration cannot legitimise the circumvention of the obligations binding on Italy under international law. According to the judge seised of the case, even if the bilateral agreement in question had made express mention of the rejection of the intercepted migrants, it could not in itself dispense Italy of the obligations to which it was bound under both domestic and international law.¹²⁵ Significantly, said obligations are identified in the decision with reference to Article 10 of the Italian Constitution, which accords asylum to the foreigner who does not enjoy democratic rights equivalent to those set down in the Italian Constitution in his or her country of origin, and Articles 18 and 19 of the EU Charter of Fundamental Rights.¹²⁶ Whilst the Charter is an instrument of regional law, the recalled provisions reproduce the *non-refoulement* principle set down in the Geneva Convention. Article 18 in fact does no more than affirm that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees [...]”,¹²⁷ Article 19 in turn provides that individuals cannot be extradited or otherwise removed to those States where they would be under a serious risk of being sentenced to death, or of undergoing torture, inhuman or degrading treatment or punishment.¹²⁸

A parallelism can at this point be drawn between the bilateral agreement stipulated between Italy and Libya and the agreements for the repatriation of Rohingya refugees concluded between Myanmar and Bangladesh. Indeed, the latter two States are bound by the *non-refoulement* principle in much the same way as the former, not because of their ratification of the same international instruments, but because, as has been mentioned in the preceding Paragraphs to this Chapter, the

¹²³ Ibid., 9.

¹²⁴ Ibid., 10.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Article 18 of the Charter of Fundamental Rights of the EU, December 18, 2000, Doc. 2000/C 364/01

¹²⁸ Ibid., Article 19(2).

non-refoulement principle pertains to general international law. What is more, whilst the *lex specialis* criterion normally entails that international treaties can derogate from customary international law,¹²⁹ the same rule cannot apply in those cases where the international norm is of a peremptory nature, for the reason that peremptory norms of international law are norms from which no derogation is permitted.¹³⁰ Article 53 of the 1969 Vienna Convention of the Law of Treaties (“VCLT”) explicitly provides that, “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”;¹³¹ the nullity deriving from the breach of a peremptory or *jus cogens* norm entails that the treaty is rendered ineffective, and the provisions set forth therein inoperable.¹³² Peremptory international norms have accordingly been described as superseding conflicting domestic or international provisions,¹³³ thereby at once determining their invalidity and imposing on States the correlated duty to remove the consequences of any act carried out in execution of the conflicting provisions.¹³⁴ The non-derogable nature of *jus cogens* norms also entails that treaty provisions must be interpreted so as to conform to the peremptory rule in order for them to preserve their effects; the invalidating force of peremptory international norms is such that treaty provisions that are not necessarily in contrast with a non-derogable norm may nonetheless become void if they are interpreted in a manner that is at odds with the abovesaid prescription.¹³⁵

To the extent that *non-refoulement* can be considered a *jus cogens* norm, international treaties must be concluded and interpreted in conformity with the principle in order for them to maintain their validity and effects under international law. The question whether the proscription of *refoulement* amounts to peremptory international law merits further attention, as it directly impacts on the repatriation agreements concluded between Bangladesh and Myanmar. As has been

¹²⁹ Natalino Ronzitti, “Trattati Contrari a Norme Imperative?” in Roberto Barsotti et al., *Studi in Onore di Giuseppe Sperduti*. Milan: Giuffr  editor, 1984, 264; Natalino Ronzitti, *Introduzione al Diritto Internazionale*, Turin: Giappichelli editore, 2013, 180.

¹³⁰ Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (“VCLT”) defines a peremptory norm of international law as “[...]norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See also International Law Commission, “Peremptory Norms of General International Law (*Jus Cogens*)”, Chapter VIII of the Report on the Work of the 69th Session (1 May-2 June and 3 July-4 August 2017), in Yearbook of the International Law Commission Vol. II, Part. II, U.N. Doc. A/72/10, 2017, 193.

¹³¹ Ibid.

¹³² See Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*. London: Hart Publishing, 2015, 113.

¹³³ Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law* 100, no. 2 (2006): 304-305.

¹³⁴ Article 71(1) of the VCLT provides that, “[i]n the case of a treaty which is void under article 53 the parties shall: (a) [e]liminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (b) [b]ring their mutual relations into conformity with the peremptory norm of general international law.”

¹³⁵ Ronzitti, “Trattati Contrari a Norme Imperative?” in Barsotti et al., *Studi in Onore di Giuseppe Sperduti*, 264.

observed,¹³⁶ the *non-refoulement* principle has been set forth in absolute, and therefore non-derogable, terms in a series of international instruments¹³⁷ and UN General Assembly resolutions;¹³⁸ the UNHCR has likewise described the norm as pertaining to the set of non-derogable norms operating on the international plane.¹³⁹ What is more, the European Court of Human Rights has explicitly acknowledged that the absolute character of the proscription of torture and inhuman or degrading treatment laid down in Article 3 of the ECHR is such as to render the duty not to *refouler* similarly absolute where the individual would be subjected to proscribed treatment upon return.¹⁴⁰ The non-derogable character of the *non-refoulement* obligation carries with it significant implications regarding the validity of international treaties for the removal or repatriation of potential refugees.

The issue was addressed by the Tribunal of Trapani in a judgment delivered on June 3, 2019.¹⁴¹ The case concerned criminal proceedings undertaken against a group of migrants rescued from a sinking boat by the *Vos Thalassa*, a merchant vessel flying the Italian flag, for the violent conduct undertaken by such migrants onboard the vessel upon learning that they were being sent back to Libya instead of heading for the Italian peninsula.¹⁴² The implicated individuals were found to have acted in legitimate defence¹⁴³ of their right as persons in distress at sea to arrive to a Place of

¹³⁶ See Paragraph 2.1. of this Chapter.

¹³⁷ Article 2(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, September 10, 1969, 1001 UNTS 45 (entered into force June 20, 1974); Article 19(2) of the Charter of Fundamental Rights of the EU, December 18, 2000, Doc. 2000/C 364/01; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, para. 5, <https://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>.

¹³⁸ Declaration on Territorial Asylum, G.A. Res. A/RES/2312(XXII), U.N. GAOR, 1631st plen. mtg, December 14, 1967, Article 3; Office of the United Nations High Commissioner for Refugees, G.A. Res. 51/75, U.N. GAOR, 51st sess., Agenda Item 105, UN. Doc. A/RES/51/75, February 12, 1997, para. 3. See also G.A. Res. 52/132, U.N. GAOR, 52nd session, Agenda Item 112 (b), UN. Doc. A/RES/52/132, 12 December 1997, at 3.

¹³⁹ UNHCR *Non-Refoulement* Advisory Opinion, para. 12; UNHCR Executive Committee, “General Conclusion on International Protection” No. 25(XXXII), October 20, 1982, letter (b). See also Francesco Salerno, “L’Obbligo Internazionale di *Non-Refoulement* dei Richiedenti Asilo” *Diritti umani e diritto internazionale*, 4 (2010): 492.

¹⁴⁰ See *Hirsi v Italy*, para. 123; *Chahal v the United Kingdom*, Application no. 22414/93, Judgment, November 15, 1996, para. 80: “[t]he prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration”.

¹⁴¹ Trib. Trapani, ufficio del giudice per le indagini preliminari, sent. no. 112/2019, 3 giugno 2019 (“Tribunal of Trapani Decision”).

¹⁴² *Ibid.*, 2-4.

¹⁴³ Article 52 of the Italian Penal Code reads as follows: “Non è punibile chi ha commesso il fatto, per esservi stato costretto dalla necessità di difendere un diritto proprio od altrui contro il pericolo attuale di un’offesa ingiusta, sempre che la difesa sia proporzionata all’offesa”. Where conduct which would normally integrate a crime under Italy’s domestic law is carried out in defence of the author of the conduct or another person’s right against the risk of an unjust (and not necessarily criminal) offence to that right, the conduct is not considered criminally relevant.

Safety (POS) set forth in the Hamburg Convention of 1979,¹⁴⁴ as well as of their fundamental right to life and physical and sexual integrity¹⁴⁵, which rights had been jeopardised by the attempt to send them back to Libya, a place not considered safe in the terms of the Convention.¹⁴⁶ Upon excluding any form of criminal responsibility of the group that had engaged in the violent conduct,¹⁴⁷ the Tribunal of Trapani expressly dwelled on the legality of the 2017 Memorandum concluded between the Italian and Libyan Prime Ministers,¹⁴⁸ in execution of which the *Vos Thalassa* had attempted to reach the North African coasts in order to hand the rescued migrants over to the Libyan authorities.¹⁴⁹ The deciding judge noted that the execution of the 2017 Memorandum jeopardised the right not to be subjected to torture or inhuman or degrading treatment enshrined in Article 3 of the ECHR, and recalled that, in the *Hirsi v Italy* decision, the European Court of Human Rights had derived from this right the corresponding obligation on States not to send back or otherwise remove individuals to those States where they would face a risk of such conduct.¹⁵⁰ Noting that the prohibition of torture was replicated in non-derogable terms in a plethora of international instruments and therefore integrated a peremptory norm of international law (extending beyond the regional framework of the ECHR),¹⁵¹ the Tribunal affirmed that the norm prohibiting *refoulement* is similarly peremptory when the removal of individuals would expose them to torture and degrading or inhuman treatment.¹⁵² Having recalled the rule set forth in Article 53 of the VCLT accounting for the nullity of treaties contrary to peremptory international norms, the Tribunal asserted that the 2017 Memorandum concluded between the Italian and Libyan Prime Ministers was void in that it was concluded at a time when the proscription of *refoulement* had already acquired *jus cogens* standing, and set up a mechanism

¹⁴⁴ The International Convention on Maritime Search and Rescue, April 27, 1979, 1405 UNTS 23489 (entered into force June 22, 1985, amended by res. MSC. 70(69) of May 18, 1998) sets down a framework for the rescue of persons in distress at sea. Chapter 3.1.9 of the amended Convention provides that “[t]he Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety [...]”. The “place of safety” is described by the International Migration Organisation’s Guidelines on the Treatment of Persons Rescued, Res. JMSC.167(78), May 20, 2004 as being “[...] a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. [...]”.

¹⁴⁵ Tribunal of Trapani Decision, 46.

¹⁴⁶ *Ibid.*, 32. See also *ibid.*, 46-65, where the judge seized of the case refers to a series of UNHCR describing the political instability in Libya as well as the dire conditions to which migrants, including refugees, are subjected in the State in order to determine that Libya cannot be considered a POS for the purposes described in the 1979 Hamburg Convention.

¹⁴⁷ *Ibid.*, 69.

¹⁴⁸ For the full text of the 2017 Memorandum, visit: <http://www.governo.it/sites/governo.it/files/Libia.pdf>. See also ; Marina Mancini, “Il Memorandum d’Intesa tra Italia e Libia del 2017 e la sua Attuazione” in Elena Sciso and Natalino Ronzitti, *I Conflitti in Siria e Libia: Possibili Equilibri e le Sfide al Diritto Internazionale*, Turin: Giappichelli editore, 2018, 194-196.

¹⁴⁹ *Ibid.*, 31-38.

¹⁵⁰ *Ibid.*, 33-34.

¹⁵¹ *Ibid.*, 35-37.

¹⁵² *Ibid.*, 37.

whereby the migrants could be sent back to a country where they would be at risk of torture or inhuman or degrading treatment.¹⁵³¹⁵⁴

Not only is the decision a concrete example the invalidating effect which derives from a treaty's non-conformity with peremptory international norms under Article 53 VCLT, it also extends the scope of this rule to the principle of *non-refoulement*, at least in those cases where the individuals would face a risk of torture or inhuman or degrading treatment upon being sent back to the country of origin. The consequence being that any treaty containing provisions that are in breach of the abovesaid principle is nullified and therefore rendered inoperable. Whilst the Tribunal of Trapani found *non-refoulement* to be peremptory only in relation to the proscription of torture or inhuman or degrading treatment, the principle may be considered of peremptory standing in all those cases where the pushed back or removed individuals would veritably be subjected to the violation of rights set forth in *jus cogens* norms of international law.¹⁵⁵ It has already been mentioned that the prohibition of genocide and, indeed, of all international crimes,¹⁵⁶ pertains to the set of peremptory international norms: the principle of *non-refoulement* is therefore likewise peremptory in relation to these *jus cogens* proscriptions. This reasoning directly impacts on the legality and, therefore, the validity of the repatriation agreements concluded between the Governments of Bangladesh and Myanmar. As has been illustrated in Paragraph 1 of this Chapter, said agreements contain a commitment on the part of the two States to repatriate the Rohingya refugees currently residing in Bangladesh to Myanmar; insofar as the Rohingya face a credible risk of genocide or international crimes, or indeed any other conduct integrating torture or inhuman or degrading treatment, the

¹⁵³ Ibid., 38. The effects affirmation of the Memorandum's invalidity are limited to the case with which the Tribunal was seised.

¹⁵⁴ It should be noted that the agreement itself does not make mention of any endeavour on the part of Italy to push back potential refugees intercepted on high seas to Libyan waters or otherwise hand them over to the Libyan authorities. The agreement merely provides for the collaboration of the two contracting States in combating illegal immigration particularly through the technical support of the Italian authorities to the Libyan Coastguard, as is evidenced by the commitment under Article 1 to "curb the flux of illegal migrants [...] in conformity with the previous agreements signed by the Parties". Article 5 of the 2017 Memorandum goes so far as to affirm that "[t]he Parties endeavour to interpret and apply the agreement in conformity with the international obligations and human rights treaties to which the two States are parties". However, it is also true that the "previous agreements" recalled in Article 1 of the Memorandum possibly include the 2009 Protocol concluded between the two States, which expressly mentioned that "the two countries undertake to repatriate clandestine immigrants and to conclude agreements with the countries of origin in order to limit clandestine immigration", see see *Hirsi v. Italy*, para. 19. The Protocol in question constituted the framework for the push-back practice giving rise to Italy's responsibility in the terms described in the *Hirsi v Italy* decision.

¹⁵⁵ Lenzerini, "Il Principio del Non-Refoulement dopo la Sentenza Hirsi della Corte Europea dei Diritti dell'Uomo", 732: "[...] anche il *non-refoulement* assurge a livello di norma cogente ovviamente nella misura in cui sia funzionale a proteggere la persona da trattamenti riconducibili a tortura. Lo stesso ragionamento può essere esteso alle altre fattispecie in cui la protezione dal respingimento sia indispensabile al fine di proteggere l'individuo da altri trattamenti integranti violazioni di norme di *jus cogens* [...]."

¹⁵⁶ See International Law Commission, "Crimes Against Humanity", Chapter IV of the Report on the Work of the 69th Session (1 May-2 June and 3 July-4 August 2017), in Yearbook of the International Law Commission Vol. II, Part. II, U.N. Doc. A/72/10, 2017, 10; Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge: Cambridge University press, 2015 (published online in August 2015), Chapter 11, para. iii.

agreements themselves should be considered void pursuant to Article 53 of the VCLT by reason of their non-conformity with the *jus cogens* norm proscribing *refoulement*.

In light of the above-described caselaw, it becomes clear that that the procedures undertaken by the Governments of Bangladesh and Myanmar for the purpose of repatriating the Rohingya refugees to the latter State should be weighed against the prohibition of *refoulement* in order for their legality to be credibly tested. Such an assessment is aided by the findings of the IFFM illustrated in its 2019 Report, as the Report contains a Section explicitly dedicated to verifying whether the repatriation efforts can be considered to conform to the international norms on refugee protection.

2.2. The IFFM's Findings

The Mission found that the level of discrimination and human rights violations perpetrated against the Rohingya “remain[ed] largely unchanged” since the report issued one year earlier.¹⁵⁷ It went so far as to say that the permanent “deplorable conditions” suffered by those 600,000 Rohingya who had remained in Myanmar possibly rendered their situation worse than that analysed in its 2018 Report.¹⁵⁸ As has already been examined, the Mission found credible evidence that the perpetration of the crimes against humanity and of genocide against the Rohingya was ongoing at the time of writing the report, and that Myanmar “continues to harbour genocidal intent”, thus accounting for the perdurance of a serious risk of genocide for the Rohingya population.¹⁵⁹ The collected evidence led the Mission to conclude that “conditions in Myanmar are unsafe, unsustainable and impossible for approximately one million displaced Rohingya to return to their homes and lands”.¹⁶⁰ Noting that under international law, the principle of *non-refoulement* grants people the “right to voluntary, safe, dignified and sustainable return to their country of origin”,¹⁶¹ the Mission affirmed that the dire conditions faced by the Rohingya in Myanmar, and the danger of falling victims to the crimes perpetrated within the State, were such that the abovesaid requirements for return “have not been met and, in fact, cannot be met at this time”.¹⁶²

Based on these findings, the Mission concluded that the Government of Myanmar’s attempts at repatriation merely stemmed from the State’s desire to tranquilise the Government of Bangladesh and the wider international community, thus rendering the resettlement plans inadequate for the

¹⁵⁷ IFFM 2019 Report, para. 212.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, para. 244.

¹⁶² *Ibid.*, para. 247.

safe repatriation of the Rohingya refugees.¹⁶³ As the Mission's conclusion on the matter makes clear, the situation in Myanmar is such that the very validity of the repatriation agreements signed by the Governments of Bangladesh and Myanmar should be questioned; the ongoing risk of genocide and crimes against humanity faced by the Rohingya in Myanmar means that the commitment to repatriate refugees contained in the agreements conflicts with the peremptory norm of international law prohibiting *refoulement* in connection with these crimes. What is more, were the repatriation agreements to result in the actual repatriation of the Rohingya community currently in Bangladesh, there would be substantial grounds for considering the return a breach of the international norms on refugee protection and of the principle of *non-refoulement* upheld therein, with all that this would entail in terms of the two States' international responsibility.¹⁶⁴ This risk has been evidenced by numerous commentators, who have criticised the two Governments' reiterated attempts at repatriation and, in some cases, even the UNHCR's active involvement in the correlated procedures. Indeed, the agency itself has on more than one occasion brought attention to the fact that conditions in Myanmar are not as yet conducive to the Rohingya's safe and voluntary return. It is therefore important that the repatriation procedures take due account of the conditions in Myanmar, and are not undertaken in disregard of the concrete dangers of persecution which the Rohingya refugees would currently face upon returning to their home State.

2.3. The Voluntariness Requirement

Non refoulement has also been interpreted by the UNHCR as constituting the basis for the requirement that the repatriation of refugees be voluntary.¹⁶⁵ According to the agency, the involuntary return of refugees would integrate an example of *refoulement*, being that a person who has a well-founded fear of being persecuted in the country of origin qualifies as a refugee and therefore "[...] cannot be compelled to repatriate".¹⁶⁶ The voluntariness requirement is set down in Article 1 of the UNHCR Statute, according to which the agency's role is that of providing international protection to refugees and aiding Governments and private entities "to facilitate the

¹⁶³ Ibid., para. 668.

¹⁶⁴ On State responsibility for the *refoulement* of intercepted potential refugees, see Salerno, "L'Obbligo Internazionale di *Non-Refoulement* dei Richiedenti Asilo", 513; Mancini, "Il Memorandum d'Intesa tra Italia e Libia del 2017 e la sua Attuazione" in Sciso and Ronzitti, *I Conflitti in Siria e Libia: Possibili Equilibri e le Sfide al Diritto Internazionale*, 205-211.

¹⁶⁵ UNHCR, The International Law of Voluntary Repatriation (April 19, 2018), 1-2, <https://www.unhcr.org/events/conferences/5ae079557/comment-draft-1-gcr-international-law-voluntary-repatriation.html?query=the%20international%20law%20of%20voluntary%20repatriation>.

¹⁶⁶ UNHCR, Voluntary Repatriation: International Protection Handbook (1996), para. 2.3 ("UNHCR Voluntary Repatriation Handbook"), <https://www.unhcr.org/publications/legal/3bfe68d32/handbook-voluntary-repatriation-international-protection.html>.

voluntary repatriation of such refugees [...]”.¹⁶⁷ It is further reiterated in Article 8(c) of the Statute, which lists “[a]ssisting governmental and private efforts to promote voluntary repatriation [...]” among the ways by which the UNHCR can afford refugees international protection.¹⁶⁸ Read together, these provisions indicate that the repatriation of refugees must be voluntary in character once conditions in the country of origin are conducive to their return, and that if such conditions do not yet guarantee the refugee’s safe repatriation, the refugee can only be repatriated if he or she manifests a willingness to return.¹⁶⁹ In both cases, said willingness must have freely taken shape, and cannot be the result of physical or psychological influence such as has driven the individual to leave the host country.¹⁷⁰

The principle of voluntary repatriation derives from the right of individuals to return to their country of origin.¹⁷¹ This right is set down in a series of international instruments, and is accompanied by the State of nationality’s duty to allow an individual currently situated abroad to return.¹⁷² The fact that individuals are entitled to return to their country entails that refugee status is necessarily transitory in character, and stems from the refugee’s temporary inability or unwillingness to avail him or herself of the national protection of his or her home country; the status therefore ceases once the refugee “[...] resumes or establishes meaningful national protection”.¹⁷³

The resumption of national protection can occur either on objective grounds (in the form of the removal of the circumstances legitimising the fear of persecution), or because the individual has voluntarily decided to re-avail him or herself of the country of origin’s protection. This is made clear by Article 1 (c) of the Geneva Convention which identifies the situations subsisting which the status of refugee can be said to have ceased. The provision distinguishes those cases where the refugee has “voluntarily re-availed himself of the protection of the country of his nationality” (which include even the voluntary reacquisition of the previously lost nationality, or the voluntary re-establishment of the refugee in the country left for fear of persecution), from a fundamental

¹⁶⁷ Article 1 of the Statute of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc. A/RES/428(V), December 14, 1950 (“UNHCR Statute”).

¹⁶⁸ *Ibid.*, Article 8(c).

¹⁶⁹ See para. 1.6 of the UNHCR Voluntary Repatriation Handbook.

¹⁷⁰ Jeff Crisp and Katy Long, “Safe and Voluntary Refugee Repatriation: From Principle to Practice,” *Journal on Migration and Human Security* 4, no. 3 (2016): 142-143.

¹⁷¹ See Guy-Goodwin Gill, *The International Law of Refugee Protection*, 8.

¹⁷² *Ibid.*, para. 2.1. Examples of the international instruments providing for the right of return are: Article 13(2) of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd sess, 183rd plen mtg, U.N. Doc. A/810, 10 December 1948 (“UDHR”), which provides that “[e]veryone has the right to leave any country, including his own, and to return to his country”; Article 12(4) of the International Covenant on Civil and Political Rights, December 16, 1966, 999 UNTS 171 (entered into force March 23, 1976) (“ICCPR”) which provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country”; Article 5(d)(ii) of the Convention on the Elimination of Racial Discrimination, 660 UNTS 195, March 7, 1966 (entered into force January 4, 1969) (“CERD”) which provides for “[t]he right to leave any country, including one’s own, and to return to one’s country”.

¹⁷³ UNHCR Voluntary Repatriation Handbook, para. 2.2.

change in the circumstances in connection to which the individual had acquired the refugee status.¹⁷⁴ Only in the latter case does the voluntary character of repatriation become irrelevant, due to the fact that the alteration of conditions in the refugee's home country render the fear of persecution unfounded and therefore does away with the refugee status regardless of the individual's inclination to return.¹⁷⁵ In all of the other abovementioned situations, the cessation of the refugee status derives from the individual's choice to place him or herself under the country of nationality's protection; if this choice manifests itself in the form of the individual's reestablishment in his or her country, such return must be voluntary in order for the international protection to end. What is more, the termination of the circumstances subsisting which the individual has acquired the refugee status does not always determine the cessation of refugee status: as has been clarified by the UNHCR, the individual may continue to have a reasonable fear of persecution, or the previously faced persecution may be of such character that the status is not automatically lost upon the circumstances' alteration.¹⁷⁶ This is yet another example of how voluntariness, or the absence thereof, plays a central role in legitimising the individual's repatriation. Similarly, if the choice of the refugee to return to the country of nationality derives from the dire conditions and human rights deprivations faced by the individual in the host country, the ensuing repatriation cannot be said to result from a voluntary decision.¹⁷⁷

It has been noted that the UNHCR resorts to the voluntariness requirement even in those cases where the alteration of circumstances would legitimise the repatriation of the individual irrespective of his or her consent.¹⁷⁸ While this may not take away from the role of the termination of circumstances accounting for refugee status in legitimising the individual's repatriation, the UNHCR's focus on *voluntary* repatriation entails that, where it is involved in repatriation procedures, those procedures will be effectively dependent on the refugees' consent.¹⁷⁹ The UNHCR itself goes so far as to assert that a customary international norm mandating the voluntary character of repatriation under all circumstances has taken shape,¹⁸⁰ citing for support a series of General Assembly resolutions which, though not in themselves of a binding nature, are nonetheless symptomatic of an *opinion juris* to this effect.¹⁸¹ The consideration inevitably impacts on the

¹⁷⁴ Article 1(c) of the 1951 Geneva Convention.

¹⁷⁵ Hathaway, James C. "The Right of States to Repatriate Former Refugees" *Ohio State Journal on Dispute Resolution* 20, no. 1 (2005): 177-179.

¹⁷⁶ *Ibid.*, para. 2.2.

¹⁷⁷ *Ibid.*, para. 2.3.

¹⁷⁸ See Hathaway, "The Right of States to Repatriate Former Refugees", 180-182; Crisp and Long, "Safe and Voluntary Refugee Repatriation: From Principle to Practice", 145.

¹⁷⁹ See Hathaway, "The Right of States to Repatriate Former Refugees", 183-4.

¹⁸⁰ UNHCR, *The International Law of Voluntary Repatriation*, 2-4.

¹⁸¹ See, for example, G.A. Res. 72/150, U.N. GAOR, 72nd sess., Agenda Item 64, U.N. Doc. A/RES/72/150, December 19, 2017, para. 42-43.

attempts to repatriate the Rohingya community currently situated in Bangladesh, as such efforts have been undertaken on the basis of agreements concluded with the UNHCR, and should therefore necessarily revolve around the voluntariness of the Rohingya's return to Myanmar.

As has been illustrated in Paragraph 1 of this work, the refugees in Bangladesh have not as yet consented to their planned repatriation. The spontaneous protests in Cox Bazaar and the threats of suicide uttered by the refugees when faced with the prospects of return clearly indicate their reluctance to go back to Myanmar.¹⁸² The lack of voluntariness means that any enforcement of the repatriation agreements would contravene the international law on refugee protection, and the rules regulating the UNHCR's own mandate. So far, the refugees' protests have acted as an effective barrier to the reiterated attempts at repatriation by the Governments of Bangladesh and Myanmar. However, the very fact that the two Governments periodically embark on renewed procedures with the aim of repatriating the Rohingya to Myanmar may be said to jeopardise the respect for the Rohingya's will. For the same reason, any future attempt at repatriation will have to consider whether the voluntariness of the Rohingya refugees subsists for the ensuing return to comply with the international standards of refugee protection, an assessment which should in the first place be carried out by the UNHCR.

2.4. The Principle of Safe Return

The return of refugees must also be safe. This condition encompasses a series of measures which the country of origin must guarantee or put in place in order for repatriation to occur without endangering the returning individual. The UNHCR differentiates between measures of legal safety, including "amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return", measures of physical security, such as "protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites", and measures of material security, such as "access to land or means of livelihood".¹⁸³ The return must also be dignified, the which presupposes, *inter alia*, the integral restoration of the refugees' previously denied human rights.¹⁸⁴

It has already been mentioned that the so-called "legal safety" measures are lacking in Myanmar;¹⁸⁵ the persistent discrimination and abuse of the Rohingya community is by its very nature incompatible with the concept of legal safety indicated by the UNHCR, as it directly

¹⁸² See IIFFM 2019 Report, para. 207.

¹⁸³ UNHCR Voluntary Repatriation Handbook, para. 2.4.

¹⁸⁴ *Ibid.*

¹⁸⁵ See IIFFM 2019 Report, para. 1-9.

undermines any assurance of respect for the Rohingya's integrity or freedom from persecution. What may be added is that the measures for the returning refugees' "physical security" are also absent: the fact that landmines have been placed along the border between Myanmar and Bangladesh,¹⁸⁶ and the Tatmadaw's ongoing violence against the Rohingya,¹⁸⁷ demonstrate that the Rohingya's physical integrity would almost certainly be imperilled were the repatriation to take place. The same consideration also applies to the measures of "material security" included in the notion of safe repatriation: as has been indicated when analysing the grounds for Myanmar's state responsibility, the Myanmar authorities have either burned down or confiscated land previously owned by the Rohingya and have then engaged in projects for the alteration of demographic makeup of the affected regions.¹⁸⁸ The operation in question is in blatant contradiction with the requirement that returning refugees have access to land and livelihoods. These elements, cumulatively considered, indicate that the conditions for the Rohingya's "safe" return are not as yet present in Myanmar;¹⁸⁹ any execution of the repatriation agreements would therefore necessarily take place in breach of the norms of refugee protection mandating that the return be safe and dignified.

It is clear from the conducted analysis that Myanmar does not as yet present the conditions for the safe, voluntary, and sustainable return of the Rohingya refugees. The repatriation attempts undertaken by the Governments of Bangladesh and Myanmar reveal the two States' neglect for the refugee protection at stake in the process, and place the Rohingya refugees currently in Bangladesh under the concrete risk of *refoulement*. It is to be hoped that the UNHCR's involvement in the repatriation procedures guarantee the respect for the refugees' rights under international law, particularly in light of the serious dangers of persecution they would otherwise face upon return.

Concluding Remarks

This Chapter has addressed the question of the legality of the repatriation agreements and the procedures for their implementation undertaken by the Governments of Bangladesh and Myanmar in light of the international norms of refugee protection. It has been observed that the ongoing repatriation efforts should be undertaken with due regard for the principle of *non-refoulement* set down in the 1951 Geneva Convention, which proscribes any form of rejection of refugees to those countries where they would face a credible fear of persecution. The analysis of the caselaw of both

¹⁸⁶ IIFFM 2018 Report, para. 1205.

¹⁸⁷ IIFFM 2019 Report, para. 249.

¹⁸⁸ See *ibid.*, para. 116, 128, 139.

¹⁸⁹ *Ibid.*, para. 207.

domestic and regional courts has evidenced that the proscription of *refoulement* act a concrete impediment to the removal of refugees from a host country, regardless of whether or not their status has been recognised by the country's competent administrative bodies. What is more, the principle enshrined in the 1951 Geneva Convention has acquired the standing of customary international law, meaning that it applies even to those States that, like Myanmar, have not ratified the Convention or the 1967 Additional Protocol in which it is enshrined. The peremptory standing of the prohibition of *refoulement* when the rejection or removal of refugees (and all other individuals) would jeopardise their rights set forth in *jus cogens* norms of international law raises serious doubts as to the validity pursuant to Article 53 of the VCLT of the repatriation agreements concluded between Bangladesh and Myanmar, particularly in light of the findings of the IIFFM on the continued risk of genocide faced by the Rohingya in the latter State. The continuing discrimination and violence against those Rohingya who have remained in Myanmar also undermines the compatibility with international law of a possible execution of the repatriation plans negotiated with Bangladesh, especially when considering that the refugees situated in the latter State have repeatedly expressed their fear of the persecution they would face upon return.

Another aspect of refugee protection which is of relevance to the Rohingya's repatriation is that of voluntariness. As has been highlighted in Paragraph 2.3, the refugee's willingness to return to their home country is essential for the repatriation procedures' legality in those cases where the risk of persecution in their home countries is still present. What is more, voluntariness of return is at the core of the UNHCR's involvement in all repatriation programmes, as well as being expressly mentioned in the agency's Statute. The fact that the UNHCR's mandate is based on the voluntariness requirement entails that, where the agency is involved in repatriation plans, it must ensure that such plans are only executed once the refugees' willingness to return has been established. The UNHCR's participation in the procedures undertaken by Bangladesh and Myanmar for the Rohingya's repatriation has enabled it to verify the Rohingya's reluctance towards prospects of return; it is to be hoped that the agency will continue to consider the refugees' attitude before allowing their repatriation to Myanmar.

The final Paragraph has illustrated that the Rohingya's repatriation would not be safe; the conditions in Myanmar such that both the refugees' physical integrity, and their legal protection, would be severely compromised return. The denial of citizenship and basic human rights, the destruction of their homes, and the continuing violence against those Rohingyas situated in Myanmar reveal that the situation in the State is not conducive to the refugee's safe repatriation.

It is clear from the conducted analysis that none of the conditions needed for the Rohingya's repatriation to take place in conformity with international law are present in Myanmar. The fact that the repatriation programmes have not yet been materially carried out is further confirmation that the refugees currently located in Bangladesh cannot be returned to their home country without contravening the relevant norms of international refugee law. Whether or not the situation will vary in future depends on the Myanmar authorities' ability to adopt the legal and material safeguards necessary for ensuring the Rohingya's protection; the international proceedings against the State, coupled with the UNHCR's active involvement in the repatriation programmes, may play an essential role in bringing about these much needed reforms.

Conclusion

This thesis has examined the international and domestic proceedings regarding the Rohingya crisis from an international law perspective, with the aim of ascertaining whether and to what extent it is possible to talk of individual criminal liability or state responsibility for the crimes of deportation and genocide alleged to have been perpetrated against the ethnic minority. The International Criminal Court's 2018 and 2019 Decisions affirming its jurisdiction over the crime of deportation and authorising the Prosecutor's investigation into the Bangladesh/ Myanmar situation, have served to understand the conditions needed for the Court to entertain criminal proceedings over crimes committed at least in part in a State not a party to the Rome Statute, and assess whether its jurisdiction, already affirmed with regards to deportation, could be extended to the genocidal acts alleged to have been perpetrated against the Rohingya. For their part, the proceedings instituted by The Gambia before the International Court of Justice were analysed in connection with the relevant norms of State responsibility, and the more specific requirements governing the responsibility of States for genocide: the aim was that of evaluating whether Myanmar could be considered responsible for the presumably genocidal conduct carried out by the national authorities in the context of the 2016 and 2017 "clearance operations" undertaken against the Rohingya civilians, and whether the State could be said to have *committed* this international crime. The severe oppression faced by members of the minority, in the form of both persecutory policies and the continuing violence against members of the ethnic group, have also raised the question of the conformity of the agreements concluded by the Governments of Bangladesh and Myanmar for the repatriation of the Rohingya refugees situated in the latter State.

The starting point to this analysis was a description of the Rohingya's status under domestic and, consequently, international law. It has been noted that, whilst the Rohingya satisfy the criteria for them to qualify as "minorities" on the international plane, this qualification has not brought with it the correlated forms of protection accorded minorities under international law, the principal of which being the right to existence set forth in Article 27 of the International Covenant on Civil and Political Rights. Myanmar's failure to safeguard the minority against the violent conduct of the Tatmadaw and other forces undertaken as part of the 2016 and 2017 "clearance operations", is at variance with the obligation to preserve the Rohingya's cultural and even physical existence. The overlap of this right with the prohibition of genocide laid down in the Genocide Convention is such that, if the other conditions underlying this crime are found to be subsistent, the State's

non-compliance with Article 27 of the 1966 Covenant may also amount to a breach of the Genocide Convention's obligations.

Myanmar's discriminatory policies against the Rohingya and its implementation of citizenship laws in such a way as to deprive the Rohingya of their nationality, indicate that the State has also fallen short of its obligations under the CERD to accord rights to people residing within its territory without distinction on racial grounds, thereby refraining from discriminatory practices and annulling those domestic laws having an equivalent effect. The ultimate manifestation of Myanmar's discrimination of the Rohingya is the 1982 Burma Citizenship Law which, coupled with the Government authorities' practice of retrieving the group members' citizenship cards and substituting them with temporary identification cards of dubious legal importance have effectively divested the Rohingya of their Burmese citizenship, thus rendering them stateless. The arbitrary withdrawal of the Rohingya's citizenship is at once primarily due to their ethnicity, and in breach of the obligations set forth in the 1961 Convention on the Reduction of Statelessness, which have become a part of customary international law and are therefore binding on Myanmar.

Whether international refugee law can apply to the Rohingya rests on the possibility of their qualifying as refugees on the international plane. It has been observed that, as a result of the violence perpetrated against them as part of the 2016 and 2017 "clearance operations", a total of over 700,000 Rohingya have fled to neighbouring Bangladesh. The forced displacement of the minority's members mainly originates from their fear of persecution on account of their race, religion, nationality or membership of a distinct social group, and this fear of persecution can be considered well-founded in light of the scale of discrimination and restrictions faced by the Rohingya in their country of origin, as well as the criminal conduct seemingly perpetrated against them. The fact that these oppressive policies and actions directed against the Rohingya are continuing in Myanmar are such that the minority members situated in Bangladesh are not only unwilling, but also genuinely *unable* to avail themselves of their country's protection. Cumulatively considered, these elements satisfy all of the conditions set down in the 1951 Geneva Convention for the Protection of Refugees (or "1951 Geneva Convention"), thus corroborating the definition of the Rohingya as refugees under international law. Such a conclusion has specific implications concerning the legality of the repatriation agreements concluded between Bangladesh and Myanmar, and the procedures under way for their execution.

Chapter 2 of this thesis has addressed the question whether the crimes of deportation and genocide can be said to have occurred in Myanmar. The analysis represented a necessary precursor to that of the criminal proceedings instituted before the International Criminal Court being that,

for one thing, the Court's authorisation of an investigation by the Prosecutor into the Myanmar/Bangladesh situation was premised on its assertion of its jurisdiction over the crime of deportation and, for the other, the Court left open the possibility that such jurisdiction be extended to other crimes set down in Article 5 of the Rome Statute.

In order to verify whether genocide and deportation could have been carried out against the Rohingya community, the constitutive elements of each of these crimes was taken into consideration. With regards to genocide, it has been observed that the perpetration of the crime requires the subsistence of both the objective and the subjective elements, the first being any of the underlying acts set forth under Article 2 of the Genocide Convention directed against a racial, national ethnical or religious group; the second consisting of the intent to destroy the protected group in whole or in part with which the abovesaid acts are performed. The difficulties of ascertaining the *dolus specialis* underlying genocide are such that the proof of its subsistence can be given by way of inferential evidence, on the basis of the presumed author's conduct; if the individual's actions alone do not have the potential to bring about the protected group's destruction, they must have taken place in the context of a pattern of similar conduct directed against the group in order for the specific intent requirement to be satisfied. The description of the individual modes of liability for international crimes, as explained in the jurisprudence of the International Criminal Tribunals and the International Criminal Court, served to make clarity as to the level of individual involvement in criminal conduct required to hold that individual liable for any one genocidal act.

The crime of deportation has instead been described in relation to the wider category of crimes against humanity to which it belongs under Article 7 of the Rome Statute. It has therefore been illustrated that the deportation must in the first place possess the constitutive traits of all Article 7 crimes, and that it must therefore take place in the context of a State-organised widespread and systematic attack directed against the civilian population, with knowledge of both the author's criminal conduct, and the wider attack in relation to which it is perpetrated. In addition to these elements, deportation requires the displacement across international borders of civilians who had until then lawfully resided in the country by way of their expulsion or of other coercive acts, absent the grounds permitted under international law.

The crimes of genocide and deportation's constitutive elements have been put in relation with the IFFM's findings on the violence perpetrated against the Rohingya in the context of the 2017 "clearance operations", with a view to understanding whether such actions could integrate any one of the two statutory crimes. It has been recounted that the Mission found the genocidal acts of

killing members of the group, causing serious bodily or mental harm to members of the group, inflicting on the group conditions of life calculated to bring about the group's destruction in whole or in part, and imposing measures to prevent births within the group, to have occurred in Myanmar. The "clearance operations" in fact featured the widescale killing, maiming and sexual abuse of the Rohingya civilians, the which could fit into one or the other of the abovesaid prohibited acts. The subsistence of the *mens rea* proper to genocide was instead established by the Mission by relying on the inferential evidence at its disposal, in the form of the hate rhetoric against the Rohingya on the part of the Burmese authorities, the discriminatory legislation and policies aimed at altering the demographic make-up of Rakhine State and reduce the minority's presence in the regions, the sheer level of the violence perpetrated against the Rohingya, and the existence of an organised plan of destruction evidenced by the methodical manner in which the "clearance operations" were ultimately carried out. These factors, cumulatively considered, led the IIFFM to conclude that both the objective and subjective elements of genocide had materialised in Myanmar, and that the genocide of the Rohingya could in fact be said to have occurred within the State.

The deportation of the Rohingya was likewise found to have occurred. The Mission noted that the disproportionate violence carried out against the minority in the context of the "clearance operations", and the correlated destruction of entire villages, had coerced over 725,000 Rohingya into migrating across Myanmar's national border to Bangladesh. The exodus was both involuntary and determined by conduct carried out in the absence of the justificatory grounds set down in international humanitarian law. It had further taken place in the context of a widespread and systematic attack against the Rohingya civilians, forming part of the 2017 "clearance operations", and had been perpetrated against a group who had lawfully resided within Myanmar, in accordance with the international law notion of lawful residence. The Mission therefore concluded that the crime of deportation had also been carried out against the Rohingya and affirmed that the primary responsibility for both genocide and deportation rested with the Tatmadaw military forces.

Having established the likelihood of the two crimes' commission, Chapter 3 has moved on to verify whether and in what ways the ICC's jurisdiction over such crimes may be said to subsist. The evaluation moved from the Prosecutor's Request on Jurisdiction and the subsequent Request for an Authorisation of Investigation, as well as from the corresponding Decisions of the assigned Pre-Trial Chambers, on account of the various arguments regarding jurisdiction put forward in these legal acts. It has been observed that the premise for the ICC's power to entertain the Prosecutor's Requests hinges on the Court's objective international legal personality, which endows international organisations and tribunals with the rights, duties and functions to operate on the international field even in relation to third party States. The ICC's role of combating

impunity through the prosecution of those suspected of having committed statutory crimes that is set down in the Rome Statute enables it to exercise its jurisdictional powers regardless of the stance adopted towards it by those States that have not ratified the Statute, subject only to the rules regulating the Court's jurisdiction.

While this consideration allowed for a dismissal of Myanmar's argument that the Court could not consider the Prosecutor's Requests due to the *pacta tertiis* principle set forth in Article 34 VLCT, it left open the question of the conditions needed for the ICC to entertain proceedings for crimes alleged to have been committed on the territory of third States, particularly considering that, unlike States, the Court does not have universal jurisdiction. Article 12 of the Rome Statute in fact provides that, except in the case of a Chapter 7 Security Council deferral or of a referral of a situation by the third State itself, the ICC can only exercise its jurisdiction over events concerning third States if either the territoriality or the active nationality criteria subsist.

The analysis of Pre-Trial Chamber I's Decision on Jurisdiction has allowed for an affirmative solution in relation to the crime of deportation. According to the Chamber, the crimes' inherently transboundary nature meant that, while the violence perpetrated against the Rohingya took place entirely in Myanmar, it coerced the Rohingya into fleeing into neighbouring Bangladesh, which is a State Party to the Rome Statute. The interpretation of the term "conduct" contained in Article 12(2)(a) as being a synonym for "crime" led the Chamber to conclude that the ICC could exercise its jurisdiction even over those crimes committed in third States to the Rome Statutes, when their legally mandated results materialised on the territory of party States; the Chamber thereby affirmed its jurisdiction over the alleged deportation of the Rohingya from Myanmar to Bangladesh.

Pre-Trial Chamber III's Authorisation of Investigation has instead been examined primarily in relation to the conditions that must be met in order for an investigation by the Prosecutor to be authorised. It has been illustrated that the assigned Chamber can only authorise an investigation into a situation if there is a reasonable basis to believe that a statutory crime falling within the Court's jurisdiction has been or is being perpetrated. The standard set down in Article 15(4) of the Rome Statute requires that the crime or crimes' commission must be plausible for the investigation to take place; applied to the Rohingya situation, this meant that the deportation had to be *prima facie* subsistent in order for Pre-Trial Chamber to grant the Prosecutor's request. Noting that the "clearance operations" had taken place in the context of the State-sanctioned marginalisation of the Rohingya, and had resulted in the forced displacement of over 700,000 members of the minority previously residing in Myanmar to neighbouring Bangladesh, the Chamber underlined that this exodus had occurred without the grounds permitted under international law, being that

unlawful actions cannot integrate permissible grounds on the international plane. The deportation of the Rohingya was therefore found to be reasonable, the which led Pre-Trial Chamber III to authorise the Prosecutor’s investigation into the Bangladesh/Myanmar situation.

Whilst no request for jurisdiction over genocide or for the authorisation of an investigation into said crime was advanced by the Prosecutor, thus dispensing the Chambers from the corresponding assessment, the Mission’s findings on genocide have given rise to the question whether the ICC could in fact entertain proceedings for this statutory crime. Having noted that the Court would only have jurisdiction over genocide if at least a part of the crime was found to have occurred in Bangladesh, attention has been given to the various ways in which such jurisdiction could be affirmed. The Victims Submission by the Global Rights Compliance indicates a first possible way as resting on the crime’s nature of “continuing crime”: the dismal conditions in which the Rohingya refugees live in the Bangladeshi camps, read in combination with the intentional obstruction of their return to Myanmar, could integrate both “causing serious bodily or mental harm” set down in Article 6(b) of the Rome Statute, or the “conditions” genocide proscribed under letter (c) of the same Article; the fact that this conduct persists on Bangladeshi territory would lead to an affirmation of the Court’s jurisdiction over genocide if the uprooting of the Rohingya were found to correspond to a specific genocidal intent.

The ICC’s jurisdiction over genocide could also be asserted on the basis of the connection between the crime of deportation and that of genocide: relying on the reasoning set forth in both *Prosecutor v Karadzic and Mladic* Review of Indictments and the ICJ’s *Bosnian Genocide* judgment, it has been emphasised that the deportation of a certain ethnic group in such a way that it can no longer reconstitute itself can amount to genocide under Articles 6(b) and 6(c) of the Rome Statute if it is carried out with the intent to bring about the displaced group’s destruction. The fact that the Rohingya’s mass exodus stemmed from widespread killings and violence arguably aimed at bringing about their removal from Myanmar, coupled with destruction of villages and State-organised “demographic re-engineering” of Rakhine State all point to the subsistence of such a genocidal design.

The Chambers’ own interpretation of the term “conduct” under Article 12 as including both the criminal acts and their legally mandated consequences has been indicated as representing a third basis for asserting the ICC’s jurisdiction over genocide. The inclusion of the results in the scope of Article 12 has the potential of expanding the Court’s jurisdiction to all those crimes committed in third States, including genocide, when the effects of such crimes take place on the territory of a State that is a party to the Rome Statute. However, it has also been noted that the Chambers’

interpretation of “conduct” departs from the objective territoriality, the ubiquity, and the constitutive elements approaches on the basis of which the Court’s jurisdiction for deportation was officially determined, rather following the “effects” doctrine discarded by the Prosecutor.

Having analysed the possible grounds for jurisdiction over the crimes of deportation and genocide, the Chapter has dwelled on the potential cases’ admissibility before the Court, being that, pursuant to Article 17, the assigned Pre-Trial chambers may only authorise investigations if the cases that will presumably be brought before the Court by the Prosecutor at the end of such an investigation are deemed admissible. It has been clarified that the primary component of the admissibility test is that of complementarity, which conditions the Court’s hearing of criminal proceedings on the inaction on the part of the States with jurisdiction over the potential cases, or their unwillingness or inability to investigate and eventually prosecute said cases. Whilst the initiatives for the investigation of the crimes alleged to have occurred against the Rohingya that have been undertaken in Myanmar have been described by both the IIFFM and Pre-Trial Chamber III as being insufficient for the purpose of rendering the corresponding potential cases inadmissible before the Court, the lawsuit filed by the non-governmental organisation Brouk before an Argentinian court against Myanmar’s top officials may have precisely such an effect, at least in relation to the crime of genocide. The Argentinian court could in fact entertain criminal proceedings regarding events devoid of any link with the forum country based on the principle of universal jurisdiction; if the court decided to address Brouk’s lawsuit over the genocide and crimes against humanity committed on Myanmar, the possibility that the ICC also authorise an investigation over genocide and hear the correlated proceedings would in all likelihood be dismantled. The fact that Prosecutor has not as yet requested the authorisation of an investigation into genocide makes this challenge to admissibility merely theoretical in character; in any event, the admissibility would only be challenged if no impediment to the proceedings before the Argentinian court subsisted, the which seems unlikely in light of the customary norm on immunities shielding high-ranking State officials in office from the jurisdiction of another State’s domestic courts.

Based on the Application filed by The Gambia against Myanmar before the International Court of Justice for the breach of the Genocide Convention, Chapter 4 has contemplated both the constitutive elements of State responsibility, and the consequences arising therefrom. The analysis of the objective and subjective factors, in the form of the breach of an international obligation, and its imputability to the State, has led to the observation that, whilst volition is usually not essential for the purposes of State responsibility, it can nonetheless come into play where the primary norm

setting the international obligation requires a degree of culpability for the international wrongdoing to take place, the proscription of genocide being an example of such an international norm.

Whereas the commission of an internationally wrongful act ordinarily gives rise to a bilateral relationship between the author of the wrongdoing and the injured State, resting on the former State's obligation to put an end to the wrongdoing and make reparations for the corresponding damage, this is not the case with *erga omnes* obligations. As clarified by the ICJ in the *Barcelona Traction* case, the fact that such obligations are owed to the international community as a whole is such that all States have a legal interest in their protection and standing to invoke the contravening State's international responsibility. The Gambia's Application before the ICJ rests on the *erga omnes nature* of the obligations set down in the Genocide Convention; the fact that the State should also have invoked Myanmar's responsibility for the *commission* of genocidal acts against the Rohingya led to the analysis of the circumstances that need to subsist in order for a State to commit this international crime.

The *Bosnian Genocide* and *Croatia v Serbia* case have provided the backdrop for this analysis. On these occasions the ICJ developed the concept of the duality of responsibility, according to which State responsibility can subsist alongside the criminal liability of individuals for the same acts. However, the ascertainment of a State's commission of genocide is rendered particularly difficult by the high standard of proof set by the Court in order to demonstrate a State's genocidal intent: according to the Court, unless a general plan for the destruction of the protected group is proved, it is necessary the pattern of conduct carried out by the State's organs may only reasonably point to the existence of such intent.

The IFFM's findings provide evidence as to the possible subsistence of a genocidal intent; the Mission itself affirmed that the progressive erosion of the Rohingya's rights and legal status, together with the methodical and coordinated violence perpetrated against the Rohingya civilians as part of the 2017 "clearance operations" and the ensuing destruction of their previously inhabited villages, are unequivocal indicators of the criminal design to destroy the minority in whole or in part. It is on the back of such evidence that The Gambia chose to take action against Myanmar before the ICJ for the commission of genocide and of the other acts proscribed in Article 3 of the Genocide Convention, as well as for the failure to prevent and to punish genocide, further requesting that the Court to issue an order for the adoption of provisional measures on the part of Myanmar. The Application, and the ensuing interim order issued by the ICJ in January 2020, have allowed for a description of the requirements needed for a provisional measures order to be issued by the Court. These have been identified as being the *prima facie* subsistence of the Court's

jurisdiction over an existing dispute between States concerning the application of an international treaty, the plausibility of the rights that form the object of the dispute, and an imminent risk of irreparable damage to those rights.

All these elements were found to be present by the ICJ. Particularly relevant was the Court's clarification that the ICJ does not need to establish definitely the existence of the Rohingya's rights in order for them to be considered plausible, it being sufficient that they are grounded in a possible interpretation of the Genocide Convention. The Court's assertion as to the possibility that the Rohingya's rights, and particularly their right to existence, could be irreparably impaired during the time necessary to reach a decision on the merits of the dispute, is confirmation of the situation of extreme vulnerability faced by the Rohingya in Myanmar.

Whether these findings are followed by a decision asserting Myanmar's responsibility for the commission of genocide remains to be seen. The different standards of proof set down for the merits as opposed to the interim phase of proceedings render such a finding unlikely, especially in light of the fact that the Court has shied away from affirming States' responsibility for the commission of genocide in the past. The Court could, however, hold the State responsible for the failure to prevent and to punish genocide, being that the *dolus specialis* would not have to be proved in this case. Regardless of the outcome of the dispute, the 2020 Provisional Merits Order is in itself highly important, as it represents the first instance in which the ICJ has affirmed the standing of States not directly affected by the alleged breach of the Genocide Convention to institute proceedings before the Court, on account of the *erga omnes* nature of the obligations set out therein.

The final Chapter to this thesis has addressed the issue of the conformity with international law of the agreements concluded between Bangladesh and Myanmar for the repatriation of the Rohingya currently situated in the former State. It has been observed that, on account of the Rohingya's refugee status, their return cannot occur in breach of the principle of *non-refoulement* set down Article 33 of the 1951 Geneva Convention, which is now a part of customary international law. The proscription of any form of return that would expose refugees to a well-founded risk of persecution severely undermines the legality on the international plane of the repatriation procedures undertaken by the Governments of Bangladesh and Myanmar, particularly when considering the IFFM's finding that there is an ongoing risk of genocide for those Rohingya who have remained on Burmese territory. What is more, the *Hirsi v Italy* decision of the European Court of Human Rights has shed light on the fact that, where the treatment that the removed individual would risk suffering in his or her country of origin is in breach of a *jus cogens*

international norm, the prohibition of *refoulement* likewise acquires the standing of peremptory international law. The Court's affirmation was relied upon by the Tribunal of Trapani in its 2019 decision to assert the invalidity and consequent ineffectiveness pursuant to Article 53 of the VCLT of treaties providing for the *refoulement* of individuals under such circumstances. It has been noted that, whilst this principle was only affirmed in relation to the proscription of torture and inhuman or degrading treatment set down in Article 3 of the ECHR, the same rule can apply with regards to any treatment contrary to *jus cogens* norms, including genocide and international crimes. The rule in question has the potential of invalidating the repatriation agreements stipulated between Bangladesh and Myanmar, on account of the severe violations faced by the Rohingya in their home country, which in all probability amount to international crimes. The strenuous resistance of those refugees situated in Bangladesh to their repatriation means that any execution of the abovementioned agreements would also depart from the requirement that return be voluntary set down in the UNHCR Statute, and would raise serious doubts as to the legal and material safety accorded to the repatriated Rohingya.

At the time of writing, the Rohingya crisis remains unresolved. The now over 800,000 refugees living in Bangladesh risk facing a health crisis that aggravates their already desperate conditions.¹ Their prospects of returning to Myanmar are undermined by the ongoing violence and discrimination suffered by those members of the minority that still reside in their home State. This bleak picture must however be weighed against the international developments that have formed the object of this thesis. Whilst the proceedings before the International Criminal Court are still at a preliminary stage, and will only regard high-ranking officials, its very involvement is an important step in ensuring that the perpetrators of the crimes allegedly committed against the Rohingya are brought to justice. The Court's involvement in the Bangladesh/Myanmar situation may also act as a deterrent to the further commission of these acts in the future, especially when considering the parallel proceedings before the Argentinian court for the crimes committed entirely on the territory of Myanmar. Regardless of the outcome of the proceedings before the Court, it must be emphasised that the Pre-Trial Chambers' interpretation of the term "conduct" contained in Article 12 as inclusive of the consequences of the author's actions may have the unprecedented effect of expanding the ICC's jurisdiction considerably in relation to all those situations involving

¹ "Primo Caso Confermato di Coronavirus negli Insediamenti di Rifugiati Rohingya: Pronte le Misure di Salute Pubblica" *UNHCR*, May 15, 2020: <https://www.unhcr.it/news/primo-caso-confermato-di-coronavirus-negli-insediamenti-di-rifugiati-rohingya-pronte-le-misure-di-salute-pubblica.html>

third States, thereby possibly overcoming one of the principal obstacles to the activation of the Court.

For its part, the ICJ's Provisional Measures Order has confirmed that there is an imminent danger of irreparable damage to the Rohingya's right to existence enshrined in the Genocide Convention. Whereas this does not guarantee a decision by the ICJ establishing Myanmar's responsibility for the commission of genocide, especially considering the difficulties of proving special intent with evidence that is fully conclusive, the possibility that such a decision is reached is not excluded altogether. The Maldives' recent decision to intervene in the international proceedings in support of The Gambia may provide for an opportunity to corroborate the already existing evidence to this end, although this possibility is significantly weakened by the restrictions to investigations repeatedly imposed by the Burmese authorities. It is left to the ICJ to decide whether the evidentiary material collected by the IIFFM on which The Gambia based its application suffices to prove Myanmar's genocidal intent; the Court may also find the State to be responsible for the failure to prevent and to punish genocide based on the same evidence. Decision on the merits aside, the fact that the Application was filed with the Court by a State that is not directly injured by the alleged breach of the Genocide Convention may be indicative of a newfound awareness of the need to protect human rights.

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