

**LUISS** 

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# **Rohingya's genocide case and violation of human rights**

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## **LIST OF ABBREVIATIONS**

ARSA → Arakan Rohingya Salvation Army

ICC → International Criminal Court

ICTR → International Criminal Tribunal for Rwanda

ICJ → International Court of Justice

NVC → National Verification Card

OIC → Organization of Islamic Cooperation

SLORC → State Law and Order Restoration Council

UN → United Nations

UNHCR → United Nations Highs Commissioner for Refugees

UNHRC → United Nations Human Rights Council

## INTRODUCTION

The Rohingyas are an ethnic minority living in Myanmar that is currently not recognized by its own country. The Rohingyas are persecuted for religious reasons since they are Muslims living in a Buddhist country. The persecution of these people is nothing new for the international community, but has returned to be dealt with after both the International Criminal Court and the International Court of Justice have established that they have jurisdiction to deal with the situation of the Rohingya people in Myanmar. In my research paper, I will answer the question whether the human rights violations that are taking place in the Rakhine state can be considered as part of Myanmar's plan to destroy in whole or part the Rohingya people or not. In other words, if the Myanmar's government is perpetrating the crime of genocide in the Rakhine state against the Rohingya ethnic group. As a matter of fact, I am convinced that the clearance operations started after 2017 can be considered as part of a genocide plot.

In the first chapter I will analyze the history of the Rohingyas who have been persecuted since Myanmar's independence from British rule. In fact, the citizenship law has been created to make the majority of the Rohingya population stateless. The first planned persecutions began with Operation King Dragon in the 70s and continued over the years, culminating in the clearance operations of 2017. In the second chapter, I will give space to the violations of international law and international reactions to the crime of genocide. Then I will explain both the resolution adopted by the General Assembly and the one adopted by the Human Rights Council. I will explain the mechanism through which the Human Rights Council appointed an independent international fact-findings mission to control the development of human rights in Myanmar. Moreover, I will also analyze the results of the report sent by the independent international fact-findings mission which were the basis for the ICJ's decision to indicate provisional measures. There will be a look to the articles of the Genocide Convention with particular attention to article 2, in which the concepts of *actus reus* and *mens rea* are expressed without which the crime of genocide cannot occur. To conclude the chapter I will examine the background of the dispute between Gambia and Myanmar on the application, interpretation and fulfillment of the Genocide Convention.

In the third chapter I will initially look at the question of the ICJ jurisdiction on the Gambia vs Myanmar case, in which the Gambia argued that Myanmar violated its obligations under the Genocide Convention to prevent and punish the crime of genocide. I will explain the functioning and the reason behind the ICJ's decision to indicate provisional measures. In addition, I will take into consideration the request made by the Prosecutor for a ruling by the International Criminal Court on the issue of the deportation of the Rohingyas from Myanmar to Bangladesh. In this sense, the Pre-Trial Chamber 1 concluded that the crime of deportation initiated in a non-member state but completed in a member state falls within the jurisdiction of the court. While the Pre-Trial Chamber 3 authorized the Prosecutor to investigate the possible crime of deportation perpetrated by members of the security forces against the Rohingya people.

In the conclusion, I will give take into considerations the findings analyzed during the paper and I will give my opinion whatever or not Myanmar has violated its obligations under the Genocide Convention.

## **CHAPTER ONE: THE ROHINGYA CRISIS**

### **1. Historical Background**

The Rohingya presence in the Arakan<sup>1</sup> state is dated to the 7<sup>th</sup> century AD when this ethnic group was formed through the mixture with different cultures living in the region like Arabs, Bengalis and Moghuls. In this sense, they can be considered as an indigenous ethnic group as the others in Myanmar.<sup>2</sup> This is a fundamental issue considering that the Rohingyas are not entitled to the Burmese citizenship because the government claim that they are Bengalis arrived during the British colonial period. However according to the work published in 1789 by Francis Buchanan there was a dialect in western Burma «spoken by the Mohammedans, who have long settled in Arakan and who call themselves Rooinga, or natives of Arakan».<sup>3</sup> In 1826 the Arakan state was annexed to the British India becoming

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<sup>1</sup> The Arakan state is part of the Republic of the Union of Myanmar bordered by the Bay of Bengal and Bangladesh to the west. This state has been independent until it was conquered by the Burmese king Bodaw Paya in 1784 AD.

<sup>2</sup> The Republic of the Union of Myanmar was part of the British India until the British colonialists decided to separate administratively the Myanmar from the Indian Empire.

<sup>3</sup> BUCHANAN F., *A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire*, "SOAS Bulletin of Burma Research", Vol. 1,2003, p.55.

part of the British Empire. Mr. Paton who was the controller of civil affairs in the region sent to the British government a full report which indicated that the Rakhine state was composed by a population of 60.000 Maghs, 30.000 Muslims and 10.000 Burmese. The Rohingyas are a minority in the whole country where there is a prevalence of Buddhist. This is the main reason why the Rohingyas, a Muslim community, living in a Buddhist country such as Myanmar is clashing with the Arakanese community in the Rakhine<sup>4</sup> state as well as with the national government. The first tensions started during the Second World War because many atrocities were committed by both parties in the fight between Arakanese Buddhists and the Muslims. The Rohingyas formed the Volunteer Force with the support of the British army to contrast the Japanese invasion but «when the British administration was withdrawn to India in 1942 the Arakanese hoodlums began to attack the Muslim villages in southern Arakan and the Muslims fled to the north where they took vengeance on the Arakanese in Buthidaung and Maungdaw townships».<sup>5</sup> «The Burma Independence Army»<sup>6</sup> led by Bo Rang Aung perpetrated a massacre killing 100.000 Rohingya and destroying their settlements. The Rohingyas Muslims declared on 10<sup>th</sup> June 1942 the creation of the North Arakan state as a Muslim state and a Peace Committee was charged with the administration of the area. The brigadier C.E Lucas Phillips started the negotiation with the Rohingyas leaders of the Peace Committee that ended with the recognition of the Muslim's state as Muslim National Area. On 1945 the brigadier C.E Lucas Phillips was appointed as Chief Administrator of the area and promised to the members of the Peace Committee to guarantee the autonomy of the North Arakan for their efforts during the war against the Japanese army.

## 2. Developments after the Second World War

In 1946 the Muslims decided to join their forces creating the Muslim Liberation Organization which later changed its name in the Mujahid Party. After the London Agreement of October 7, 1947, which gave the control of Rakhine region to the to the

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<sup>4</sup> The Arakan state changed its name into Rakhine state during the military government

<sup>5</sup> CHAN A., *The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)*, "SOAS Bulletin of Burma Research", Vol.3, 2005, p.405

<sup>6</sup> Burma Independence Army (BIA) supported at first the Japanese Invasion with the thought of obtaining the independence from the British rule but later decided to change its size to fight with the British Army against the Imperial Japanese Army

«Union of Burma»<sup>7</sup>, the Mujahid Party led by the Muslim singer Jafar Hussain has managed to lure hundreds of Rohingyas to demand for a Muslim Autonomous State. After the war, the British government granted the independence to Myanmar and the Muslim population feared the possible outcomes to live under a new regime. In 1948 the Mujahid Party demanded through a letter to the new government led by U Nu<sup>8</sup> a series of requests such as «The area between the west bank of Kadadan River and the east bank of Naaf River must be recognized as the National Home for the Muslims in Burma. The Muslims in Arakan must be accepted as the nationalities of Burma. The Mujahid Party must be granted legal status as a political organization. The Urdu language must be acknowledged as the national language of the Muslims in Arakan and be taught in the schools in the Muslim areas. The refugees from the Kyauktaw and Myohaung (Mrauk U) Townships must be resettled in their villages at the expense of the state. The Muslims under detention by the Emergency Security Act must be unconditionally released. A general amnesty must be granted for the members of the Mujahid Party».<sup>9</sup> However, their requests were ignored but some members of Parliament were elected from Buthidaung and Maungdaw townships in the Rakhine state. In 1961 the Burmese government decided to create the Mayu Frontier District including the cities Maungdaw, Buthidaung and Rathidaung township with the support of Rohingyas leaders. The Mayu Frontier District was under military administration but was not dependent to the Arakan authorities. Subsequently the government promised to grant the statehood to Arakan region but a military coup perpetrated by the Revolutionary Council in 1962 changed this project. The Revolutionary Council led by general Ne Win took all the powers of the state deciding to abolish the Constitution and dissolving the Parliament of Burma. Rohingyas were deeply affected by the change in government since many productive activities like rice shops or small grocery were nationalized. The Revolutionary Council chose to ban all political parties and found a new party known as Burma Socialist Programme Party which decided to restrict the free movement of Rohingyas. In 1964 the Mayu Frontier District was abolished to put it together with the whole Akyab District under the jurisdiction of the Home ministry. The Rohingya Language Programme as well as other socio-cultural organizations were canceled. In 1973 general Ne Win asked for the public opinion to draft a new

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<sup>7</sup> The military government in 1989 decided to change the name of the country to Myanmar but both names are currently used to refer to the country

<sup>8</sup> U Nu was the first president of independent Myanmar after the assassination of Aung San war hero and father of the actual State Counsellor Aung San Suu Kyi

<sup>9</sup> CHAN A., *The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)*, «cit.», note 5, p. 397

Constitution, so the Rohingyas tried to propose to the new Constitution Commission the creation of a Muslim State, which was obviously rejected. The following year at the elections the Rohingyas could not present candidates for the People's Congress which ratified the new constitution. The Arakan state now named Rakhine state was part of the Union of Burma.

### **3. Operation King Dragon and the first refugee crisis**

This operation has been carried out in Rakhine State under the supervision of the State Council of Burma to force the Rohingya minority to leave the country. This was a major operation started in 1977 by the government with the aim to «scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally».<sup>10</sup> The operation began in the village of Sakkipara near Akyab where the arrest, torture and rape of hundreds of people was perpetrated. In the aftermath of these events 300,000 Rohingyas decided to cross the border into Bangladesh to seek refuge. According to Mohammed Yunus the Rohingyas «were systematically robbed off of their valuables and money by the rapacious Magh Buddhists and security personnel. Many of the refugees were killed by gun fire and many others drowned in the surging Naf river while crossing on heavily loaded boats».<sup>11</sup> The government of Bangladesh tried to persuade the Burmese state to stop the operation which was described as a normal census operation and the so-called refugees were just illegal Bengali immigrants fleeing the country to avoid prosecution. The United Nations High Commissioner for Refugees (UNHCR) created camps to give food and shelter to the refugees in Bangladesh but soon the Bangladesh government started negotiations with the Burmese government for a repatriation scheme. In 1979, Burma under international pressure signed a bilateral agreement with Bangladesh to accept the return of refugees. However, Rohingyas 's first refusal to leave the country brought to the cut of food supplies to the camps from the Bangladesh 'government with the intent to persuade them to leave. It has been estimated

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<sup>10</sup> Human Rights Watch, *The Government could have stopped this, sectarian violence and ensuing abuses in Burma's Arakan state*, www.hrw.org [16 May] ,2012.

<sup>11</sup> MOHAMMED Y., *A History of Arakan Past and Present*, www.netipr.org,1994



that «200.000 refugees returned home while 40.000 died in the refugee camps».<sup>12</sup>

#### 4. Citizenship Law

In 1982 the Burmese government passed the Citizenship Law which distinguish between three different types of citizenship: citizenship, associate citizenship, and naturalized citizenship. According to this law all «nationals 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 anterior to 1185 B.E., 1823 A.D. are Burma citizens».<sup>13</sup> In this way, all ethnic groups have the right to citizenship apart from the Rohingyas who are not considered as an ethnic group. The associated and naturalized citizens are those who entered the country during the British rule. The difference between the latter two is that associated citizens have already applied for citizenship under the Union Citizenship Act of 1948<sup>14</sup>, while those who did not apply at the time, and are entitled to do so, are considered naturalized citizens. Furthermore, according to the section 44 «an applicant for naturalized citizenship shall have the following qualifications: (a) be a person who conforms to the provisions of section 42 or section 43; (b) have completed the age of eighteen years; (c) be able to speak well one of the national languages; (d) be of good character; (e) be of sound mind».<sup>15</sup> The law prevents associated and naturalized citizens from owning property and participating in political activities. The decision whether an ethnic group is to be considered national or not is based solely on the decisions of the Council of State. This law had the result of not recognizing the Rohingya as an ethnic minority as well as not giving them the right to obtain the Burmese citizenship<sup>16</sup>.

Subsequently the Burmese government took a census of the whole population

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<sup>12</sup> Ibi

<sup>13</sup> Burmese Citizenship Law, 15 October 1982, Law No.4, Burma

<sup>14</sup> According to the 1982 Burmese Citizenship Law: «Applicants for citizenship under the Union Citizenship Act, 1948, conforming to the stipulations and qualifications may be determined as associate citizens by the Central Body». In this sense, the associate citizenship is granted to people who have applied under the Union Citizenship Act of 1948. According to the 1982 Citizenship Law: «Persons who have entered and resided in the State anterior to 4th January 1948, and their offsprings 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». Then the naturalized citizenship is granted to people who lived in Burma before 1948 and applied for citizenship under the new Burmese Citizenship Law.

<sup>15</sup> Ibi

<sup>16</sup> According to the Human Rights Council international fact-findings mission: «The Rohingya are automatically disqualified from full citizenship, not being one of the 135 recognized national races. Individual Rohingya people may however qualify for associate or naturalized citizenship if they prove ancestral links to residence in what is now Myanmar since 1824 or a link that predates the establishment of the State in 1948

excluding the Rohingya who constituted the 24,3% of the whole population in the Rakhine state. In 1988 the students of the Rangoon Institute of Technology went on the streets to demand free elections and the end of the dictatorship to which General Ne Win responded appointing as president of the Socialist Republic of the Union of Burma Maung Maung. Despite the President Maung Maung's decision to revoke the martial law the protest continued. For this reason, Ne Win promoted a new "coup d'état" led by the general Saw Maung. General Saw Maung, leader of the State Law and Order Restoration Council (SLORC), ordered the killings of more than 3000 students to stop the protests. According to Mohammed Ashraf Alam: «students and political activists were hunted down and either thrown into torture cells or killed. A large number of them fled across the border into neighbouring countries or joined anti-government revolutionary groups based along the border».<sup>17</sup> Surprisingly in 1989 the SLORC announced that it would allow free elections, so the Rohingyas were allowed to register their own political party without using the name Rohingya in it. However, the success of the National Democratic Party for Human Rights formed by Rohingyas inside the Rakhine state and the overwhelming victory of the National League for Democracy which brought 392 members out of 492 seats was not recognized by the SLORC. The SLORC did not allow the National League for Democracy to form a government and put under arrest its leader Aung San Suu Kyi.<sup>18</sup>

## **5.The refugee crisis of 1991-92**

When the masses began to become restless because of the refusal to hand over power, the SLORC implemented a plan to divert the attention of the protesters. In 1991 the SLORC launched a new campaign in Rakhine state called Pyl Thaya to persecute the Rohingyas minority. The Burmese government pursued this campaign through «killing, raping of women, destruction of Muslim settlements, holy places of worship, religious institutions, and Muslim relics, confiscation of land, detention, portering and slave labour and various other atrocities rose sharply in early 1991».<sup>19</sup>

The government issued identity card according to which the Rohingyas were considered as foreigners. This operation had the purpose to deny their citizenship, destroy

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<sup>17</sup> MOHAMMED ASHRAF A., *A short historical background of Arakan*, Research and Publication Department of Arakan Historical Society, [www.kaladanpress.org](http://www.kaladanpress.org), [ 17 May],1999, p.27

<sup>18</sup> Aung Sau Suu Kyi was an activist who supported the demand for new elections». Then she became the leader of the National League for Democracy and was put under house arrest after the elections

<sup>19</sup> MOHAMMED ASHRAF A., *A short historical background of Arakan*, «cit.», note 17, p.27

their homes and scare them out of the country. The destruction of villages and the killing of hundreds of civilians caused a new exodus of refugees to Bangladesh. The Burmese army was responsible for the escape of more than 250.000 people looking for shelter in the near Bangladesh. Both countries amassed troops along the border creating a very tense situation. The SLORC activated the propaganda machine against the Rohingya accusing the Bangladesh's government of harboring anti-government rebels. The two governments, which had a mutual interest, agreed to resolve all outstanding issues through negotiations. A bilateral agreement was signed in 1992 which guaranteed the safe and voluntary return of refugees: «The Government of the Union of Myanmar agree to repatriate in batches all persons inter-alia: carrying Myanmar Citizenship Identity Cards, National Registration Cards; those able to present any other documents issued by relevant Myanmar authorities and, all those persons able to furnish evidence of their residence in Myanmar, such addresses or any other relevant particulars».<sup>20</sup> According to this agreement there would be the return of 5000 people a day over a period of six months but many people were excluded by the clauses of the agreement. Rohingyas strongly protested against this treaty that started with the killing of one of 2000 refugees' protesters by the Bangladesh army. The Rohingya Solidarity Organization and the Arakan Rohingya Islamic Front<sup>21</sup> gave weapons to the insurgents to defend themselves against the attacks. Many Rohingyas asked to the UNHCR to monitor the repatriation and reintegration process. As a matter of fact, the UNHCR denounced the involuntary repatriation from Bangladesh to Myanmar of more than 4000 people and the lack of free access to the camps of its staff. On 1993 the UNHCR and the Bangladesh government reached an agreement through a Memorandum of Understanding which guaranteed a major involvement of the UNHCR in the repatriation process: «When a UNHCR survey revealed that less than 30% of the Rohingya wished to repatriate, however, the Bangladeshi government responded by insisting that all of the Rohingya should return by the end of 1994 and allowing the MOU with UNHCR to expire in July 1994».<sup>22</sup> At first the Burmese authority refused the establishment of the UNHCR in its own territory because the SLORC did not want to involve the United Nations in the repatriation process.

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<sup>20</sup> Joint Statement by the Foreign Ministers of Bangladesh and Myanmar concluded on the official visit of the Myanmar Foreign Minister to Bangladesh on 23 April 1992 and entered into force on 28 April

<sup>21</sup> The Rohingya Solidarity Organization Army and the Arakan Rohingya Islamic Front were two separate organizations which were formed during the 1980s to fight for an independent Muslim state in Rakhine. These two organizations continued the fight of the mujahedeen against the Burmese government.

<sup>22</sup> Human Rights Watch, *Burma-Bangladesh, Burmese Refugees in Bangladesh: Still No Durable Solution*, www.hrw.org, [May], 2000.

Afterwards the SLORC accepted the presence of UNHCR on the Burmese side of the border to control the situation. The UNHCR built nineteen camps along the road between Teknaf and Bazaar of Cox's in the southern district of the Chittagong division in Bangladesh. Despite the repatriation agreement, the Government of Myanmar has continued to oppress the Rohingya through a number of discriminatory policies, including stopping the issue of birth certificates for children, and restricting two children per couple. In November 1993 UNHCR and SLORC signed a memorandum of understanding allowing the former to operate within Rakhine State. According to the Rohingya Post the document provides that the «UNHCR will be given access to all returnees; that the returnees will be issued with the appropriate identification papers and that the returnees will enjoy the same freedom of movement as all other nationals».<sup>23</sup> Needless to say, all hopes of the Muslim ethnic groups are subsequently dashed. The persecution continued in the following years, leading thousands of Rohingya to put their lives in danger to reach Bangladesh, Malaysia or Thailand.

## **6. The conflict in the Rakhine state**

In 2001 there have been numerous clashes between the Buddhists and Muslims communities in the Rakhine state which culminated with the destruction of 28 mosques around Maungdaw township. In May 2012 three men of Rohingya ethnicity were accused of raping and murdering a girl of Buddhist faith, causing a hard blow to the already difficult coexistence between the different ethnic groups. A few days later a group of Arakan Buddhists killed ten people in the assault against a bus carrying Muslim pilgrims from the capital. The Rohingyas and the Arakan Buddhists continued to destroy each other properties and villages. After this episode, the government declared a state of emergency due to the following clashes. The Burmese president Thein Sein<sup>24</sup> gave more power to the military to take control of the situation in the Rakhine state. Following the continuous riots 4 staff members working for the UNHCR and three for the World Food Programme were arrested from the security forces, three of whom were detained for stimulating the riots in the Rakhine state. The United Nations High Commissioner for Refugees António Manuel de Oliveira

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<sup>23</sup> ULLAH A., *The 1993 MOU between UNHCR and SLORC*, The Rohingya Post, [www.rohingyapost.com](http://www.rohingyapost.com), [17 May], 2018

<sup>24</sup> Thein Sein was appointed as president of Myanmar after the election held in 2010 which were considered as fraudulent from the international community

Guterres<sup>25</sup> failed to obtain the release of the UN staffs during a meeting with president Thein Sein. Despite the situation the president Thein Sein asked to Antonio Guterres help to relocate the Rohingyas in refugees' camps or in other countries affirming: «We will take responsibility for our ethnic people but it is impossible to accept the illegally entered Rohingyas, who are not our ethnicity».<sup>26</sup> For this reason the Arakanese Buddhists felt free to attack the Rohingya villages not fearing possible repercussions from the security forces. On October, the Arakanese attacked Yan Thei village in Mrauk-U Townships killing 70 Rohingyas. As a matter of fact, a witness said that «First the soldiers told us, do not do anything, we will protect you, we will save you, so we trusted them, but later they broke that promise. The Arakanese beat and killed us very easily. The security did not protect us from them».<sup>27</sup> Thousands of Rohingyas tried to escape certain death by leaving Myanmar by boat through the Naf River.

On November 8, 2015, the first free elections were held in the country, which saw the victory of Aung San Suu Kyi's National League for Democracy, and on February 1, 2016 the elected parliament was convened. Aung San Suu Kyi won the Nobel prize for peace in 2015, putting formally an end to military rule, but in reality, it is worth noting that the army is currently in control of three key ministries: defense, interior and border affairs. Aung San Suu Kyi has never shown any particular sympathy for this minority, so the few times she has talked about the persecution, had as purpose to invite the media not to exaggerate the difficulties that this minority is facing. Furthermore, the League for Democracy did not present any candidates of Islamic faith during the 2015 elections. Aung San Suu Kyi's indifference has damaged the ability of humanitarian organizations to help the Rohingya people and raise funds for their cause.

## **7. The Arakan Rohingya Salvation Army and the Arrangement on the Return of Displaced Persons**

The Arakan Rohingya Salvation Army (ARSA), is a Rohingya rebel group active in northern Rakhine State, Myanmar. The group is led by Ata Ullah, a Rohingya born in

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<sup>25</sup> Antonio Guterres has become the 9<sup>th</sup> Secretary General of the United Nations

<sup>26</sup> ROBINSON G., *UN aid workers face Myanmar riot charges*, Financial Times, [www.ft.com](http://www.ft.com), [May], 2012

<sup>27</sup> Human Rights Watch, *“All You Can Do is Pray”. Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State*, [www.hrw.org](http://www.hrw.org), [ 17 May],2012

Pakistan and raised in Saudi Arabia. Other members of his leadership include a committee of Rohingya emigrants in the Middle East. The Central Counter-Terrorism Commission of Myanmar officially declared the ARSA a terrorist group on August 2017. The Burmese government has claimed that the rebels have been subsidized by foreign Islamist entities, although there is no firm evidence to support such insinuations. Ata Ullah rejected all accusations made by the government and sustained in a video that «Arsa has no quarrel with other ethnic groups in Rakhine state. There was no call for solidarity from other Muslims. He did not frame his struggle in terms of jihad, or as part of a global Islamist struggle».<sup>28</sup>

The group, also known as Harakah al-Yaqin which means faith movement, was formed in 2013 after the incidents that had occurred the year before. Before the attacks committed in October 2016 the ARSA was limited to patrolling villages, considering that a large part of its members appeared to be armed with bamboo sticks. The ARSA leader Ata Ullah said that the group's primary objective is to free the Rohingya people from the inhuman oppression perpetrated for decades by the Burmese regime. The ARSA calls itself an ethno-nationalist rebel group, and denied being a jihadist group and having ties with foreign terrorists. The ARSA does not have a paramilitary type organization, and its members have often appeared on video wearing civilian clothes. They are also poorly equipped, that is why during attacks against the security forces they always suffer serious losses. They cross the border from one country to another to launch small-scale attacks and then retreat across the border to communities with similar ethnic and religious backgrounds. According to the Burmese government, the group began recruiting in the villages six months before the 2016 attacks, with the intention of training the Rohingya in Bangladesh for future operations. A police document obtained by Reuters news in March 2017 listed a number of 423 Rohingyas detained since 2016, of whom thirteen were children and the youngest of ten years old.<sup>29</sup> The Burmese police said that the children had confessed their alleged crimes during interrogations, and that they had not been beaten. A police captain in Maungwad did not deny the accusations but affirmed: «We police have to arrest those related with the attacks, children or not, but the court will decide if they are guilty, we cannot decide».<sup>30</sup> In July 2017, the Burmese government accused the rebels of having killed 40 civilians and kidnaped 22 civilians suspected of being government collaborators, even though no reliable evidence was

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<sup>28</sup> HEAD J., *Rohingya crisis: Finding out the truth about Arsa militants*, BBC NEWS, [www.bbc.com](http://www.bbc.com), [18 May], 2017

<sup>29</sup> LONE W., LEWIS S., N.DAS. K., *Exclusive: Children among hundreds of Rohingya detained in Myanmar crackdown*, Reuters, [www.reuters.com](http://www.reuters.com), [18 May], 2017

<sup>30</sup> Ivi

ever found. On 25 August 2017, the group claimed responsibility for coordinated attacks on police stations and attempted raids on an army base. As a result of this action the Burmese government started some “clearance operations” in the Rakhine state which led to the flee of 530.000 Rohingyas to find shelter in Bangladesh. On August 26, 2017, Burmese troops opened fire on Rohingya civilians as they tried to flee to Bangladesh. The army spokesman said that four hundred people, mostly terrorists, died during the operation, but many civilians including women and children were among the victims. The United Nations High Commissioner for Human Rights Zeid Ra’ad al-Hussein said that «the situation seems a textbook example of ethnic cleansing».<sup>31</sup> In addition, the Burmese military laid mines near the Bangladesh border to prevent refugees from returning to the country. The government of Bangladesh built camps for 400.000 refugees, but at the same time restricted Rohingya’s movements to limited areas. Both the international community and the United Nations, while condemning the ARSA attacks have strongly criticized the Myanmar’s government operations against civilians. As a matter of fact, the United Nations Security Council «Through a statement read out by Sebastiano Cardi (Italy), its President for November, condemned attacks against the Myanmar security forces by the Arakan Rohingya Salvation Army on 25 August, while strongly condemning violence and abuses that had taken place since then that had displaced more than 607,000 people, the vast majority Rohingya, citing reports of systematic killing, sexual violence and destruction of homes».<sup>32</sup>

The military imposed curfews and blocked international food aid to 80.000 people in Rakhine state. Following numerous allegations, the Burmese government denied any responsibility, but it recognized that some individual members of the security forces may have committed crimes. The ARSA has repeatedly stated that its actions are to be considered defensive, and has accused the military and security forces of rapes and killings of defenseless civilians. The group also stated that Rathedaung village had been under a total blockade for more than two weeks, and its inhabitants were beginning to suffer from hunger and disease. The Burmese government continued its propaganda against the rebels using false accusations, holding the ARSA responsible for the killing of twenty-seven people of Hindu faith in the village of Ye Baw Kya after discovering their bodies in a mass grave. A spokesman for the group denied the accusations, saying that the aim of the government and Buddhist

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<sup>31</sup> CUMMING-BRUCE N., *Rohingya Crisis in Myanmar Is ‘Ethnic Cleansing’*, *U.N Rights Chief Says*, The New York Times, [www.nytimes.com](http://www.nytimes.com), [18 May],2017

<sup>32</sup> *Security Council Presidential Statement calls on Myanmar to end excessive military force, intercommunal violence in Rakhine state*, Meetings Coverage and Press Releases, [www.un.org](http://www.un.org), [19 May],2017

nationalists is to spread lies, to create divisions between Hindus and Muslims. On 9 September 2017, the ARSA declared a one-month unilateral ceasefire in an attempt to allow humanitarian workers safe access to Rakhine State. In a statement, the group urged the government to lay down its arms and accept the ceasefire. The government led by State Counsellor Aung San Suu Kyi accepted the ceasefire. Aung San Suu Kyi gave a speech during which she sustained that «there had been no conflicts since the 5 of September and no clearance operations».<sup>33</sup>

However, the ethnic cleansing continued which brought to the destruction of 288 villages in Maungdaw area between August 25 and September 25. The Burmese government accused the Arakan Rohingya Salvation Army of destroying the villages but did not show any proof to support this theory. The deputy director of Human Rights Watch's Asia division Phil Robertson said «The Burmese military destroyed hundreds of Rohingya villages while committing killings, rapes, and other crimes against humanity that forced Rohingya to flee for their lives».<sup>34</sup> On November 2017, the Minister of Foreign Affairs of Bangladesh Abul Hassam Mahmood Ali affirmed during a meeting in Dhaka that «Bangladesh and Myanmar are in the process of negotiation for a bilateral agreement for repatriation of displaced people and expect to form a Joint Working Group to facilitate the repatriation».<sup>35</sup> The Bangladesh and Myanmar governments signed a joint agreement for the repatriation of the Rohingyas into Myanmar. A joint working group composed of UNHCR and members of both nations was established to start the process. The Bengali Foreign Minister affirmed that returning refugees will be kept in camps near their abandoned villages. The agreement provided that Myanmar will not keep the Rohingyas in camps for long, and that identity documents will be issued for the refugees. According to the agreement there would have to be a «safe and voluntary return».<sup>36</sup> The Myanmar's government committed to building new camps and villages to host the refugees. In this sense, the Rakhine state secretary U Tin Maung Swe said to the BBC News that: « the houses are not yet built, we plan to build them under a cash-

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<sup>33</sup> Speech by the State Counsellor of Myanmar Aung San Suu Kyi, Nay Pyi Taw, 19 September 2017

<sup>34</sup> Human Rights Watch, *Burma: New Satellite Images Confirm Mass Destruction*, www.hrw.org, [18 May], 2017

<sup>35</sup> QUADIR S., *Bangladesh says it's in talks with Myanmar on Rohingya repatriation deal*, Reuters, www.reuters.com, [19 May], 2017

<sup>36</sup> According to the arrangement on return of displaced persons from Rakhine state between the government of the people's republic of Bangladesh and the government of the republic of the Union of Myanmar "the criteria for eligibility for return will be as follows: Returnees must be residents of Myanmar; and Returnees must be the one who voluntarily wish to return to Myanmar by themselves. The members of split families and their left behind members, and orphans need to be certified by a Court of Bangladesh; Both parents of additional offspring born on the other side of the border must be residents of Myanmar. Children born out of unwarranted incidents are to be certified by a Court of Bangladesh."



for-work project, we will give them both money and jobs. The returnees will build their homes by themselves».<sup>37</sup> In this sense, it was already evident how the Myanmar's government could not be trusted to respect the rights of Rohingyas which continued to flee to Bangladesh in 2018 despite the agreement signed between the two countries.

For this reason, in 2017 the United Nations Human Rights Council (UNHRC) decided to establish an independent international fact-finding mission to have deeper knowledge of the human rights situation in Myanmar. United Nations Fact Finding Mission was composed by independent experts who had to send a full report on the presumed violations committed by the military and security forces. Furthermore the international fact-finding mission was quite clear on this issue when it stated that «refugees know that conditions are not conducive for return owing to the precarious situation of the remaining Rohingya, including denial of citizenship, the lack of access to livelihood opportunities, fear of arbitrary arrest, movement restrictions, the Myanmar authorities' failure to implement confidence-building measures inside Rakhine».<sup>38</sup> It has been estimated that 14.500 people arrived in Bangladesh during that year reporting of abuses, extortions and killings perpetrated by the security forces in Myanmar. According to the witnesses Rohingyas had no other option than accepting the National Verification Card, which did not guarantee the citizenship, or leave Myanmar.

In 2018 the Prosecutor of the International Criminal Court (ICC) submitted a request to the Pre-Trial Division of the Court, pursuant to Article 19(3) of the Statute, for a ruling on the jurisdiction of the Court with regard to the events in Myanmar and more specifically the alleged deportation of the Rohingyas from Myanmar to Bangladesh. I will further analyze the decision of the Pre-Trial Chamber on the jurisdiction of the ICC in the third chapter.

According to the international fact-finding mission the Burmese army was responsible for the destruction of 30 villages and the detention numerous Rohingyas in Rakhine state which were prohibited from returning in their birthplaces. Thousands of Rohingyas continued to stay in Bangladesh not trusting Myanmar 's government promises of restitution of confiscated properties and lands. On September 2019, there were still

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<sup>37</sup> *Rohingya crisis: Bangladesh and Myanmar agree repatriation timeframe*, BBC NEWS, [www.bbc.news](http://www.bbc.news), [19 May], 2018

<sup>38</sup> United Nations Human Rights Council, Report 42/CRP.5, 16 September 2019, A/HRC/42/CRP.5

130.000 Rohingyas living in camps for internally displaced people with no access to aids, electricity and internet. The findings of the United Nations mission were that the «Myanmar incurs State responsibility for committing genocide and is failing to its obligations under the Genocide Convention to investigate and, where appropriate, prosecute genocide. It is also failing to enact effective legislation criminalizing and punishing genocide».<sup>39</sup> On 11 November 2019, the Republic of The Gambia, backed by the Organization for Islamic Cooperation, brought a case against Myanmar to the International Court of Justice (ICJ) which will give a verdict as to whatever or not Myanmar has violated the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>40</sup> The Genocide Convention was introduced after the Second World War to punish and prevent the crime of genocide. The adoption of the Genocide Convention through a resolution of the United Nations General Assembly was considered as a fundamental step in the development of international criminal and international human rights law.

At the moment, the ICJ ordered to Myanmar to take provisional measures to prevent the crime of genocide in its territory according to Genocide Convention. According to the Max Planck Encyclopedias of International Law: «Generally speaking, provisional measures in international adjudication are meant to protect the object of the litigation in question and, thereby, the integrity of the decision as to the merits».<sup>41</sup> I will further analyze the meaning and functioning of provisional measure in the third chapter. For this reason, the Myanmar will have to implement the order of the ICJ which is legally binding<sup>42</sup>.

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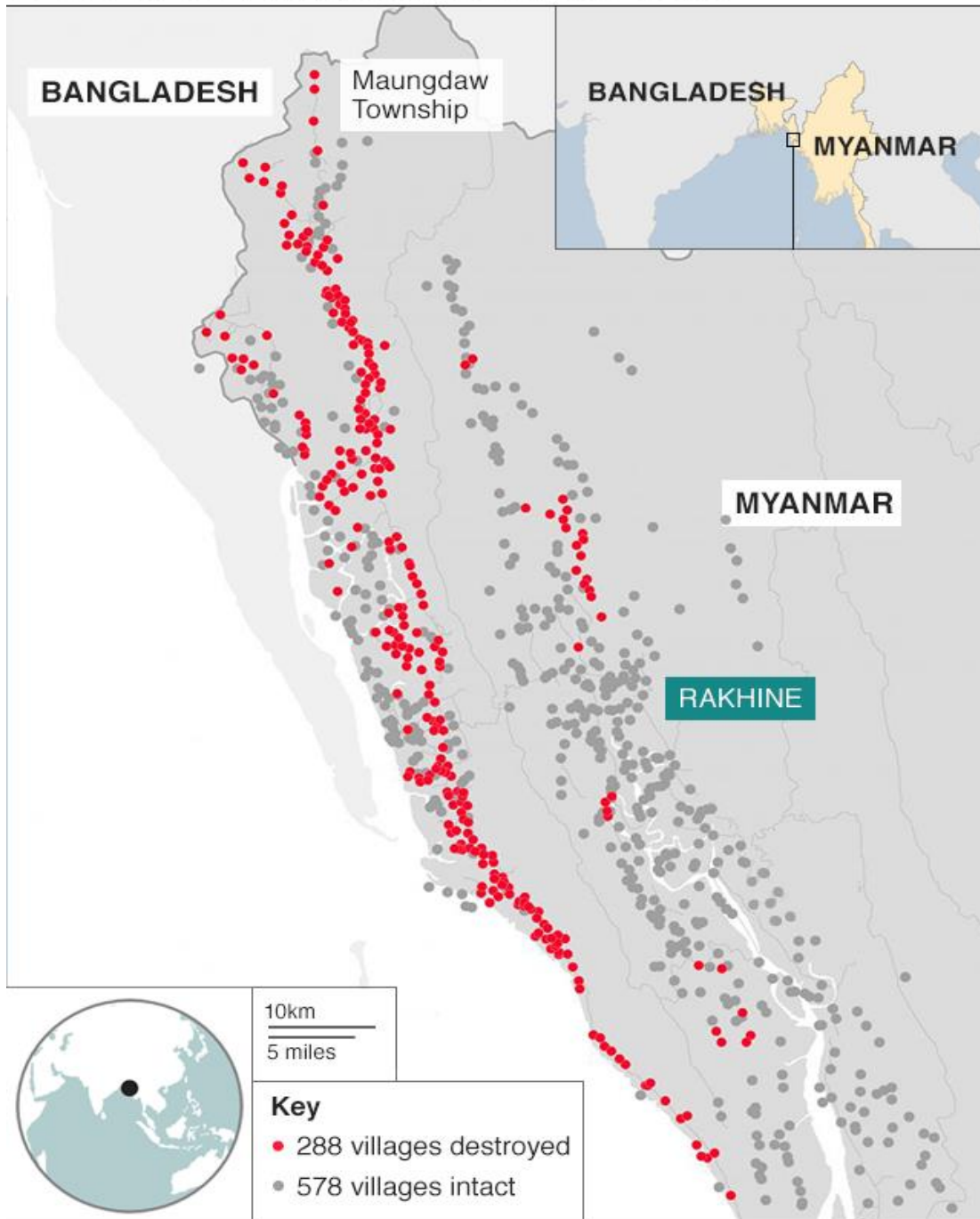
<sup>39</sup> Ibidem, p.68

<sup>40</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, concluded in 9 December 1948 and entered into force on 12 January 1951. Myanmar signed Genocide Convention on 30 December 1949 and ratified on 14 March 1956.

<sup>41</sup> WOLFRUM R., *Interim Provisional Measures of Protection*, Max Planck Encyclopedias of International law, <https://opil.ouplaw.com/home/mpil>, [19 May],2006

<sup>42</sup> In LaGrand Case (Merits) the ICJ sustained that the provisional measures have a binding effect

## Destroyed villages in Rakhine state



Source: Human Rights Watch 25 August - 25 September 2017

**BBC**

This graph shows how the destruction of villages by the Burmese army continued even after the 5 of September when the State Counsellor Aung San Suu Kyi said that the hostility would have ended

# CHAPTER TWO: THE VIOLATION OF INTERNATIONAL LAW AND THE INTERNATIONAL REACTIONS TO THE GENOCIDE

## 1. The prohibition of genocide as a norm of jus cogens

In the first paragraph of this chapter I will analyze how the violation of a peremptory norm like the prohibition of genocide give rise to international responsibility. According to article 53 of the Vienna Convention on the law of the treaties, the peremptory norms are norms which are «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»<sup>43</sup>. Peremptory norms are the expression of common values of the international community and their protection represents an interest of the community of states as a whole rather than the interest of the individual state. The peremptory norms are characterized by the same two elements of general international law: the *opinio iuris and diuturnitas* to which the principle of non-derogation is added.<sup>44</sup> Then the Vienna Convention states in article 64 that «If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates».<sup>45</sup> In this sense article 64 provides that in the event of the emergence of a new peremptory norm of general international law, any existing treaty in conflict with that norm shall be null and void<sup>46</sup>. The ICJ gave an advisory opinion on the 1948 Convention on the Prevention and Punishment of the crime of Genocide sustaining that «The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations

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<sup>43</sup> Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969 and entered into force on 27 January 1980, 1155 UNTS 331.

<sup>44</sup> MARCHISIO S., Corso di diritto internazionale, Torino, 2017<sup>2</sup>, pp. 68-71

<sup>45</sup> Vienna Convention on the law of treaties, note 43, article 64

<sup>46</sup> MARCHISIO S., Corso di diritto internazionale, «cit.», note 44, p. 65

as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of cooperation required “in order to liberate mankind from such an odious scourge” (Preamble of the Convention). The Genocide Convention was intended by the General Assembly and by the contracting parties to be definitely universal in scope». <sup>47</sup> Furthermore, the International Criminal Tribunal for the Former Yugoslavia stated in the case *Kupreskic and others* that «Most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character». <sup>48</sup>

## **2.The Rohingya case: the role of the Human Rights Council and the resolution 34/22 of 24 March 2017**

The United Nations Human Rights Council (UNHRC) was established by the United Nations General Assembly in 2006 through resolution 60/251. According to this resolution the General Assembly: «decides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years». <sup>49</sup> The UNHRC is constituted by 47 member states elected by the majority of the members of the General Assembly through a secret ballot. The members of the UNHRC are elected for a period of three years that can only be renewed once. This subsidiary organ has the functions of promoting, respecting and protecting human rights at the universal level; looking over human rights violations which include those flagrant and systematic; adopting recommendations at the General Assembly to promote the progressive development of international human rights and promote their protection; doing an universal periodic review of all UN member states in order to monitor compliance with their human rights obligations. <sup>50</sup> Moreover, the General Assembly established that the UNHRC should promote the coordination and the mainstreaming of human rights within the UN. It was also

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<sup>47</sup> International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the crime of Genocide, 28 May 1951, 15

<sup>48</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 14 January 2000, IT-95-16-T, The Hague

<sup>49</sup> United Nations General Assembly, Resolution 60/251, 3 April 2006, A/RES/60/251

<sup>50</sup> MARCHISIO S., *L'ONU, il diritto delle Nazioni Unite*, Bologna, 2012<sup>2</sup>, p.159

established through the General Assembly's resolution that the UNHRC work should be guided by the principles of impartiality, objectivity, universality and non-selectivity, in order to enhance the promotion and protection of all human rights.

Furthermore, the UNHRC should also have an impartial method of work and keep positive interactions with special procedures. Therefore, the special procedures holders have to send an annual report to the UNHRC containing theoretical analysis, developments and recommendations. The special procedures holders could be an individual called Special Rapporteur or a group of five members appointed by the UNHRC, who are sent to report on the situation of human rights in a specific country. Normally the special procedures need an invitation from the government to operate within the country, but sometimes unofficial visits are made thanks to civil society invitation to a specific mandate holder to a particular event. The difference is that during unofficial visits the special procedure cannot send a report on the situation of human rights. The Special Rapporteur is not a staff member of UN, that makes him independent in his judgment of the situation. Following the humanitarian crisis in Myanmar the UNHRC has appointed Yanghee Lee as Special Rapporteur for the country. The Special Rapporteur Yanghee Lee has reported that: «In January 2017, I visited northern Rakhine. I saw the sites of the alleged attacks by ARSA in October 2016 and met with villagers following the security operations that involved mass human rights violations against the Rohingya population. Following that, I had my first visit to Bangladesh in February 2017. I met with some of the 80,000 Rohingya who had been forced out during the security operations following 9 October 2016 and were living in makeshift camps in Cox's Bazar together with Rohingya refugees who had been there for up to 25 years. It was then that I was informed of the worst atrocities committed by human beings against their fellow people having taken place, including killings, torture, dismembering of body parts, slitting of throats and breasts, children being thrown into fires and gang rapes».<sup>51</sup> Subsequently the Special Rapporteur has been decisive through its reports in the establishment of an international fact-finding mission.

For this reason, the UNHRC adopted a resolution on the situation of human rights in Myanmar to demand the end of discrimination against the Rohingya minority. This resolution had the purpose to ask the end of the 1982 Citizenship Law, which violates human rights not guaranteeing the access of citizenship to the Rohingyas. The UNHRC decided to

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<sup>51</sup> Statement of Special Rapporteur on the situation of human rights in Myanmar, 23 January 2020, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25490&LangID=E>

establish through this resolution an independent international fact-finding mission, which was appointed by the President of the Human Rights Council, with the purpose to determine the facts of the human rights violations perpetrated by the security forces in Myanmar. Moreover, the mission had the purpose to guarantee justice for the victims and accountability for the perpetrators of the following crimes: torture, arbitrary detention, rape, enforced disappearances, summary or arbitrary killings, forced displacement and unlawful destruction of property. For this reason, the UNHRC requested the mission to present a full report at its thirty-seventh session. Furthermore, the UNHRC advised the Myanmar's government to take action to put an end to gender base discrimination, and to the violence against women and children based on religious or racial hate. In this sense, the UNHRC: «Stresses the need for the fact-finding mission to be provided with all the resources and expertise necessary to carry out its mandate, including forensic expertise and expertise on sexual and gender-based violence».<sup>52</sup> Finally the UNHRC asked the Burmese government a full cooperation with the fact-finding mission in order to have the possibility of access to each areas of the country and implement its mandate.

### **3.The outcome of the Independent International Fact-Finding Mission**

The UNHRC mandated the independent international fact-finding mission to establish the facts and circumstances of the alleged violations of human rights. The purpose of the mission was to identify whether there were abuses perpetrated by the security forces and to bring justice for the victims in the Rakhine state. The mission found out that the Rohingya continued to suffer for the Government's attacks which had the purpose of erasing their identity and removing them from Myanmar. Moreover, according to the mission's results the Rohingya's living conditions in the Rakhine state remained more or less the same of 2018 with the same factors that brought to the rapes, gang rapes, killings, forced displacement, torture committed by the Tatmadaw and other government authorities.

The mission adopted the principles of impartiality, independency and objectivity during its work. As a matter of fact, the mission's experts interviewed more than 419 victims and witnesses to gather information on the situation. The mission « found that, in much of northern Rakhine, “every trace of the Rohingya, their life and community as it had existed for decades, was removed” and that “indeed the clearance operations were successful”. The

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<sup>52</sup> United Nations Human Rights Council, Resolution 34/22,24 March 2017, A/HRC/RES/34/22

Mission concluded on reasonable grounds that, in addition to crimes against humanity and war crimes, the factors allowing for inference of genocidal intent were also present».<sup>53</sup>

The mission has described the conditions of 600.000 Rohingyas, of whom 126.000 live still in internally displaced camps, living in poverty and denied access to citizenship. In 2017 the Myanmar 's government modified the Citizenship Law with the introduction of the National Verification Cards (NVCs) which recognized the holder as non-citizen applying for citizenship. The government has forced many Rohingyas to accept a NVC that does not grant citizenship. However, the Rohingyas have refused to request this card because it states that the holder of the card is a Bengali and not a Rohingya.

The government claims that the NVC is a first step to obtain the citizenship, but in reality Rohingyas are coerced to demand for the NVC which does not give any rights. A Rohingya interviewed said that «The authorities have linked everything to the NVC. People cannot fish or cut wood in the forest without holding a NVC. Businesspersons cannot do their business and families cannot visit relatives in prison. The Government is using every possible means to force people to obtain NVC».<sup>54</sup> The Rohingyas are constantly threatened by the security forces that they will be killed and their villages destroyed, unless they don't take the National Verification Cards. Rohingya prisoners have to decide whatever to accept the NVC or stay in prison, while their family members have to show their NVC to visit them in prison. The NVC has deprived also the Rohingyas of the freedom of movement because they have to show to be in possess of the NVC at every security checkpoint in the Rakhine state.

According to the mission's findings: «the manner in which the Government restricts citizenship also denies Rohingya their identity and deprives them of the rights people need to survive and live with dignity. The Mission regards such restrictions and denials as one of several indicators that it has identified to infer that the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide».<sup>55</sup>

Moreover, the mission has found how the government has implemented a policy of confiscation of Rohingya's lands. These lands have been abandoned or confiscated, during the clearance operations perpetrated by the military forces, with the purpose of depriving the Rohingyas of food supplies. In this sense, the mission has sustained that depriving Rohingya

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<sup>53</sup> Ibidem

<sup>54</sup> Ibidem

<sup>55</sup> Ibidem

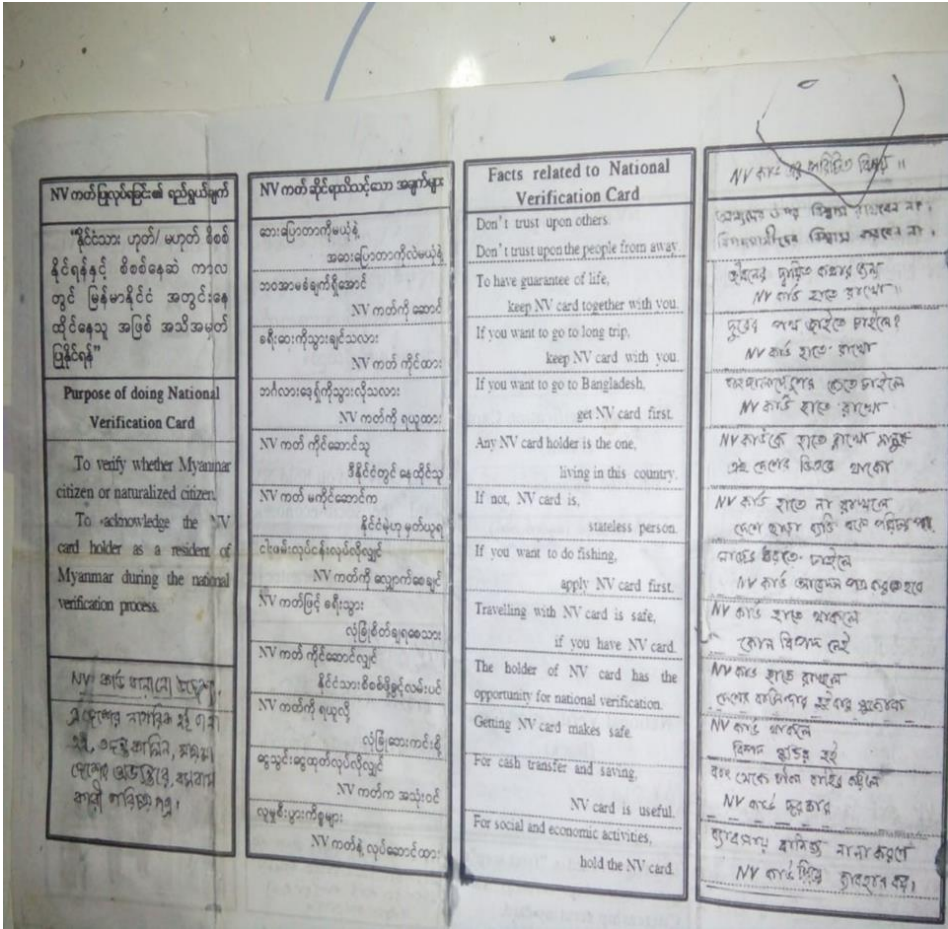


of their land can be considered as another sign that the government continues to pursue a genocidal attempt and that the Rohingya are still under serious risk of genocide. The Mission has concluded that the Government's land access restrictions has led to an unsustainable and unsafe situation for both the Rohingya living in Rakhine State and for those who would like to return in Myanmar.

In addition, the government has restricted the freedom of movement of the Rohingyas who are not authorized to leave their villages or camps without an authorization. The government has implemented this policy through the arrest of people who do not have the necessary documentation. The restriction of movement has had negative consequences for the Rohingyas because in this way they cannot access to many activities like health, education fishing or cultivating land. The Rohingyas have suffered for the lack of access to health facilities due to the restrictions, so many of them have decided to self-medicate or rely on traditional healers. According to the mission: «finally, the manner in which the Government imposes its movement restrictions, deprivation of food and denial of humanitarian relief is one of several indicators that the Mission has identified to infer that the Government continues to harbour genocidal intent and that the Rohingya remain under serious risk of genocide».<sup>56</sup>

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<sup>56</sup> Ibidem



This image shows the brochure given by the Myanmar’s delegation to the Rohingyas refugees in Bangladesh

Therefore, the Rohingyas are still suffering for discrimination in Myanmar because they are targeted for their ethnicity and religion. The situation of the 600.000 Rohingyas living in the Rakhine state is getting worse every year for the deplorable conditions to which they are subjected. The mission concluded that Myanmar was committing crimes against humanity as part of a widespread attack against the Rohingya minority. In this sense Myanmar could be held responsible for the commission of genocide and failure of its obligations under the Genocide Convention to investigate and prosecute genocide. Moreover, the Myanmar’s government failed to enact legislation with the purpose of punishing genocide. Finally, the mission concluded that «the State of Myanmar continues to harbour genocidal intent and the Rohingya remain under serious risk of genocide. Conditions

in Myanmar are unsafe, unsustainable and impossible for approximately one million displaced Rohingya to return to their homes and lands»<sup>57</sup>.

#### **4.The resolution 73/264 of the United Nations General Assembly on the human rights situation in Myanmar**

The General Assembly's acts are called resolutions, meaning deliberations adopted by the General Assembly itself as a collegial body. The term resolution has a generic meaning that says nothing about the legal effectiveness, binding or otherwise, of the resolution contained therein. The legal scope of individual resolutions depends on their legal basis in the UN Charter. Resolutions of the General Assembly are usually recommendations but they can also be binding decisions as in the case of article 17 of the UN Charter. According to article 17: «the expenses of the organization shall be borne by the members as apportioned by the General Assembly».<sup>58</sup> Then the General Assembly adopt resolutions that can be considered as binding decision in few cases such as the one in article 17 on the distribution of the UN's expenses between its member states. Recommendations are expressions of desire without binding force, which invite the addressees to comply with them. The general duty of the addressees, especially of the member states, is to conform their conduct to the recommendations of the General Assembly that derives in any case from the obligation of loyal cooperation with the organisation<sup>59</sup>. According to article 2 of the UN Charter: «all members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the UN is taking preventive or enforcement actions»<sup>60</sup>. In 2018 the General Assembly adopted a resolution on the situation of human rights in Myanmar. The resolution has demanded the military force to end violence, respect international law and stop the violations against the Rohingya community.

Furthermore, the resolution has emphasized the arbitrary killings, sexual violence and destruction of homes perpetrated against the Rohingya. The resolution has also recalled: «the responsibility of States to comply with their relevant obligations, to prosecute those responsible for violations of international law, including international humanitarian law,

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<sup>57</sup> Ibidem

<sup>58</sup> Charter of the United Nations concluded in San Francisco on 26 June 1945 and entered into force on 24 October 1945

<sup>59</sup> MARCHISIO S., *il diritto delle Nazioni Unite*, «cit.», note 50, p.160

<sup>60</sup> Un Charter, note 58, article 2

international human rights law, international criminal law and international refugee law, as well as abuses of human rights law, and to provide an effective remedy to any person whose rights have been violated, with a view to ending impunity»<sup>61</sup>. In this sense, the General Assembly has expressed its view on the fact that the people responsible for the crimes should be persecuted for violations of human rights. Then the General Assembly has asserted the gravity of the situation in Myanmar by arguing that it is necessary to begin an investigation into the possible crime of genocide. The resolution «expresses grave concern at the findings of the independent international fact-finding mission on Myanmar that there is sufficient information to warrant investigation and prosecution so that a competent court may determine liability for genocide in relation to the situation in Rakhine State».<sup>62</sup>

For this reason, the resolution has asked the Myanmar 's government to remove the people responsible of persecutions from positions of power. In conclusion, the resolution has been a fundamental step for the international community to be fully aware of the necessity to prosecute the Myanmar for the crime of genocide.

## **5.The crime of genocide in the 1948 Convention on the Prevention and Punishment of the crime of Genocide**

The term genocide had its origin in the mixture between the Greek word *genos* and the Latin word *cide* which means killings of a race. The term was used for the first time by Raphael Lemkin who used the word genocide in his book *Axis Rule in Occupied Europe*. As a matter of fact, the Nazi targeted a specific group with the intent to destroy it. The crime of genocide was introduced after the horrors of the Second World War when 6 million Jews were killed by the Nazi Germany. The Convention on the prevention and punishment of the crime of genocide entered into force through the resolution of the General Assembly on 12 January 1951 and ratified by Myanmar on 14 March 1956. For this reason, members of the security forces or the government could be held responsible for individual criminal responsibility. Meanwhile Myanmar could be held responsible for violation for the Genocide Convention committed by state actors or non-state actors under its control. For this reason, it will be emphasized the difference existing between *actus rea* and *mens rea* in the article 2 of

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<sup>61</sup> United Nations General Assembly, Resolution 73/264, 22 December 2018, A/RES/73/264

<sup>62</sup> Ibidem

the Genocide Convention. Then the other articles of the Genocide Convention will be explained.

### 5.1 *Actus reus*

«The *actus reus* is a behavioral element of a crime which requires an action of some kind. Though *actus reus* normally entails harmful consequences, it is also possible that *actus reus* consists of behavior only. Logically, the behavior proscribed in the *actus reus* requires the person's positive act. Nonetheless, an omission or failure to act may also constitute the *actus reus* when a person has a duty to act but fails to do so»<sup>63</sup>. In this sense, the *actus* can be considered as the physical act or omission. Therefore, the *actus reus* is expressed in the article two of the Genocide Convention through the following definition: «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 s bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group».<sup>64</sup>

According to the International Criminal Tribunal for Rwanda(ICTR) the words used in the part (b) of article 2 of the Genocide Convention meant: « “methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group”, but which are, ultimately, aimed at their physical destruction. The Trial-Chamber 1 holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard».<sup>65</sup> Clearly the *actus reus* was present in the

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<sup>63</sup> MARCHUK I., *The Fundamental Concept of Crime in International Criminal Law, A Comparative Law Analysis*, Berlin,2014, p.112

<sup>64</sup> 1948 Genocide Convention, note 40, article 2

<sup>65</sup> International Criminal Tribunal for Rwanda,6 December 1999, Case No. ICTR-96-3-T, Arusha

acts reported by the independent international fact-findings mission in Myanmar. According to the mission «in the case of Myanmar, the Mission has concluded on reasonable grounds that the Tatmadaw is the most notable, but not the only, State organ that engaged in underlying genocidal acts with the inference of genocidal intent»<sup>66</sup>. Then the state was deeply involved in the genocide through its military and civilian acts.

## 5.2 *Mens Rea*

The guilty state of mind is fundamental «since the absence or defect of the *mens rea* precludes the imposition of criminal responsibility».<sup>67</sup> The genocide requires the presence of *mens rea* aggravated by *dolus specialis*. «The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder. The Trial Chamber opines that for the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent».<sup>68</sup>

## 5.3 Articles of the Genocide Convention

According to article 3 of the Genocide Convention «the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide»<sup>69</sup>

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<sup>66</sup> United Nations Human Rights Council, Report 42/CRP.5, 16 September 2019, A/HRC/42/CRP.5

<sup>67</sup> MARCHUK I., *A Comparative Law Analysis*, «cit.», note 22, p.113

<sup>68</sup> Trial Chamber II, 6 December 1999, Case No. ICTR-96-3-T

<sup>69</sup> 1948 Genocide Convention, note 40, article 3

Article 3 gave rise to the obligation to punish the crime of genocide. The ICJ sustained in its order regarding the dispute between Gambia and Myanmar on the application of the Genocide Convention that its provisions have the purpose to protect the members of a religious, national, racial or ethnical group from the acts in article 3. According to article 4 «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». <sup>70</sup> The article 4 embodied the principle of individual criminal responsibility because individuals are considered responsible without taking into consideration their positions. Instead article 5 stated that: «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». <sup>71</sup> In this sense article 5 demanded to state parties to the Genocide Convention to implement legislation and penalties for punishing the crime of genocide. Furthermore, the penalties provided according to article 5 must be effective.

Article 9 gives the power to the ICJ to resolve possible disputes existing between different parties on the interpretation, application and fulfillment of the Genocide Convention. Article 9 states that «disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute». <sup>72</sup> This article will be fundamental to establish the jurisdiction of the ICJ in the dispute between Gambia and Myanmar.

## **6. The background of the dispute between Gambia and Myanmar**

The dispute between Gambia and Myanmar is based on the application, interpretation and fulfilment of the Genocide Convention. Actually, Gambia started

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<sup>70</sup> Ibidem

<sup>71</sup> Ibidem

<sup>72</sup> Ibidem

proceedings against Myanmar for the violation of the Genocide Convention. For this reason, Gambia asked to the ICJ to state that Myanmar violated the Genocide Convention.

The Gambia based its request on article 9 of the Genocide Convention, which grants jurisdiction to the ICJ in the case of dispute on the interpretation, application and fulfilment of the Genocide Convention. Moreover Gambia asked the ICJ to take the following provisional measures: «taking all measures within its power to prevent all acts that amount to or contribute to the crime of genocide, including taking all measures within its power to prevent the following acts from being committed against [any] member of the Rohingya group: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part».<sup>73</sup> In addition Gambia sustained in its request that Myanmar's military or paramilitary personnel do not have to be involved in the commission or conspiracy of acts of genocide against the Rohingya minority. «Myanmar shall not destroy or render inaccessible any evidence related to the events described in the Application, including without limitation by destroying or rendering inaccessible the remains of any member of the Rohingya group who is a victim of alleged genocidal acts, or altering the physical locations where such acts are alleged to have occurred in such a manner as to render the evidence of such acts, if any, inaccessible; (d) Myanmar and The Gambia shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of this Application, or render it more difficult of resolution».<sup>74</sup> In conclusion Gambia requested the Myanmar to cooperate with the UN fact-finding mission and send a report to the UN outlining how the provisional measure were implemented. Clearly Myanmar asked the ICJ to dismiss the case or reject the provisional measures supported by Gambia. The decision on the jurisdiction of the case by the ICJ and the functioning of provisional measures will be explained in the next chapter.

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<sup>73</sup> International Court of Justice, 23 January 2020, No.178, The Hague

<sup>74</sup> Ibidem



# CHAPTER THREE: THE ORDER OF THE INTERNATIONAL COURT OF JUSTICE

## 1. Jurisdiction of the International Court of Justice

The term dispute is used in The Hague Conventions for the pacific settlement of international disputes (1899 and 1907), the Covenant of the League of Nations, the Permanent Court of International Justice (PCIJ) and the ICJ's statutes, the UN Charter. International disputes are only those disputes, in which two or more sovereign entities that present themselves as subjects of international law are involved. The disputes related to chapter 6 of the UN Charter are also international disputes that are characterized by the will of the parties involved to make their interests prevail and by their dangerous nature for peace. The doctrine identifies the dispute with a situation of contrast, regarding a conflict of interests, between the claim of one subject and the resistance of the other.<sup>75</sup> In the *Obligations concerning negotiations relating to the cessation of the nuclear arms race and to nuclear disarmament (Marshall Islands v United Kingdom)* judgement the ICJ states that there is a dispute when the claim of one party is positively opposed by the other. Moreover, according to the ICJ a dispute exists when «the evidence must show that the parties “hold clearly opposite views” with respect to the issue brought before the court».<sup>76</sup> Clearly the dispute's concept does not coincide with the conflict of interests between states, because otherwise the states would be always in dispute in any conflictual situation. Furthermore, the dispute is a situation of contrast of subjective behaviors regarding a conflict of interest: the two behaviors must be expression of the willingness of the states involved to give precedence to the respective position (contending in argument).

On the application of the Convention on the prevention and punishment of the crime of genocide Gambia sustained the existence of a dispute with Myanmar based on article 9 of the Genocide Convention. Then Gambia accused Myanmar of violating its obligations under the Genocide Convention during the clearance operations which had the purpose to destroy in whole or in part the Rohingya minority. Moreover, Gambia affirmed during the proceeding how Myanmar knew that the UN international fact-findings mission «welcomes the efforts of States, in particular The Gambia and Bangladesh, and the

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<sup>75</sup> MARCHISIO S., *Corso di diritto internazionale*, «cit.», note 44, pp.378-379

<sup>76</sup> International Court of Justice, 5 October 2016, Case No.1107, The Hague

Organisation of Islamic Cooperation to encourage and pursue a case against Myanmar before the International Court of Justice (ICJ) under the Genocide Convention».<sup>77</sup>

Gambia sustained that Myanmar refused both the reports' conclusions of the international fact findings mission and the *note verbale* sent by Gambia to communicate its claim on the breaches of the Genocide Convention. On the contrary Myanmar sustained during the proceedings that there was no dispute since the proceedings were started by the Gambia on behalf of the Organization of Islamic Cooperation<sup>78</sup> (OIC). According to Myanmar, the *note verbale* sent by Gambia did not request for a response since it did not formulate any allegations. For this reason, Myanmar sustained both the absence of a dispute and the ICJ's lack of jurisdiction.

However, the ICJ affirmed that Gambia started proceedings on its own name and the support of other states or international organizations did not preclude the existence of a dispute between the two parties. Furthermore, the ICJ noted that Gambia affirmed at the seventy-fourth session of the UN General Assembly its willing to bring the question of the Rohingya minority before the ICJ, while Myanmar affirmed that the mission's results were biased. Clearly the ICJ affirmed how these different positions expressed during the General Assembly show the existence of a dispute. In this regard, the ICJ said that: «a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*, the position or the attitude of a party can be established by inference, whatever the professed view of the party».<sup>79</sup>

For this reason, ICJ stated that the presented elements were enough to establish the existence of a dispute between the two countries on the application of the Genocide Convention, considering that some of the acts alleged by the Gambia to Myanmar could fall in its provisions. Subsequently Myanmar questioned the possibility of Gambia to seize the ICJ on the basis of its reservations made to article 8 of the Genocide Convention. According to article 8 of the Genocide Convention: «any Contracting Party may call upon the competent organs of the UN to take such action under the Charter of the UN as they consider

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<sup>77</sup> United Nations Human Rights Council, Report 42/CRP.5, 16 September 2019, A/HRC/42/CRP.5

<sup>78</sup> According to article 34 of the ICJ statute: «only states may be parties in cases before the Court». Moreover, it is not enough that the dispute submitted to the ICJ is international, meaning between subjects of international law, because the parties must have the status of states. International organizations are excluded from the ICJ's jurisdiction. The ICJ Statute gives international organizations a status similar to *amicus curiae*. International organizations may, at the request of the Court or on their own initiative, submit observations in the case of disputes relating to international conventions to which they are party.

<sup>79</sup> International Court of Justice, 11 June 1998, No.708, The Hague

appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III». <sup>80</sup> Clearly Myanmar used this argument because Gambia based its request to take action to the ICJ on article 8 which is a precondition for the ICJ's jurisdiction based on article 9 of the Genocide Convention.

However, the ICJ noted «that this provision only addresses in general terms the possibility for any Contracting Party to “call upon” the competent organs of the UN to take “action” which is “appropriate” for the prevention and suppression of acts of genocide. It does not refer to the submission of disputes between Contracting Parties to the Genocide Convention to the court for adjudication. This is a matter specifically addressed in article IX of the Convention, to which Myanmar has not entered any reservation». <sup>81</sup> Therefore article 8 and 9 have different areas of application, which means that only article 9 is relevant to assess the jurisdiction of the ICJ. For this reason, the ICJ concluded that it had jurisdiction to treat the case.

Subsequently the ICJ had to establish if the rights claimed by Gambia and for which is looking protection are plausible. As a matter of fact, the Gambia stated that it was looking for the protection of Rohingya group from the acts of genocide based on article 3 of the Genocide Convention. Furthermore, Gambia sustained that there is clear evidence of genocidal intent (*dolus specialis*) in the conduct against the Rohingya group in Myanmar. On the contrary Myanmar affirmed that Gambia did not provide sufficient evidence that the acts committed had the specific genocidal intent. The ICJ relied on the international fact-finding mission conclusion which stated that: «on reasonable ground that the factors allowing for inference of genocidal intent were also present». <sup>82</sup> Furthermore the ICJ took into consideration the General Assembly's resolution which affirmed the necessity to start an investigation on the possible crime of genocide. At this stage of the proceeding the ICJ sustained that the rights of the Rohingya minority to be protected from all acts enumerated in article 3 of the Genocide Convention as well as the rights of the Gambia to ensure Myanmar's respect of its obligations to prevent and punish the crime of genocide are plausible. Finally, the ICJ concluded «that a link exists between the rights claimed and some of the provisional measures being requested by Gambia». <sup>83</sup>

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<sup>80</sup> 1948 Genocide Convention, note 40, article 8

<sup>81</sup> International Court of Justice, 23 January 2020, No.178, The Hague

<sup>82</sup> United Nations Human Rights Council, Report 42/CRP.5, 16 September 2019, A/HRC/42/CRP.5

<sup>83</sup> International Court of Justice, 23 January 2020, No.178

## 2. Provisional Measures to be adopted and Conclusions of the Court

In this paragraph, I will consider the functioning and the ICJ's decision to indicate provisional measures. According to article 41 of the ICJ Statute: «the court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council».<sup>84</sup> The decisions on provisional measure were given through an order of the ICJ. In the Fisheries Jurisdiction Cases (United Kingdom v Iceland, Federal Republic of Germany v Iceland) three elements were identified that relate to the objectives of the provisional measures. According to these three elements, the provisional measures have to preserve the rights of the parties involved, protect them against irreparable prejudice of the rights subjects of judicial proceedings and not anticipate the court's final judgement on the merits.

Therefore, the ICJ will indicate provisional measures only when there is urgency due to the risk of irreparable prejudice before the court's final decision. At this stage, the ICJ did not have to determine whatever there was or not a breach of the Genocide Convention by Myanmar but if the situation required the adoption of provisional measures to protect the rights of Rohingya minority. Gambia sustained that there was a risk of irreparable prejudice for Rohingya's rights because the Myanmar's government continued to pursue genocidal intent. Instead Myanmar affirmed how its government was involved in the repatriation of Rohingyas from Bangladesh with the help of international actors and implemented numerous initiatives to bring stability to the Rakhine state.

The ICJ noted that the Rohingyas faced numerous acts which threatened their existence as a protected group like the mass killings, rapes, destruction of villages and denial of access to food. In this sense, the ICJ considered that the Rohingyas remained extremely vulnerable in Myanmar. Moreover, the ICJ stated «that Myanmar has not presented to the court concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention».<sup>85</sup> Then the ICJ stated that Myanmar as a state party to the Genocide Convention was still responsible under

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<sup>84</sup> Statute of the International Court of Justice concluded in San Francisco on 26 June 1945 and entered into force on 24 October 1945.

<sup>85</sup> International Court of Justice, 23 January 2020, No.178

article 1 to prevent and punish the crime of genocide without taking into consideration the possible context of peace or war. For this reason, the ICJ stated that there was a real risk of irreparable prejudice to the rights claimed by Gambia.

Then the ICJ affirmed that it had the power to indicate provisional measures different in whole or in part from those requested. In this situation, the ICJ decided to indicate provisional measures not equal to the ones requested. Moreover, it has to be remembered that In LaGrand Case was established the binding effect of provisional measures. In LaGrand Case the ICJ sustained that article 41 was designed to prevent the court from being obstructed in its tasks of preserving the rights of the parties involved in the dispute. In this sense, the ICJ provisional measures are bindings «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 determined by the final judgement of the court».<sup>86</sup>

Finally, the ICJ indicated that Myanmar had «to prevent the commission of all acts within the scope of article II of the Convention, in particular:

- (a) Killing members of the group;
- (b) Causing seriously 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»;<sup>87</sup>

Furthermore Myanmar had to «ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide; (3) Unanimously, The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; (4) Unanimously, The Republic of the Union of Myanmar shall submit a report to the court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the

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<sup>86</sup> International Court of Justice, 27 January 2001, No.822, The Hague

<sup>87</sup> International Court of Justice, 23 January 2020, No.178

case is rendered by the court». <sup>88</sup> Therefore Myanmar had to guarantee that any military, organizations or person under its control was not involved in any conspiracy, attempt, incitement or complicity to commit genocide. Myanmar had to take measures to preserve the evidence related to allegation made under article 2 of the Genocide Convention. In its final request the ICJ indicated that Myanmar had to submit a report within four months explaining how the order was implemented and later every six months until the reach of a final judgment by the ICJ.

However, the ICJ refused the sixth provisional measures asked by Gambia which stated that: «Myanmar shall grant access to, and cooperate with, all the UN fact-findings bodies that are engaged in investigating alleged genocidal act against the Rohingya, including the conditions to which the Rohingya are subjected». <sup>89</sup> In this case the ICJ simply affirmed that this provisional measure was not necessary. It is possible that the ICJ made a political choice, because otherwise, it could not be explained why the UN did not indicate to Myanmar to collaborate with the UN missions. In fact, it was already possible to detect an uncooperative attitude from the words of the government's spokesman Zaw Htay according to which: «our stance is clear and I want to say sharply that we don't accept any resolutions conducted by the Human Rights Council». <sup>90</sup> Myanmar showed that it was not collaborating with the international fact-findings mission by appointing its own commission, which denied the most significant results of the international mission. For this reason, Myanmar set up an Independent Commission of Inquiry which had the purpose to investigate the attacks and the possible consequences of these attacks after the clearance operations on 2017. Then Myanmar published a report in which came to the conclusion that crimes against humanity and war crimes were potentially committed in the Rakhine state through the excessive use of force by members of the security forces. However, the report argued that there was not enough evidence to say that there was the *mens rea* necessary for the crime of genocide, and the intent to destroy in whole or in part the Rohingya group. According to the report there was no proof that the acts were committed with genocidal intent. Moreover, the Myanmar's government denied access to the country to the experts of the independent international fact-findings mission.

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<sup>88</sup> Ibidem

<sup>89</sup> International Court of Justice, 23 January 2020, No.178

<sup>90</sup> MCPHERSON P., *Myanmar rejects false allegations in UN genocide report*, Reuters, www.reuters.com, [6 June], 2018

I think that it could be also interesting to take into consideration the separate opinion of Vice-president Xue on the Gambia vs Myanmar case, who sustained the indication of provisional measures without being convinced of the Gambia's legal standing in the case. Xue believed that there were human rights violations but not violations of the Genocide Convention. In this sense Xue refused the reasoning of the ICJ on the legal standing of Gambia against Myanmar, which were based on Belgium vs Senegal case. As a matter of fact, the ICJ sustained that the provisions in the Convention against the Torture looked alike to the provisions in the Genocide Convention. Therefore, according to the ICJ these provisions created *erga omnes partes* obligations, meaning that «any state party to the Genocide Convention, and not only a specially affected state, may invoke 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».<sup>91</sup> Contrary to this position, Xue expressed the idea that Belgium vs Senegal case was completely different case because Belgium did not file an application against Senegal because it had an interest in the respect of the Convention against Torture. Then Belgium filed its application «because it was specially affected by Senegal's alleged non-fulfillment of its obligations *aut dedere aut judicare* under article 7 of the Convention, as its national courts were seised with lawsuits against Mr. Hissène Habré for allegations of torture. In other words, it was supposedly an injured state under the rules of state responsibility».<sup>92</sup> Finally, Xue did not agree on the interpretation made by the ICJ on the Convention against Torture, so it cannot be allowed the start of proceedings in the ICJ by any state party without any qualification on jurisdiction. However, despite his doubts, Xue approved the indication of provisional measures because he based its decision on the report of the independent international fact-findings mission.

### **3. The jurisdiction of the International Criminal Court**

The ICC has complementary jurisdiction to the national jurisdictions, which means that states parties to the Rome Statute have the first responsibility to investigate and prosecute crimes covered by the Statute. The ICC's jurisdiction on the most serious crimes of international significance can only be exercised when the state having jurisdiction over the case does not have the will or ability to conduct the investigation or to hold the relevant trial

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<sup>91</sup> International Court of Justice, 23 January 2020, No.178

<sup>92</sup> Ibidem

.According to the article 17 of the Statute the case is considered inadmissible «where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under article 20, paragraph 3; the case is not of sufficient gravity to justify further action by the court». <sup>93</sup>

Furthermore, the ICC does not have universal jurisdiction and cannot proceed against citizens of states that have not accepted the Rome Statute or situations occurred in the territory of those states unless they have consented to it. The ICC's jurisdiction is automatic for crimes listed by the Rome Statute, if the state on whose territory the crimes were committed or for which the alleged perpetrator is a citizen are contracting parties. <sup>94</sup>

Moreover, the Rome Statute accepts the principle of irrelevance of the immunity, according to international law, enjoyed by persons accused of crimes within ICC' jurisdiction. According to article 27: « this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person». <sup>95</sup>

The Prosecutor can start an investigation based on the information received from states or non-governmental organizations with the prior authorization of the Pre-Trial Chamber. Despite the fact that Myanmar is not a state party to the Rome Statute, the Prosecutor filed a request to the Pre-trial Division under Article 19 of the Statute for a ruling on the ICC's jurisdiction over the alleged deportation of the Rohingyas from Myanmar to Bangladesh. In this case the Prosecutor has based his reasoning on article 7 which

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<sup>93</sup> Rome Statute of the International Criminal Court, concluded in Rome on 17 July 1998 and entered into force on 1 July 2002, 2187 UNTS 3

<sup>94</sup> MARCHISIO S., *Corso di diritto internazionale*, «cit.», note 44, pp.289-290.

<sup>95</sup> Rome Statute of the International Criminal Court, note 93, article 27



enumerates the possible crimes against humanity. According to article 7 of the Rome Statute: «"deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law».<sup>96</sup> For this reason the Prosecutor has put a great emphasis on the crossing of an international border by the Rohingyas because it has involved a state party to the statute.

### 3.1 Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute

On April 2018, the Prosecutor of the ICC sent to the President of the Pre-Trial Division a request to seek the ruling of the Pre-Trial Chamber on the possible jurisdiction, based on article 12 of the Rome Statute, over the deportation of Rohingya people from Myanmar to Bangladesh. The President of the Pre-Trial Division assigned a Pre-Trial Chamber to rule the request. Then the Pre-Trial Chamber sustained that according to article 119: «any dispute concerning the judicial functions of the court shall be settled by the decision of the court»<sup>97</sup>. As a matter of fact according to article 12 of the Rome Statute: «the court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the court in accordance with paragraph 3: (a) the State on the territory of which the conduct in question occurred or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft, the State of which the person accused of the crime is a national».<sup>98</sup> However the Prosecutor based his reasoning on the transnational nature of the crime of deportation. The Prosecutor highlighted how article 12 of the Rome Statute, for the part in which it links the exercise of jurisdiction to the territory of the State Party where the crime is committed, must be interpreted in the light of the fact that some criminal conduct originates on the territory of a State and produces effects on the territory of another state. The Prosecutor sustained that the ICC could exercise jurisdiction because there was the crossing of the international border with Bangladesh which is a state party to the Rome Statute. Furthermore, the Prosecutor affirmed that: «in exercising their own sovereign powers, States commonly assert their criminal jurisdiction over conducts that occur on the territories of multiple States»<sup>99</sup>. Because

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<sup>96</sup> Ibidem

<sup>97</sup> Ibidem

<sup>98</sup> Ibidem

<sup>99</sup> International Criminal Court, 9 April 2018, The Hague

of this it was necessary to take into account how certain crimes for their nature, like deportation, or for the way in which they are produced, like cross border shootings, are characterized by transnationality.

Moreover, the Prosecutor affirmed that the concept of conduct included not only the perpetrator's act but also its consequence. In this sense, the Prosecutor stressed that although these were two concepts that could be kept separate, there was nothing to suggest that the wording of article 12 must be understood in a restrictive sense which took into account only the conduct and not also the possible consequences. Then the Prosecutor stressed that the wording of article 12 did not offer any particular explanation as to whether it was necessary that the crimes over which such jurisdiction was exercised should be committed fully on the territory of the state party or if it was sufficient for them to be committed even partially. Therefore, the interpretation of article 12 should be understood not in a restrictive sense but rather in such a way to admit the exercise of jurisdiction even in cases when only a part of the criminal conduct was committed on the territory of a member state.

According to article 19 of the Rome Statute: «the Prosecutor may seek a ruling from the court regarding a question of jurisdiction or admissibility».<sup>100</sup> In this sense the Pre-Trial Chamber can decide on jurisdiction without the need to start definite ruling on the applicability of article 19 at this stage of proceedings. In this situation, the Prosecutor required the ICC to exercise the principle of international law referred as *kompetenz-kompetenz*, according to which an international tribunal can determine its own jurisdiction. The Prosecutor's request was based on the substantive aspect of the concept of deportation, because Myanmar is not a state party to the Rome Statute. Moreover, the Prosecutor stressed the fact that provision was deliberately conceived in generic terms so as to admit that the court's ruling could concern issues related to substantive jurisdiction, territorial or temporal jurisdiction. Taking into consideration the fact that article 19 does not give any precise indication as to when or at what stage of the proceedings the exercise of such jurisdiction was permitted, the Prosecutor affirmed that the request to establish jurisdiction could be made at any stage because limiting the possibilities of application of the rule to the final stage of the proceedings would mean significantly restricting the effectiveness of the rule itself.

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<sup>100</sup> Rome Statute of the International Criminal Court, note 93, article 19

The Pre-Trial Chamber 1 concluded that «acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute»<sup>101</sup> . Subsequently the Prosecutor sent a request to the Presidency in order to start investigations on the situation in Myanmar which was authorized by the Pre-Trial Chamber 3 based on article 15 of the Rome Statute. According to article 15: «the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court».<sup>102</sup> The Pre-Trial Chamber 3 pointed out that the Prosecutor must have necessarily, at least in part, been based on the criterion of the reasonable basis provided by article 15. In this sense, the examination of the information placed the Prosecutor in the condition of believing that there were reasonable grounds to believe that crimes listed in the Rome Statute were already committed or at least in progress. Therefore, the Prosecutor was obliged to start the investigative phase because this served to ascertain the facts. Finally, the Pre-Trial Chamber 3 accepted that there was reasonable basis to «believe that since at least 9 October 2016, members of the *Tatmadan*, jointly with other security forces and with some participation of local civilians, may have committed coercive acts that could qualify as the crimes against humanity of deportation (article 7(1)(d) of the Statute) and persecution on grounds of ethnicity and/or religion (article 7(1)(h) of the Statute) against the Rohingya population».<sup>103</sup>

## CONCLUSIONS

In this final paragraph, I would like to answer to my research question affirming that I believe there is an ongoing genocide in Myanmar perpetrated by the security forces with the tacit government's support. The independent international fact-findings mission has been quite clear when it has stated that the Myanmar's government is harboring genocidal intent.

However, I might say that there is no certainty on what will be the final judgment of the ICJ on this case. As a matter of fact, the ICJ has only established its jurisdiction in the

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<sup>101</sup> International Criminal Court, 6 September 2018, No. ICC-RoC46(3)-01/18, The Hague

<sup>102</sup> Rome Statute of the International Criminal Court, note 93, article 15

<sup>103</sup> International Criminal Court, 14 November 2019, No. ICC-01/19

dispute between Gambia and Myanmar over the application, interpretation and fulfillment of the Genocide Convention, which does not mean that the ICJ will rule in favor of Gambia against Myanmar in the merits of the case. The ICJ has already established that Rohingyas can be considered as a protected group which is fundamental to define the possible violations of the Genocide Convention. However, it will be difficult for the ICJ to prove the *dolus specialis* which is necessary for proving the Myanmar's genocidal intent. In fact, the ICJ will not need to consider the individual actions taken, but will simply have to analyze those actions that could demonstrate the existence of a specific pattern of actions with a genocidal intent.

Surely the ICJ has been far-sighted in pointing out some provisional measures, but I'm afraid these are not enough to prevent the ongoing genocide. In this sense, I believe that it is mostly unlikely that Myanmar will comply with the provisional measures provided by the ICJ. As a matter of fact, the Myanmar's Ministry of Foreign Affairs has published a press release stating that there has been no genocide in the Rakhine state and the provisional measure have been meant to protect the ICJ from possible accusations not to take preventive actions. The Myanmar's government showed clearly not to care about the results of the international fact-findings mission. Surely the order of the ICJ is relevant under international law because it plays a crucial role in protecting the Rohingya group. However, it will certainly be necessary for the measures taken to be effective if other states expressly support Gambia's application against Myanmar. In addition, it is also fundamental that not only the ICJ, but also the other UN's organs such as the General Assembly or the UN Secretariat, would be more involved in monitoring the implementation of the measures.

The pressure of the ICJ's order on Myanmar is clearly linked to the general will of the international community. Moreover, it has to be remembered that several times the provisional measures ordered by the ICJ have been ignored like in the Bosnia and Herzegovina vs Yugoslavia case. In this particular case despite the provisional measures taken by the ICJ according to which Yugoslavia had to take all necessary measures to prevent the crime of genocide, there has still been the massacre in Srebrenica. Then it is clear that provisional measures might not be enough to prevent a genocide, because Myanmar could simply ignore them without any repercussion.

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## ABSTRACT

La presente tesi si è posta l'obiettivo di comprendere, se si può affermare che le violazioni dei diritti umani perpetrate nello stato del Rakhine in Birmania possano essere considerate come facenti parte di un piano architettato dal governo birmano per distruggere la minoranza Rohingya. Questa tesi è stata divisa in tre capitoli che affrontano i vari aspetti che hanno condotto alla violazione dei diritti umani e infine al genocidio della minoranza Rohingya.

Nel primo capitolo è stato fatto un excursus storico sulla situazione dei Rohingya in Birmania a partire dalla seconda guerra mondiale per arrivare alla crisi migratoria presente, che è iniziata con le operazioni di pulizia etnica condotte dalle forze di sicurezza birmane con il tacito appoggio del governo. Dalla fine del dominio britannico sulla Birmania la minoranza Rohingya ha subito numerosi abusi e violazioni, da parte dei vari governi succedutesi nel tempo, per motivi religiosi. Infatti l'operazione Nagamin, voluta dal generale Ne Win, è stata condotta contro l'etnia Rohingya nello stato di Rakhine portando alla fuga di centinaia di persone verso il Bangladesh. Successivamente è stata introdotta la legge sulla cittadinanza che ha reso praticamente impossibile per la maggioranza della popolazione Rohingya di ottenere la cittadinanza. Il gruppo etnico dei Rohingya non è stato riconosciuto e ha reso de facto questa minoranza apolide.

In seguito agli attacchi dell'Esercito di salvezza dei Rohingya dell'Arakan (ARSA) contro la polizia birmana nel 2017, il governo birmano presieduto dal consigliere di stato Aung San Suu Kyi ha iniziato una serie di operazioni di pulizia etnica all'interno dello stato di Rakhine. Le operazioni di pulizia hanno portato circa 530.000 persone appartenenti all'etnia Rohingya ad attraversare il confine per trovare rifugio in Bangladesh. Queste operazioni sono state fondamentali per risvegliare la comunità internazionale sul genocidio attualmente in atto all'interno del paese. In seguito a queste operazioni il Procuratore della Corte Penale Internazionale ha fatto una richiesta al Presidente della Pre-Trial Division per ricevere una pronuncia sulla giurisdizione del caso da parte della Pre-Trial Chamber 1; mentre il Gambia ha iniziato un procedimento contro la Birmania richiedendo misure provvisorie da parte della Corte Internazionale di Giustizia per violazione della Convenzione per la prevenzione e la repressione del crimine di genocidio.

All'interno del secondo capitolo ho trattato le questioni relative alle violazioni dei diritti umani e alla reazione della comunità internazionale. Infatti il Consiglio per i diritti



umani delle Nazioni Unite ha stabilito attraverso una risoluzione una missione internazionale indipendente sui fatti della Birmania, che ha avuto il compito di stabilire i fatti e le circostanze relative alle violazioni dei diritti umani compiute dalle forze di sicurezza birmane. Questa missione ha scoperto che le forze di sicurezza hanno compiuto una serie di violazioni e abusi con l'intento di perpetrare il crimine di genocidio. Secondo il report inviato alla Nazioni Unite da parte della missione internazionale indipendente, la Birmania sarebbe responsabile di aver commesso il crimine di genocidio e non aver quindi rispettato i suoi obblighi come stato firmatario della Convenzione per la prevenzione e la repressione del delitto di genocidio nei confronti dell'etnia Rohingya. Quindi il report conclude che i Rohingya si trovano in pericolo in Birmania, perché il governo continua ad avere un intento genocidario nei loro confronti. Le rivelazioni della missione internazionale indipendente hanno condotto l'Assemblea Generale delle Nazioni Unite a esprimersi attraverso una risoluzione in favore dell'inizio di un'indagine e di un'azione penale da parte di una corte competente per determinare la responsabilità del crimine di genocidio.

Successivamente ho spiegato i concetti penali di *actus rea e mens rea* che si applicano nell'articolo 2 della Convenzione per la prevenzione e la repressione del delitto di genocidio, in quanto sono fondamentali per poter determinare il crimine di genocidio. Infatti il crimine di genocidio si basa sulla presenza dell'elemento mentale *mens rea* aggravata dal *dolus specialis*, che indica l'intento di distruggere in tutto o in parte un gruppo. Inoltre ho citato l'articolo 9 che è particolarmente rilevante, in quanto dà il potere alla corte di risolvere le possibili controversie tra gli stati relative all'interpretazione, applicazione e esecuzione della Convenzione per la prevenzione e la repressione del delitto di genocidio.

Nel terzo capitolo ho trattato la decisione presa da parte della Corte Internazionale di Giustizia in merito alla sua possibile giurisdizione nel caso Gambia contro Birmania. Quindi è importante notare che questa decisione non ha pregiudicato in alcun modo la competenza da parte della corte di trattare sia nel merito del caso sia della questione relativa all'ammissibilità della richiesta fatta dal Gambia.

. Infatti il Gambia ha chiesto alla corte una serie di misure provvisorie contro la Birmania per prevenire la distruzione totale o in parte del gruppo etnico Rohingya. La corte ha stabilito prima l'esistenza di una controversia tra i due stati e in seguito di avere giurisdizione per poter trattare il caso. Inoltre la corte ha stabilito che i diritti che erano rivendicati dal Gambia per la protezione della minoranza Rohingya erano plausibili. Successivamente mi sono focalizzato sul funzionamento delle misure provvisorie e sulle

ragioni della corte per stabilirle. Le misure provvisorie sono vincolanti e sono state indicate per proteggere i diritti di questa minoranza prima della sentenza finale, ma non determinano assolutamente se vi siano state o no delle violazioni della Convenzione per la prevenzione e la repressione del delitto di genocidio. In seguito ho trattato la richiesta fatta dal Procuratore della Corte Penale Internazionale sulla deportazione dei Rohingya dalla Birmania al Bangladesh. Incredibilmente la Corte Penale Internazionale ha ritenuto di avere giurisdizione sul caso, nonostante la Birmania non sia uno stato membro dello Statuto di Roma, basandosi sul fatto che il crimine sia stato compiuto sul territorio del Bangladesh uno stato facente parte dello Statuto di Roma. Sicuramente la Corte Penale Internazionale potrà accertare la responsabilità individuale per il crimine di deportazione compiuto da parte delle forze di sicurezza birmane.

Nelle conclusioni ho sostenuto che la Birmania probabilmente non rispetterà le misure provvisorie, in quanto si era già espressa in modo sfavorevole attraverso il portavoce del governo sostenendo di non accettare la risoluzione del Consiglio per i diritti umani delle Nazioni Unite, e in seguito aveva espulso i membri della missione internazionale indipendente delle Nazioni Unite dal paese. Inoltre la Birmania ha questionato la possibilità da parte della Corte Internazionale di giustizia di poter trattare il caso per le riserve fatte sull'articolo 8 della Convenzione per la prevenzione e la repressione del delitto di genocidio.

Attraverso l'ordinanza della Corte Internazionale di Giustizia è stato imposto alla Birmania di presentare, entro quattro mesi e poi ogni sei mesi, un report che spiegasse tutte le misure prese per implementare le misure provvisorie decise della corte, però non mi è stato possibile visionare i risultati del primo report.

Nel finale della tesi ho espresso la mia convinzione che dopo i risultati dei vari report effettivamente in Birmania sia stato perpetrato il crimine di genocidio