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The International Criminal Court and the Crimes against the Rohingya People of Myanmar

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Introduction

The Rohingya people are a Muslim minority group residing predominantly within Rakhine State, in the Republic of the Union of Myanmar, previously known as Burma. Ever since Burma became independent in 1948, this minority has confronted a prolonged history of persecution and discrimination[1] culminating in 1982, when the Burmese State enacted a legislation that effectively denied the Rohingya people of their nationality, rendering them stateless.[2] This legislation, along with other factors, has contributed to the continuous and systematic discrimination the Rohingya have endured over the decades. This persecution escalated in August 2017, when a wave of violence took place within Rakhine State. In response to a series of attacks perpetrated by loosely organized Rohingya armed groups, Myanmar security forces initiated a systematic campaign of violence against the Rohingya population, forcing them to flee their villages and their country. In the weeks following the attacks, almost 300 thousand Rohingya fled to the neighboring country of Bangladesh and, in a short amount of time, this number rose to 700 thousand.[3] As the conditions within refugee camps in Bangladesh proves to be dire due to risks of violence, exploitation, and abuse, and the situation for those displaced within the State of Myanmar is no better as they are deprived even of the most fundamental rights, the Rohingya crisis represents one of the worst humanitarian crises of our time. For this reason, the Rohingya crisis has caught the attention of the international community, and more in particular of the International Criminal Court (ICC). This thesis explores the role of the ICC in addressing the Rohingya crisis, aiming to evaluate its potentialities and limitations within the broader context of international justice.

The following research begins by providing a fundamental basis for understanding the ICC and the international system of criminal accountability. In the first chapter, an overview of the history of international criminal law and tribunals will be provided by analyzing pivotal cases that led to the creation of the ICC. This analysis will include historical cases such as the 1474 Hagenbach trial, the 1872 proposal for a permanent

[1] Ibrahim, 2018, p.1
[2] Union Citizenship Act, Act No. LXVI of 1948
[3] *The Rohingya Crisis: Explained*, 2017

court tasked with the adjudication of violations of the laws of war presented by Gustave Moynier, the renowned Nuremberg and Tokyo tribunals, and the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Each of these elements contributed to the establishment of the ICC, the first treaty-based permanent international criminal court tasked with investigating, prosecuting and trying perpetrators of the most serious crimes concerning the international community as a whole. The first chapter will continue with an analysis of the structure, jurisdiction and powers of the ICC, providing a valuable framework for the subsequent analysis.

The second chapter will provide a detailed overview of the historical background of the Rohingya people within the State of Myanmar, detailing how this minority has been subject to systemic discrimination and grave violations of human rights by their own State over the decades. As the 1982 Union Citizenship Act effectively rendered the Rohingya people stateless, a thorough analysis of the right of nationality and its arbitrary deprivation by a State will follow. Subsequently, two out of the four international crimes that fall under the International Criminal Court jurisdiction will be analyzed, as they encompass the allegations raised against the state of Myanmar by the international community. Therefore, an analysis of crimes against humanity and genocide will be undertaken, both from an international law perspective and in application to the case under scrutiny. Regarding the crime of genocide, the description of the International Court of Justice (ICJ) case of The Gambia v. Myanmar, which represents one of the most crucial responses from the international community regarding this case, will be undertaken.

In the third and last chapter of this thesis, the ICC's involvement in the Rohingya crisis will be analyzed, detailing the legal actions undertaken by the Court so far. Said actions mainly include two judgments from the Pre-Trial Chambers I and III that respectively believed the Court to have jurisdiction over the crimes of deportation, persecution and other inhumane acts occurring between Myanmar and Bangladesh[4] and gave permission to the OTP to initiate investigation in relation to any crime falling within the jurisdiction of the Court committed, at least in part, on the territory of Bangladesh after June 1,

[4] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 06 September 2018, Pre-Trial Chamber I

2010.[5] The chapter continues by analyzing the potential challenges these legal actions might entail, which mainly stem from Myanmar's refusal to cooperate and the absence of a resolution from the UN Security Council (UNSC) referring the case to the ICC. These challenges may be simplified in a threefold division: they include a potential reversal of the decision of the Pre-Trial Chambers by subsequent Chambers of the Court, the limitations pertaining to the Prosecutor's investigation and the difficulties the Court may face in implementing eventual arrest warrants or decisions. In the last sections of the chapter, potential strategies the ICC may undertake to face these challenges will be hypothesized, focusing mainly on enhancing direct victim involvement mechanisms and mutual cooperation with its Member States. The role of Member States is in fact essential as they have the power to complement the material and geographical jurisdiction of the Court by appealing to the principle of universal jurisdiction and to pressurize the UNSC through an action of the UN General Assembly.

In conclusion, this thesis underlines how the ICC's role in the resolution of the Rohingya humanitarian crisis is unique and essential, but that in order to achieve a sustainable and comprehensive resolution, concerted action of the international community will be required.

[5] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 14 November 2019, Pre-Trial Chamber III

1. The International Criminal Court

1.1 Introduction

The establishment of the International Criminal Court (ICC) marks an extremely significant moment in international law, representing the first treaty-based permanent international criminal court tasked with investigating, prosecuting and trying perpetrators of the most serious crimes concerning the international community as a whole[6]. The establishment of the ICC stands as the main possibility of prosecution of international crimes such as the ones perpetrated in the case taken into consideration in this thesis, namely the crimes against humanity being committed against the Rohingya people of Myanmar. Comprehending the history and the functioning of the ICC is paramount in order to grasp both the possibilities and the constraints for the Court's action in regard to the case of Myanmar. This chapter will therefore explore in its first section the establishment and evolution of the ICC, providing an overview of the history of international criminal law and tribunals which led to the creation of the International Criminal Court. This overview will take into consideration a number of elements which proved to be pivotal for the establishment of the ICC, namely the Hagenbach case, Moynier's proposal of a permanent international court, the Nuremberg and Tokyo tribunals and finally the International Criminal Tribunals for the former Yugoslavia and for Rwanda. In the second section, the structure, jurisdiction and powers of the ICC will be analyzed, providing an understanding of the functioning and purposes of the court. This overview will set the basis for the understanding of the Court's role in confronting the atrocities committed against the Rohingya people in Myanmar, one of the most pressing human rights challenges of our time.

1.2 Establishment and Evolution of the ICC

The ICC operates under the framework of the Rome Statute, adopted in 1998, and has its headquarters in the Hague, Netherlands. It functions as an autonomous international

[6] *Understanding the International Criminal Court*, 2020

organization as it is independent from any other international organization.[7] The Rome Statute defines, among other things, the jurisdiction of the Court[8], establishes its procedural rules[9] and outlines the mechanisms for States cooperation[10] with the ICC. Those countries signatories of the Statute are State Parties and are represented in the Assembly of States Parties; the assembly convenes once a year to formulate the general policies for the administration of the ICC and review its activities[11]. As of today, more than 120 nations are signatories to the Rome Statute, reflecting a comprehensive representation spanning from regions like Africa, the Asia-Pacific, Eastern Europe, Latin America and the Caribbean, to Western Europe and North America. Financial support for the ICC is primarily based on contributions coming from State Parties; however, governments, international organizations, individuals, corporations and other entities may also contribute financially to the Court's operations.[12]

The establishment of the International Criminal Court represents the result of a prolonged and continuous process based on a gradual yet substantial shift in the international community. This development is closely intertwined with the evolution of international criminal law and, more in general, the perception of the individual under international law. Throughout history, the conventional understanding of the international community did not see individuals as direct subjects of international legal norms.[13] Traditionally, the primary subjects of international law were the States, and therefore the issue of responsibility regarded the States only. In those instances where individuals were found in breach of international law, whether in a private or in an official capacity, pathways for legal action were confined to the competent authorities of a foreign State within the national legal system of that jurisdiction, provided the fulfillment of certain preconditions: [14]

- The breached international rules had been previously implemented in the domestic legal system of the forum state.

[7] ibid.
[8] Art. 5, ICCRSt (1998); Art. 12, ICCRSt (1998)
[9] Art. 54-61, ICCRSt (1998)
[10] Art. 86-102, ICCRSt (1998)
[11] Art. 112, ICCRSt (1998)
[12] Art. 113-118, ICCRSt (1998)
[13] Cassese et al., 2020, p. 427
[14] ibid.

- The individual in violation of international rules did not enjoy immunity from prosecution under international law.
- The principle of territoriality was respected - meaning the offense was perpetrated on the territory of, or by a national of, the relevant state, providing a link between the violation and the forum State.

These conditions stem from the principle of State sovereignty, a cornerstone principle upon which the international community is based, according to which the State had exclusive jurisdiction over such criminal actions.[15] Through a gradual shift however the individual became responsible under international law: this led to the emergence of a new category of acts deemed to be punishable as international crimes under international law.[16] These offenses entailed the personal criminal liability of the individuals involved, distinct from the responsibility of the State under international law, and thus, independent from the existence of a parallel national criminal rule. Consequently, the prosecution of these crimes could take place either at the domestic level through the enactment of criminal legislation ratified to implement international treaties or directly at the international level. This second option inevitably implied the establishment and the evolution of international criminal courts and tribunals.

The process of creating and consolidating said international criminal courts and tribunals, ultimately leading to the establishment of the International Criminal Court, was shaped over time and was the result of collective efforts and actions involving different actors, such as States, relevant international institutions and representatives of global civil society.[17] This process is deserving of a thorough analysis and description.

Throughout the evolution of international criminal law, there has persistently been an interest to establish a strong and substantive mechanism dedicated to the prosecution and punishment of violators of international law[18]. However, the most notable endeavors to transform this inclination into tangible measures occurred after significant global events that profoundly affected the international community as a whole.[19] These pivotal

[15] Çakmak, 2017, p. 2
[16] Cassese et al., 2020, p. 428
[17] Çakmak, 2017, p. 3
[18] Çakmak, 2017, p.123
[19] ibid.

cases, which will be described in the subsequent sections, played an essential role in shaping the trajectory of this process. The event that could be defined as the first significant milestone of the process leading to the creation of the International Criminal Court could be traced back to the fifteenth century, to the Hagenbach trial of 1474. Regarded by some as the first international trial,[20] this case entailed the adjudication and subsequent execution of Peter von Hagenbach, a Burgundian governor accused of perpetrating atrocities during the conflict between Burgundy and Switzerland. The trial stands as a pivotal moment in the evolution of international criminal law, as it established that individuals, even when acting on behalf of a State, were not immune from prosecution for their actions. This underscored the principle according to which individuals could be held accountable for their international crimes, irrespectively of their official capacity, which still today is at the base of the functioning of the ICC. Following the Hagenbach trial however, centuries passed before the idea of establishing a system to prosecute and adequately sanction individuals under international criminal law gained significant momentum in the international community. The first noteworthy proposal for such a mechanism emerged in the late nineteenth century, and was put forth by Gustave Moynier, a prominent figure in the international humanitarian movement and one of the founders of the International Committee of the Red Cross (ICRC).[21] Motivated by the horrifying outcome of the Franco-Prussian War, Moynier presented a plan in 1872 establishing a permanent court tasked with the adjudication of violations of the laws of war. While Moynier's proposal eventually proved unfruitful, it reflected a growing recognition of the need to hold perpetrators of international crimes accountable through a proper system of adjudication.[22]

The end of World War I saw a more intense and solid interest in the establishment of such a system, but the first tangible and concrete manifestations of it actually materialized following World War II, notably through the establishment of the Nuremberg and Tokyo tribunals.[23] The atrocities perpetrated during World War II fueled the efforts of the international community, in particular of the Allied forces, to pursue

[20] Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," p. 421
[21] Glasius, 2006, p. 23
[22] ibid.
[23] Cassese et al., 2020, p. 446

the prosecution of war criminals even prior to the actual conclusion of the war. As early as 1942, the prospective victors signed an agreement establishing the United Nations War Crimes Commission,[24] tasked with laying the groundwork for post-war prosecution, demonstrating the will and determination of the Allied forces to pursue justice through the establishment of a special international military tribunal.

The Nuremberg tribunal, ultimately established through the London Agreement of 1945, epitomized this commitment. Article 1 of the agreement[25] stipulated the establishment of an International Military Tribunal to try war criminals without any specific geographical limitation, whether accused individually or as members of organizations or groups. The agreement also annexed the Charter of the International Military Tribunal, which delineated the tribunal's jurisdiction. Under this charter, the tribunal was empowered to adjudicate three groups of crimes, namely crimes against peace, war crimes and crimes against humanity[26]. Notably, individual criminal responsibility applied to all individuals, regardless of their rank or official position.[27] Despite its shortcomings preventing it from being defined as the first international criminal tribunal, the Nuremberg trial's significance is not to be underestimated. It marks the first concrete evidence of a shift in the perception of the individual under international law. At the time of the trials, International Human Rights law was still in its infancy stages[28] and the laws of warfare only referred to violations involving enemy populations. The unique nature of World War II, during which many victims of the Nazi atrocities were German citizens themselves, underscored the necessity for legal accountability. Contrary to a classical view of international law, actions that were legally permissible under German law at the time were now subject to international scrutiny. With the London Agreement, for the first time in the history of international law a limit is set to what a State can do to its own citizens. The Charter of the

[24] It should be noted that although it was preceded by the term United Nations, this commission had nothing to do with the United Nations that was created in 1945.

[25] London Agreement of August 8, 1945, Article 1: "There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities."

[26] Charter of the International Military Tribunal, 1945, Article 6

[27] London Agreement of August 8, 1945, Article 7: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

[28] Though the origins of International Human Rights law could be traced back to various historical developments and documents, its formal recognition occurred in 1948 with the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly.

International Military Tribunal embodies this innovation, as it states that the Court had jurisdiction over the previously mentioned crimes 'whether or not in violation of the domestic law of the country where perpetrated'.[29] The determination to address war crimes committed during World War II concerned also the East, where the International Military Tribunal for the Far East (IMTFE), also known as the Tokyo tribunal, was established. Empowered to try Far Eastern, predominantly Japanese, war criminals charged with offenses including crimes against humanity, war crimes and crimes against peace, the Tokyo trials faced severe criticism for judgments based on political considerations rather than evidence presented.[30] Despite their numerous deficiencies, the post-World War II tribunals have been extremely significant in the history of international criminal jurisdiction as for the first time the State had lost its monopoly of national jurisdiction over international crimes.[31] Their establishment laid the essential groundwork that contributed to the creation of the first international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). Their institution followed a surge in demand for international criminal justice coming from the end of the Cold War era, which fostered a reduction in interstate distrust and the necessity for the establishment of a new international order.[32] It is within this context of evolving global dynamics and aspirations for peace and justice that the creation of the ICTY and the ICTR found its emblematic expression.

The two *ad hoc* Tribunals for the former Yugoslavia and Rwanda were established in the early 1990s by a response of the United Nations Security Council acting after its power to decide on measures necessary to maintain or restore international peace and security[33]. The ICTY, established in The Hague, the Netherlands, in 1993 by resolution 827 of the UN Security Council, was empowered to exercise jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity[34] allegedly perpetrated against members of

[29] Charter of the International Military Tribunal, 1945, Article 6(c)
[30] Çakmak, 2017, p. 62
[31] Cassese et al., 2020, p. 447
[32] ibid. 30
[33] Chapter VII of the UN Charter (1945)
[34] Article 2, Statute of the International Tribunal for the Former Yugoslavia (1993)

various ethnic groups in the former Yugoslavia since 1 January 1991. The Tribunal indicted over 160 persons, including Heads of State, Prime Ministers, army chiefs of staff and Interior Ministers.[35] The ICTR was instead established in Arusha, Tanzania, in 1994 by resolution 955 of the UN Security Council. The tribunal had the power to adjudicate on the crime of genocide, crimes against humanity, and violations of Article 3 of the Geneva Conventions[36] perpetrated in Rwanda during 1994: over 90 people were indicted, including the former Prime Minister of Rwanda, Jean Kambanda.[37] Both the ICTY and the ICTR played a pivotal role in the establishment of the current system of international criminal justice and contributed to the clarification and development of international criminal law, but remained limited in scope and geography. Both are now out of function and their work was substituted by the Mechanism for the International Criminal Tribunals (MICT)[38].

The culmination of the transformative process within the international community occurred in 1998 in Rome, with the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court". The idea of a permanent court initially emerged in the early 1990s and was subsequently developed within the framework of the International Law Commission (ILC). In 1993, a working group submitted its report which provided a draft statute for an international criminal tribunal. After several committees and preparatory meetings were held, it was decided to hold a multilateral conference to discuss the issue of creating an International Criminal Court with a permanent seat and inherent powers to address the most heinous international crimes.[39] The Rome Conference convened from 15 June to 17 July 1998, culminating in the adoption of the Rome Statute by a decisive vote of 120 to 7, with 21 countries abstaining.[40] The Rome Statute represented a significant improvement over the 1994 ILC Draft Statute, reflecting the culmination of intensive negotiations and consensus-building efforts. In contrast to the 1994 draft, the finalized Statute gave the ICC broader discretion in exercising jurisdiction over the international crimes

[35] Cassese et al., 2020, p. 448
[36] Respectively Articles 2, 3 and 4 of the Statute of the International Tribunal for Rwanda (1994)
[37] ibid. 35
[38] UN Security Council Resolution 1996, 22 December 2010
[39] Çakmak, 2017, p. 147
[40] Glasius, 2005, p. 32

previously mentioned and endowed it with greater independence, particularly in regard to its prosecutorial functions.[41] The Rome Statute became effective in 2002 after being ratified by more than 60 countries and defines, among other things, the Court's functions, jurisdiction and structure, of which the ensuing section will provide a thorough analysis.

1.3 Structure, Jurisdiction and Powers of the ICC

1.3.1 Structure

The International Criminal Court (ICC) is composed of four principal organs:[42]

- The Presidency
- The Chambers
- The Office of the Prosecutor
- The Registry

The Presidency[43] is responsible for the administrative oversight of the Court—excluding the Office of the Prosecutor—and the representation of the Court in its interaction with external entities. Comprising three judges—a President and two Vice-Presidents—the Presidency is elected by the Court's judges for a maximum of two three-year terms.

The Chambers,[44] consisting of three different bodies, accommodate the 18 judges of the ICC:

- The Pre-Trial Chamber: This chamber, composed of either one or three judges, addresses pre-trial matters, guaranteeing the integrity of investigatory and prosecutorial activities and of the proceedings. It adjudicates over the issuance of arrest warrants and the charges against individuals suspected of crimes.
- The Trial Chamber: Upon the confirmation of charges and the arrest of an alleged perpetrator, this Chamber, consisting of three judges appointed by the

[41] Çakmak, 2017, pp. 157-163
[42] Art. 34, ICCRSt (1998)
[43] Art. 38, ICCRSt (1998)
[44] Art. 39, ICCRSt (1998)

Presidency, conducts fair and expeditious trials. It may impose a sentence of imprisonment and/or financial penalties.

- The Appeals Chamber: Consisting of the President of the Court and four other judges, this Chamber handles appeals against decisions rendered by the other two chambers. The Appeal Chamber may affirm, reverse or amend appealed decisions, and may even order a new trial.

The Office of the Prosecutor[45] operates independently from the Court's Presidency and is responsible for the analysis of situations or alleged crimes within the ICC's jurisdiction to determine whether sufficient grounds exist to start an investigation and eventually prosecute perpetrators. The Office is divided into the Investigation Division, responsible for conducting investigations, the Prosecution Division, whose responsibility is to litigate cases before the Court's Chambers, and the Jurisdiction, Complementarity and Cooperation Division, which analyzes received information to determine case admissibility.

The Registry[46] represents the administrative and operational support of the ICC, ensuring the Court's proper functioning and the conduct of fair, impartial and public trials in accordance with the Rome Statute. Additionally, It serves as the Court's official channel of communication.

1.3.2 Jurisdiction

The ICC has jurisdiction over 'the most serious crimes of concern to the international community as a whole'[47], which, as delineated in Article 5 of the Rome Statute, include genocide, crimes against humanity, war crimes and the crimes of aggression. The following paragraphs will provide an overview of these crimes. The crime of genocide and crimes against humanity will be thoroughly analyzed in the following chapter, given their significant relevance for the thesis' purpose.

[45] Art. 42, ICCRSt (1998)
[46] Art. 43, ICCRSt (1998)
[47] Preamble, § 4, ICCRSt (1998)

Genocide is defined as any activity committed with the intent of destroying, in whole or in part, a national, ethnic, racial or religious group. The acts that may constitute genocide are enumerated in Article 2 of the Genocide Convention (1948):

> [..] genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

Notably, this closed list does not include what is referred to as 'ethnic cleansing', involving the forcible expulsion of civilians belonging to a particular group from an area, a village or a town.[48] Contrary to the Genocide Conventions and other international tribunal statutes, for the ICC genocidal conduct must occur within a manifest pattern of conduct against a group, unless the conduct itself could result in such distruction.[49]

Crimes against humanity encompass a variety of acts that represent particularly odious offenses and attacks on human dignity. These acts are usually prohibited under national legal systems, involve persecution on discriminatory grounds or other inhumane acts. Additionally, these acts are not isolated or sporadic events but occur as part of a context of violence. Such definition includes acts like, as defined by Article 7 of the Rome Statute:

> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime

[48] Cassese et al., 2020, p. 435
[49] Article 6, Elements of Crimes (2000)

of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The element that distinguishes crimes against humanity from other types of crimes is the awareness of the broader context into which the crime is committed: a context of systematic, widespread and large-scale abuses. These crimes take the aggravated form of persecution when there is a will to subject a person or a group to discrimination on religious, political or other such grounds. Under the Rome Statute, crimes against humanity do not require a link with an armed conflict, but involve the existence of widespread or systematic attacks against any civilian population, with 'widespread' indicating the large-scale nature of the acts and 'systematic' referring to the organized nature of such acts.

War crimes encompass instead grave breaches of the Geneva Conventions and other serious violations of international humanitarian law, occurring both in international armed conflicts and conflicts "not of an international character", as defined in the Rome Statute. These violations, when committed as part of a plan or a policy on a large scale, constitute war crimes. Prohibited acts include, among others, murder, cruel treatment and torture.

The crime of aggression was incorporated into the ICC's jurisdiction more recently, only after its definition and relevant conditions were defined in the Kampala Review Conference of 2010. An act of aggression involves the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State. Currently, the Court may exercise its jurisdiction over this kind of act upon referral of the United Nations Security Council (UNSC). In the absence of a UNSC referral, the Prosecutor may initiate an investigation only after confirming whether the UNSC has determined the aggression by the concerned country. If not, after six months, the Prosecutor may still proceed with the investigation.

The mandate of the Court is to prosecute individuals and hold them accountable for these offenses. The ICC's jurisdiction concerns crimes committed after July 1, 2002,

when the Rome Statute entered into force[50], and can be activated through three different legal paths[51]:

I. Reporting of a suspected crime to the Prosecutor by a State party.
II. Reporting of a suspected crime to the Prosecutor by the UN Security Council acting under the Chapter VII of the UN Charter.
III. Initiation of an investigation by the Prosecutor themselves.

Regardless of the method of initiation, the Prosecutor has the duty to assess whether the alleged crimes fall within the ICC's jurisdiction, whether the Court has the authority to investigate and prosecute those crimes and whether there are sufficient grounds to proceed with the investigation.[52] In the case the Prosecutor initiates an investigation, is subject to several safeguard measures—or limitations—that constrain the autonomy of the Prosecutor. Under Article 15 of the Rome Statute, the Prosecutor must seek the authorization of a pre-trial Chamber of the ICC in order to start a thorough investigation of a case, while this authorization is not needed in the case of referral by a State Party or the UN Security Council. Moreover, the UNSC has the power to block the commencement or continuation of investigations for a period of up to 12 months.

Additionally, the ICC can exercise its jurisdiction under two primary conditions[53]:

a) The crime in question was committed within the territory of a State party to the Rome Statute or a State that has accepted *ad hoc* the Court's jurisdiction.
b) The perpetrator is a national of a State party to the Rome Statute or a State that has accepted ad hoc the Court's jurisdiction.

These conditions imply that the ICC has the authority to prosecute perpetrators of international crimes even if they belong to States not party to the Rome Statute, provided the offense occurred on the territory of a State that has ratified the statute. Importantly, there is no necessity for either condition to be satisfied if the Security Council triggers the Court's jurisdiction. A fundamental aspect of the ICC's jurisdiction is its complementarity to national criminal justice systems;[54] national jurisdiction takes primacy over the one of the Court, and the ICC's authority is invoked only if the State

[50] Article 11, ICCRSt (1998)
[51] Article 13, ICCRSt (1998)
[52] Article 15, ICCRSt (1998)
[53] Article 12, ICCRSt (1998)
[54] "The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.", Preamble of the Rome Statute (1998).

in question is unable or unwilling genuinely to carry out the investigation or prosecution.

1.3.3 Powers

In order to exercise its jurisdiction, the International Criminal Court has been endowed with an array of powers that support its mandate to prosecute individuals accountable for the most serious violations of international law. These powers are delineated within the Rome Statute and subsequent legal instruments such as supplementary agreements, resolutions and amendments. At the forefront of its powers lies the ICC's investigative capability, which gives the Court and, more specifically, the prosecutor, the authority to gather evidence and conduct thorough investigations into alleged crimes falling under its jurisdiction.[55] Ensuing this investigative mandate is the ICC's prosecutorial authority,[56] which enables the Court to initiate prosecutions and bring charges against individuals implicated in the commission of the crimes delineated in the statute and previously described. Central to the ICC's functions are its judicial powers, which empowers it to serve as a forum to hear cases, conduct trials and render fair and impartial judgements. The judicial power of the Court encompassess not only the duty to preside over legal proceedings but also the power to impose sentences[57] following a conviction, holding perpetrators responsible for their actions and delivering justice to the affected victims and communities. Furthermore, the Court has the authority to implement protective measures,[58] ensuring the safety and security of victims, witnesses and other participants in the proceedings, other than the integrity of the judicial processes. In the accomplishment of its objective, the ICC heavily relies on the principle of cooperation, which is a foundational element of its effectiveness and legitimacy. Under this principle, the Court has the authority to request cooperation from States, international organizations and other relevant entities in investigations and proceedings. This collaboration can take form in various ways, from the provision of logistical support to the sharing of information, testimonies or evidence. However, it is not to be

[55] Article 54, ICCRSt (1998)
[56] ibid. 47
[57] Article 77, ICCRSt (1998)
[58] Article 57(3), ICCRSt (1998)

forgotten that the efficacy of this cooperation mechanism depends on the willingness and capacity of States and other stakeholders to engage with the Court, and is often affected by external factors such as geopolitical dynamics, legal frameworks and resource constraints.

1.4 Conclusion

In the exploration of the role of the International Criminal Court in addressing the crimes against humanity committed against the Rohingya people of Myanmar, it is essential to understand the history, structure, jurisdiction and powers of the ICC. This chapter presented a comprehensive explanation of the events that led to the creation of such an institution, following the evolution of international criminal law from the Hagenbach trial of 1474 to the establishment of the ICC in 1998. Through a meticulous analysis of historical and juridical milestones such as the Nuremberg and Tokyo tribunals, this chapter highlighted the gradual recognition of the individual's responsibility under international law, thereby limiting the previously unchecked authority of States over their citizens. The examination of the structure, jurisdiction and powers of the ICC then provided insight into the mechanisms through which the Court operates to fulfill its mandate. As this thesis aims at analyzing the role of the ICC in addressing the crimes against humanity committed against the Rohingya people by the State of Myanmar, the foundations laid in this chapter prove to be indispensable to understand the Court's possibilities in holding perpetrators accountable and delivering justice to the victims in question.

2. The Rohingya Crisis and International Law

2.1 Introduction

For several decades, the Rohingya people have been subjected to discrimination and grave violations of human rights by the State of Myanmar. However, it is only in recent years that these violations have caught significant attention from the international community and, notably, from international courts such as the International Court of Justice (ICJ) and the International Criminal Court (ICC). Before analyzing the role of the ICC in the Rohingya case, it is essential to provide a comprehensive overview of the historical background surrounding this population. This description unfolds through decades of discrimination, forced displacement and violence, ultimately leading to a marginalized status for those remaining in Myanmar and a refugee status for those who have managed to flee. This historical context sets the stage for comprehending the systemic injustices endured by the Rohingya community over the decades and today, and will be followed by a thorough analysis of the right of nationality and its arbitrary deprivation by a State, the latter being one of the most critical elements in the discrimination against this minority. Subsequently, an examination of crimes against humanity and genocide under international law will offer a legal framework for evaluating the atrocities inflicted upon the Rohingya people. By applying these constructs to the case under scrutiny, it will be then analyzed how the systemic persecution including murder, displacement, torture and sexual violence aligns with the criteria defining crimes against humanity, positioning the Rohingya among 'one of, if not the, most discriminated people in the world'[59]. Furthermore, an analysis will be made on how the actions of the State of Myanmar, deliberately depriving rights and inhibiting births within the Rohingya community, raise serious concerns indicative of genocidal intent and how these concerns have also been shared in the international community in the ongoing proceeding of The Gambia v. Myanmar (2019).

[59] António Guterres, UN Secretary-General, Press encounter with President of the World Bank, Jim Yong Kim, 2018

2.2 Historical overview of the Rohingya People of Myanmar and Description of the Conflict

Map of Myanmar

The Rohingya people are a Muslim confessional ethnic group native to the Rakhine province of western Myanmar, formerly known as Burma[60]. Over the course of decades, this minority has confronted a prolonged history of persecution and discrimination, leading a significant portion of their population to flee the country and seek refuge elsewhere: as of today, only 600 thousand[61] Rohingyas remain within the borders of

[60] The name 'Myanmar' was adopted as part of a new set of laws in 1989.
[61] *Future Bleak for Rohingya in Bangladesh, Myanmar*, Human Rights Watch, 2023

Myanmar, with over a million having sought safety in the neighboring State of Bangladesh over time. The elimination of their citizenship rights, constraints on freedom of movement, orchestrated eviction campaigns, episodes of violence against Rohingya women, forced labor, dispossession from their lands and property, as well as systematic violence and torture perpetrated against the Rohingya people, have positioned them, in the words of UN Secretary General António Guterres, as "one of, if not the, most discriminated people in the world".[62] This discrimination is rooted on ethnic and religious grounds, as embodied by the State of Myanmar which refuses to recognize the Rohingya as one of the country's official minority groups, thereby rendering them effectively stateless and depriving them of fundamental human rights.

Despite their longstanding presence in the region largely predating Myanmar's independence from English colonial rule in 1948, the Rohingya have faced persistent marginalization by being often described as "illegal immigrants"[63]. Following the end of colonial rule, Myanmar emerged as a multi-ethnic state, accompanied by several struggles between the Burmese state and the various ethnic minorities residing along its borders. During these decades, also the Rohingya, alongside other ethnic groups, attempted to secure a degree of autonomy and self-determination through various minimal struggles, albeit with limited success. Consequently, the Rohingya quickly became a "target of convenience"[64] for the State: as previously mentioned, this discrimination was mostly fueled by their ethnic dissimilarity from most communities in the country and their status as the largest Muslim community in a predominantly Buddhist State. These elements made them a convenient and shared target for State authorities, the military apparatus, the democratic opposition and extremists alike. However, under the Constitution of the Union of Burma and more specifically the Union Citizenship Act,[65] citizenship was still granted to the Rohingya minority, encompassing a series of guidelines which led towards the attainment of Burmese citizenship. This attitude was maintained until 1962, when the conditions of the Rohingya people and their civil rights started to worsen considerably. In this year, the military, under the leadership of General Ne Win, staged a *coup d'état*, instituting a

[62] ibid. 59
[63] Ibrahim, 2018, page 10
[64] Ibrahim, 2018, page 8
[65] Act No. LXVI of 1948

military dictatorship and entering an era of severe intolerance towards this ethnic minority. The process of implementing citizenship rights of the Rohingya have been deferred and the new government rejected official documents that had previously recognized Rohingya citizenship. Subsequently, in 1974, the Constitution of the Socialist Republic of the Union of Burma[66] reclassified the ethnic group status previously granted to the Rohingya in 1948, coercing them into accepting identity cards describing them as 'Foreigners'. This shift was followed by a military campaign[67] which forced a substantial number of Rohingya individuals, approximately 200 thousand, to flee towards the neighboring State of Bangladesh. Moreover, in 1982 the Burmese Citizenship Law[68] extended citizenship exclusively to those individuals residing in Burma able to trace their familial residency in the State prior to 1823, that is, the year of the initial British military intervention in Myanmar. This legislation created a proper obsessive focus on ancestral residency, erroneously negating the Rohingya presence in the Rakhine region before 1823 and therefore denying them all forms of citizenship, neither full, associate or naturalized.[69] This provision effectively rendered the Rohingya people stateless in their own home country, representing a serious concern for the international community.[70] In fact, the right to nationality, often defined as the 'right to have rights',[71] has been recognized as a core human right by several international organizations and universal treaties.[72] For this reason, the issue of arbitrary deprivation of nationality will be more thoroughly analyzed in the section following this historical overview.

The authoritarian rule of the military junta lasted until 1990, when the National League for Democracy (NLD), led by Aung San Suu Kyi, secured a resounding victory in

[66] Government of the Union of Burma 1974. 'The Constitution of the Socialist Republic of the Union of Burma'. Rangoon.
[67] "Dragon King" campaign, 1978
[68] Burma Citizenship Law (1982, October 15)
[69] Ibrahim, 2018
[70] Molnár, 2014, p.67
[71] 'Citizenship is man's basic right for it is nothing less than the right to have rights', *United States Supreme Court Chief Justice Earl Warren, in Trop v. Dulles, Secretary of State et al*., 356 US 86, 1958; quoted e.g. in Independent Commission on International Humanitarian Issues, *Winning the Human Race?*, 1988, p. 107
[72] *inter alia,* 1948 Universal Declaration of Human Rights (Art. 15); 1965 Convention on the Elimination of All Forms of Racial Discrimination (Art. 5); 1966 International Covenant on Civil and Political Rights (Art. 24); 1979 Convention on the Elimination of All Forms of Discrimination against Women (Art. 9); 1989 Convention on the Rights of the Child (Arts. 7 and 8); 2006 Convention on the Rights of Persons with Disabilities (Art. 18)

general elections. Despite the granted possibility of participation of the Rohingya people in the elections both by voting and standing for political parties, after its election the NLD promptly attempted to remove Rohingya parliamentarians alleging their candidacy must have been based on falsified documents, given their exclusion from official citizenship. In fact, at the time the State had issued Temporary Registration Cards (TRCs), also known as White Cards, to the Rohingya population, serving essentially as a form of identification but not conferring any citizenship or full rights. This caused a resurgence in military aggressions against the Rohingya people, resulting once more in a mass exodus of approximately 250 thousand people to neighboring countries such as Bangladesh and Malaysia. Despite the NLD victory in the elections, the military junta managed to hold on to power until 2008 when, following a constitutional referendum, a new Constitution[73] was introduced, allowing for the introduction of a limited form of democracy. In spite of its relatively democratic character, the new Constitution still retained the discriminatory ethnicity laws from 1974 and 1982, effectively excluding the Rohingya from any participation in the democratic future of the country.

In 2010, Myanmar held its first general elections in over two decades and, even though they were widely criticized for their lack of fairness and freedom, they resulted in the ascension of a military-backed civilian government, with Aung San Suu Kyi assuming a prominent role. Five years later, in 2015, Myanmar held comparatively free elections, resulting in a landslide victory for the NLD and the election of Aung San Suu Kyi as State Counsellor, with the military still retaining a significant power under constitutional provisions. The following elections of 2015 represented the culmination of the gradual process of systematic destruction of Rohingya's civil rights. The 2014 census compelled the Rohingya population – estimated to be of approximately 800 thousand individuals at the time – to choose between identifying as 'Bengali' or forfeiting their right to voter registration, as Rohingya Muslims were excluded from the list of the 135 officially recognized ethnic groups of choice[74]. While opting for the first option entailed the risk of deportation, selecting the second one put individuals under the threat of being involuntarily placed into refugee camps. Additionally, during the

[73] Constitution of the Republic of the Union of Myanmar (2008).
[74] Heijmans, 2014.

elections very few Muslim candidates were allowed to run for parliament and the regime confiscated the White Cards, which were the sole remaining form of documentation for many Rohingya, rendering roughly 5% of the population disenfranchised.

The situation rapidly escalated in 2017, when, on August 25th, an attack by a militant group called the Arakan Rohingya Salvation Army (ARSA) targeted over 30 police posts and killed approximately 100 individuals. Given this event and the previous situation of discrimination against the Rohingya in Myanmar, the Burmese government and military didn't hesitate in responding to these attacks by launching a "clearance operation"[75] which resulted in armed attacks, massive scale violence and serious violations of human rights. Several non-governmental organizations documented the atrocities committed by the military of Myanmar during this period. According to Amnesty International[76], following the attacks of 2017, over 740,000 Rohingya men, women, and children fled to neighboring Bangladesh, while tens of thousands were internally displaced within Rakhine State. The NGO Human Rights Watch[77] has published reports detailing killings, rapes, tortures and mass burnings in the region, which left over 280 Rohingya villages close to destruction. In the following years, the situation failed to improve. On one hand, the Rohingya remaining in Rakhine State endure restrictions to their freedom of movement and are denied other fundamental rights, such as adequate access to food, medical care, and education. The situation was further compounded by the coup that occurred in February 2021, during which the previously elected ruling parting, the NLD, and Myanmar's State Counsellor Aung San Suu Kyi were overthrown by the military, which subsequently installed a military junta led by Senior General Min Aung Hlaing. This coup only exacerbated the insecurity already faced by the Rohingya people, as it has imposed new movement restrictions and aid blockages on Rohingya camps and villages, increasing water and food scarcity along with the risks of disease and malnutrition.[78] On the other hand, those who managed to flee the country and currently reside in refugee camps in Bangladesh find themselves in

[75] Term used to describe multi-agency efforts to combat and apprehend Rohingya militants by the Myanmar government in 2017.
[76] *Myanmar, Quinto Anniversario Della Crisi Dei Rohingya. Occorre Giustizia*, Amnesty International, 2022
[77] *Future Bleak for Rohingya in Bangladesh, Myanmar*, Human Rights Watch, 2023
[78] *Myanmar: No Justice, No Freedom for Rohingya 5 Years On*. Human Rights Watch, 2022

precarious circumstances, as they are exposed to the activities of criminal gangs, environmental disasters and other hazards. Rohingyas living in these camps are stuck in a limbo, prevented from safely returning to their home country of Myanmar and yet unable to find peace and stability in Bangladesh.[79]

2.3 Arbitrary Deprivation of Nationality in International Law

Before delving into the analysis of the alleged acts perpetrated by the Burmese State against the Rohingya people, it is necessary to examine more thoroughly the right of nationality and its arbitrary deprivation by a State. As previously mentioned, in 1982 the State of Myanmar implemented the Burmese Citizenship Law,[80] which effectively deprived the Rohingya population of their citizenship, consequently rendering them stateless.[81] This legislative measure holds considerable significance as the deprivation of nationality represents a critical infringement of human rights[82] and places individuals into a 'legal vacuum',[83] subjecting them to heightened vulnerability to human rights infringements and exposing them to poverty, social exclusion and limited legal capacity;[84] said principle is therefore deserving of a more thorough analysis. The deprivation of nationality encompasses all forms of involuntary loss of nationality,[85] covering therefore any form of denaturalization initiated by a State, ranging from the automatic revocation of nationality *ex lege* to the arbitrary denial of an individual's right to retain nationality on discriminatory grounds.[86] It is important to underscore that, under international law, there exists no absolute ban regarding the deprivation of nationality and nationality issues traditionally fall within the domestic jurisdiction of a State[87]. However, how a State exercises its right to manage nationality issues should be in accordance with relevant international law rules, at least as long as such a nationality

[79] ibid.
[80] ibid. 68
[81] ibid. 69
[82] Article 15, Universal Declaration of Human Rights (UDHR), 1948
[83] Molnár, 2014, p. 67
[84] UN Human Rights Council, resolution 20/5 of 16 July 2012, para. 7.
[85] Molnár, 2014, p. 75
[86] ibid.
[87] See for example *Nationality Decrees Issued in Tunis and Morocco (French Zone) on 8th November, 1921*, PCIJ, Ser. B. No. 4, 1923, Para. 40.

is meant to be recognized by other States.[88] Consequently, in the international landscape, denaturalization is legitimate only under certain conditions. For the deprivation of nationality to avoid being characterized as arbitrary, it must be executed as prescribed by law[89], which itself shall be consistent with international law and the purposes of human rights law.[90] In this sense, such measures may not be based on discriminatory grounds prohibited under international human rights law,[91] whether *de jure* or *de facto*,[92] and it should not result in statelessness nor be finalized to the forced expulsion of the individuals affected.[93] This regulatory framework sets stringent limitations on the lawful deprivation of nationality by States, as the prohibition to arbitrarily deprive individuals of their nationality finds expression in numerous international instruments: starting from the right to nationality mentioned in the 1948 Universal Declaration of Human Rights (UDHR)[94], which in Article 15(2) states that 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. Furthermore, several United Nations human rights conventions incorporated this general principle, including the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD),[95] the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[96] and the 1989 Convention on the Rights of the Child (CRC).[97] Applying this general legal framework to the present case, it becomes apparent that the State of Myanmar has failed to respect the right to nationality of the Rohingya people. The mass denationalization of the Rohingya has been in fact described as a State-sanctioned 'discriminatory and arbitrary

[88] Molnár, 2014, p. 70
[89] van Waas, 2008, p. 94
[90] Molnár, 2014, p. 77
[91] The prohibited grounds for discrimination in cases of the withdrawal of nationality include all the grounds enshrined in Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965).
[92] UN Committee on the Elimination of Racial Discrimination, CERD General Recommendation XXX on Discrimination Against Non Citizens, 1 October 2002, para. 14.
[93] Report of the International Law Commission, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), General Assembly Official Records, Sixty-ninth session, Supplement No. 10, A/69/10, Chapter IV, p. 33.
[94] Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The UDHR is available in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights.
[95] International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (UNTS No. 9464, Vol. 660, p. 195), Art. 5 lit. (d) (iii)
[96] Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (UNTS No. 20378, Vol. 1249, p. 13), Art. 9(1)
[97] Convention on the Rights of the Child of 20 November 1989 (UNTS No. 27531, Vol. 1577, p. 3), Art. 8(1)

use of laws to target an ethnic group'[98] which was arguably finalized to the deportation of this minority across the State borders. Although it is true that the State of Myanmar has failed to ratify several of the previously mentioned international treaties[99] which protected the right to nationality and should therefore not be bound by their provisions, it could be argued that the prohibition of the arbitrary deprivation of someone's nationality is to be considered a customary rule of international law, representing a universally binding obligation. In this context, such a principle would remain applicable to the State of Myanmar. Nonetheless, some scholars[100] remain skeptical about the rule's customary character and believe that "the only limit imposed by customary international law on States' powers to withdraw nationality is the one banning measures of denaturalization *based solely on racial or religious reasons* since such acts would infringe the customary law rule on non-discrimination on grounds of race and religion."[101] Even in this case, it could be argued that even this principle of customary law applies to the case of Myanmar, as the fundamental aspect of non-discrimination on the basis of race and religion remains essential. The violation of the right to nationality therefore constitutes a crucial element in establishing accountability for Myanmar's actions against the Rohingya people, and is to be taken into consideration by international courts such as the ICJ and the ICC. The role of the former will be analyzed in the subsequent paragraph through the case of The Gambia v. Myanmar (2019), while the one of the latter will be thoroughly addressed in the following chapter.

2.4 Crimes Against Humanity and Genocide in International Law

This subsection aims at analyzing two out of the four international crimes that fall under the International Criminal Court jurisdiction, encompassing both the elements of the crime and how they apply to the case of the Rohingya population in Rakhine State. Firstly, crimes against humanity will be thoroughly analyzed as they are comprised in

[98] UNHRC, Situation of Human Rights of Rohingya in Rakhine State, Myanmar, (A/HRC/40/37) para. 22
[99] e.g. the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the 1989 Convention on the Rights of the Child (CRC).
[100] R. Hofmann, 'Denaturalization and Forced Exile', in W. Rüdiger (Ed.), The Max Planck Encyclopedia of Public International Law, Oxford, University Press, 2013, Para. 17
[101] ibid.

the allegations raised against the state of Myanmar by the international community, encompassing international organizations such as the United Nations, numerous non-governmental and humanitarian organizations, as well as other states. Subsequently, the crime of genocide will be put under scrutiny, as uncertainty remains regarding its potential applicability to the offenses perpetrated in Myanmar.

2.4.1 Crimes Against Humanity

Crimes against humanity fall under the jurisdiction of the International Criminal Court, as stipulated in Article 7 of the Rome Statute, which is divided into three paragraphs. Art. 7(1) provides a definition of crimes against humanity, defining them as follows:

> "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]"

Following this introductory statement, the acts that fall under this definition are enlisted, including murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds, enforced disappearance of persons and the crime of apartheid. The subsequent paragraphs of the article expand on the interpretation of some crucial legal terms such as attack, extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, persecution, apartheid, enforced disappearance of persons[102] and gender[103]. When analyzing crimes against humanity in relation to the ICC and its Statute, it is necessary to interpret and define some key concepts, as the interpretations given under this Statute cannot be assumed to be universally understood and accepted. Particular emphasis must be placed on the criterion stipulating that such criminal actions are perpetrated "as part of a widespread or systematic attack". Under the International Criminal Court Rome Statute

[102] Article 7(2) ICCRSt (1998)
[103] Article 7(3) ICCRSt

(ICCRSt), an attack is defined as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[104] According to this definition, an attack needs not to occur during an armed conflict but may also be committed in times of peace, as in this context "[...] the term civilian must be understood within the context of war as well as relative peace."[105] Furthermore, an attack need not to be limited to the use of armed force or violence but may also "encompass any mistreatment of the civilian population"[106] such as the imposition of a system of apartheid or "exerting pressure on a population to act in a particular manner."[107] Moreover, an attack may not be justified by the invocation of the Roman law principle of *tu quoque*, which seeks justification in the fact that the other party is committing similar crimes.[108] Under this affirmation, the initiation of hostilities by the other side would not provide an explanation for the attack against that particular civilian population. Additionally, in order for an attack to qualify as a crime against humanity, it needs to be 'widespread or systematic'. In its past jurisprudence, the Court has clarified that the term 'widespread' "refers to the large-scale nature of the attack, as well as to the number of victims, while the term 'systematic' pertains to the organized nature of the acts of violence and to the improbability of their random occurrence."[109] The two terms are closely intertwined and to a great extent they tend to overlap such that the presence of one often implies the presence of the other. For this very reason, the Court has often deemed it unnecessary to prove the existence of both: demonstrating either one of these elements suffices for an attack to be considered a crime against humanity.

Applying this legal framework to the case of the Rohingya people of Myanmar, it could be stated that the actions perpetrated by the Burmese State security forces after August 25, 2017, allegedly constitute crimes against humanity under international law.[110] These

[104] ICC Elements of Crimes, Article 7(1)(2).
[105] ICTR, Kayishema and Ruzindana (ICTR-95-1-T) Trial Chamber, May 21, 1999, para 127-29
[106] ICTY, The Prosecutor v. Perišić (IT-04-81-T) Trial Judgment of 6 September 2011 para 82; ICTY, Prosecutor v. Gotovina et al. (IT-06-90-T) Trial Judgment of 15 April 2001 para 1702; ICTR, The Prosecutor v. Semanza (ICTR-97-20-T) Trial Judgment of 15 May 2003 para 327
[107] ICTR, The Prosecutor v Musema (ICTR-96-13-A) Trial Judgment of 27 January 2000 para 205
[108] ICTY, The Prosecutor v. Kupreškić et al. (IT-95-16-T) Trial Judgment of 14 January 2000 para 765
[109] ICC, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, para 81.
[110] *Crimes Against Humanity by Burmese Security Forces Against the Rohingya Muslim Population in Northern Rakhine State Since August 25, 2017*, Human Rights Watch, 2017

alleged criminal acts comprise murder, extermination, enslavement, deportation and forced population transfers, imprisonment, torture, rape and other forms of sexual violence, persecution and enforced disappearance of persons.[111] According to several pieces of empirical evidence, such actions were undertaken as part of a widespread and systematic attack carried out pursuant to Myanmar's State policy. As previously stated, these acts resulted as a supposed response to the terrorist attacks perpetrated by the armed group ARSA; however, this detail does not justify such a response and doesn't exempt the acts committed by the Burmese State and military from being considered crimes against humanity under international law. The vast scale of this military operation is proven by the staggering number of individuals it affected: following the military's attacks, over 400 thousand Rohingya fled the country seeking refuge into neighboring Bangladesh, while tens of thousands were internally displaced.[112] Additionally, the use of satellite imagery further proves the extent of the government and military action, showing an area of over 100 kilometers in the Rakhine State razed to the ground,[113] with 284 Rohingya villages close to total destruction. It would be arduous to state that this widespread attack wasn't part of a State policy, as several pieces of evidence support the contrary. First of all, the previous historical overview showed how the Rohingya people have been a target of the Burmese State for decades now, being victims of discriminatory policies and violations of basic human rights. Moreover, several statements coming from senior officials of the Burmese government support the belief that the crimes committed were part of an organized plan to expel the Rohingya from their homes in Rakhine State. For instance, on September 21, 2017, the Burmese army commander Senior General Min Aung Hlaing stated that "The important thing is to have our people in the region. It's necessary to have control of our region with our national races. We can't do anything if there are no people from our national races... that is their rightful place."[114] This affirmation suggests a planned strategy by the military to forcibly expel those not belonging to the "national races", i.e. the Rohingya,

[111] *Report of the Independent International Fact-Finding Mission on Myanmar in English*, OHCHR, 2018
[112] UN Office for the Coordination of Humanitarian Affairs, Myanmar: Humanitarian Bulletin, Issue 2 2017 | June – 22 September, September 22, 2017, https://reliefweb.int/report/myanmar/myanmar-humanitarian-bulletin- issue-2-2017-june-22-september
[113] Human Rights Watch, "Burma: Satellite Imagery Shows Mass Destruction," September 19, 2017, https://www.hrw.org/news/2017/09/19/burma-satellite-imagery-shows-mass- destruction
[114] Jurawee Kittisilpa, "Myanmar army chief urges internally displaced to return to Rakhine," Reuters, September 21, 2017, https://www.reuters.com/article/us-myanmar-rohingya-commander/myanmar-army-chief-urges-internally-displaced-to-return-to- rakhine-idUSKCN1BW1HD.

and create space for those who – according to them – do. Under international law, this displacement of individuals perpetrated by the government of Myanmar amounts to the crime of deportation and forcible transfer of population, which is specifically defined in Art.7 (2)(d) ICCRSt as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". In customary international law, deportation pertains to the forced displacement of individuals across State borders, while forcible transfer refers to their displacement within a State.[115] This crime not only includes the physical act of forced displacement but also "the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution [...]."[116] In addition to the crime of deportation, there exists a profusion of evidence showing that the Burmese military perpetrated other numerous atrocities against the Rohingya population, including murder, imprisonment, torture, rape and other forms of sexual abuse on the Rohingya population. Several witness accounts, independent reports, photo and video documentation detailed the killings of dozens Rohingya individuals, other than the Burmese military laying antipersonnel landmines at key crossing points along the border with Bangladesh, utilized by the fleeing Rohingya population.[117] There are numerous accounts of military personnel carrying out rapes and other sexual violences,[118] with UN health workers reporting injuries consistent with violent sexual attacks[119] among Rohingya women and girls who have sought refuge in Bangladesh. All of these actions also constitute the crime of persecution, recognized by Art. 7(2)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". Persecution might entail both from action or inaction resulting in the denial of rights deliberately targeting a group on political, national, ethnic, and religious grounds. Persecutory acts have been found to include murder, sexual assault, beatings, destruction of livelihood, and deportation and forced transfer, among others.[120] The Rohingya have endured

[115] ICTY, Prosecutor v. Krstic, (Trial Judgment) IT-98-33-T (2 August 2001), para. 521
[116] Christopher K. Hall in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (Baden-Baden: Nomos Verlagsgesellschaft, 1999), p. 162.
[117] Ganguly, 2017
[118] Burma: Security Forces Raped Rohingya Women, Girls. Human Rights Watch. 2017
[119] U.N. medics see evidence of rape in Myanmar army 'cleansing' campaign. Reuters. 2017
[120] Cassese, The Oxford Companion to International Criminal Justice, (Oxford: Oxford University Press, 2009) p. 454.

decades of persecution and systematic discrimination by the Burmese State, starting with their lack of citizenship which subjects them to numerous rights-abusing measures enacted by police, border guards and local officials. Governmental laws, policies, and practices substantially limit Rohingya's rights such as their freedom of movement, their right to livelihoods other than the one to privacy, marriage and access to essential health services and education.

2.4.2 Genocide

The crime of genocide is delineated under Article 6 of the ICCRSt:

> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

The term 'genocide' was first coined in 1944 by the Polish-Jewish lawyer Raphael Lemkin[121] with the intent to describe the atrocities committed by the Nazis during World War II. Subsequently, the term appeared in the Genocide Convention of 1951 and featured promptly in later jurisprudence of the ICTY, ICTR and ICC. This article adheres to the definition of genocide given in Article 2 of the Genocide Convention, as recommended by the Organizing Committee during the Rome Diplomatic Conference. This recommendation found widespread acceptance among the delegations present at the conference due to its already established international recognition and its application

[121] Lemkin, R. (1944). Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress. Washington, DC: Carnegie Endowment for International Peace.

by the UNSC in establishing the ICTY and ICTR. Nevertheless, some stakeholders, such as the Cuban delegation,[122] deemed the definition too strict, particularly for the exclusion of social and political groups.[123] However, it could be argued that the gaps left by the adoption of a traditional and narrower definition of 'genocide' in Article 6 are instead filled in by a broader definition of crimes against humanity in Article 7, which includes political affiliation, race, nationality, ethnicity, culture, religion and gender as grounds for discrimination[124]. In order for an act to be categorized as genocide, it must meet two criteria: firstly, the victims of such act must belong to a particular national, ethnic, racial or religious group, and must be targeted because of their affiliation with said group. Secondly, the criminal act must be part of an overall objective of destroying the group, in whole or in part. This last criterion acknowledges the fact that the act of genocide doesn't necessarily imply the annihilation of an entire group of individuals, but its partial destruction would also be sufficient for the act to fall under this term. Over time, various interpretational approaches have emerged concerning the definition of the term 'partial destruction'.[125] The most restrictive interpretation proposes that an act resulting in the partial destruction of a group, together with the intent to destruct said group in its entirety, is enough for it to be considered as an act of genocide.[126] However, this interpretation would not be in agreement with subsequent international jurisprudence, which adopts a broader perspective and assumes that the concept of 'partial destruction' encompasses the adjective 'substantial' as well. This interpretation finds support for example in the pronouncements of the International Law Commission, which stated that "[...] the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[127] Likewise, the same view was endorsed by the ICC Preparatory Committee, that affirmed the traditional definition of genocide to be understood "to refer to the specific intention to destroy more than a small number of individuals who are members of a group".[128] Similar positions were upheld

[122] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, Third Meeting A/CONF.183/C.1/SR.3 para 100
[123] Tsilonis, 2019, p. 78
[124] Tsilonis, 2019, p. 83
[125] Tsilonis, 2019, p. 88
[126] ibid.
[127] Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, 45, para 8
[128] Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, p. 2 footnote 1, https://www.legal-tools.org/doc/e652fe/pdf/

by both the ICTY[129] and in the ICTR[130]. Alongside the quantitative criterion, also a qualitative criterion might be applied to the interpretation of the sentence 'partial destruction', as also the significance of the part of the population targeted might be taken into consideration.[131] However, in this case the qualitative criterion may not stand alone because of its potential susceptibility to subjective interpretation.[132] A further criterion that might apply to the case is a geographical one, meaning that it is possible for "the killing of all members of the part of a group located within a small geographical area" to amount to genocide "if carried out with the intent to destroy the part of the group as such located in this small geographical area."[133]

When applying this legal framework to the case of the Rohingya people in Myanmar, the determination of whether the acts perpetrated in the last years by the Burmese government against this ethnic minority may amount to genocide presents a complicated challenge. The Rohingya crisis has often been described as a case of ethnic cleansing, that is "the forcible expulsion of civilians belonging to a particular group from an area, a village or a town"[134]; however, as previously stated, such an act is not included in the list of acts which may amount to the crime of genocide. Nonetheless, the Rohingyas have been victims of criminal actions included in this list, such as the killing of members of the group[135] and the imposition of measures intended to prevent birth within the group.[136] Determining if these acts amount to genocide would mean to assess whether behind these criminal actions stands an intent to destroy, in whole or in part, the Rohingya ethnic, racial or religious group. Although there has not been a universal killing nor a total expulsion of the Rohingya people from the State of Myanmar, it is certain that at least the preconditions for a genocide of this minority are in place at the moment[137]. A key element in the production of such circumstances is the slow legitimation and normalization of identity-based discrimination through a long-term development of cultural and institutional conditions: for almost 70 years, the Rohingyas

[129] ICTY, Prosecutor v. Jelisič, (Trial Judgement) IT-95-10-T (14 December 99), para. 82
[130] ICTR, Kayishema and Ruzindana (ICTR-95-1-T) Trial Chamber, May 21, 1999, para. 97
[131] ICJ, Bosnia and Herzegovina v Serbia and Montenegro, (No 91) 198-201, (26 February 2007), para. 200.
[132] ibid.
[133] ICTY, Prosecutor v. Krstic, (Trial Judgment) IT-98-33-T (2 August 2001), para. 590.
[134] Cassese et al., 2020, p. 435
[135] *Report of the Independent International Fact-Finding Mission on Myanmar in English*, 2018
[136] Mildren, 2013
[137] Ibrahim, 2018, p.100

have been stateless in their own country, have witnessed the systematic dismantling of their economic and personal livelihoods and are facing numerous restrictions on their ability to marry and have children, with a cap of children per household set below the threshold required for demographic replacement.[138] All of these policies implemented by the Burmese State over the years represent a systematic attempt to deprive the Rohingya population of the means necessary for its sustenance and to prevent births within this ethnic group. Under international law, not only the act of genocide itself but also the fear of its imminent occurrence necessitates an active response from the international community.[139] Up to this moment, one of the most crucial responses from the international community regarding this case has been the ongoing proceedings at the International Court of Justice (ICJ) concerning the Gambia v. Myanmar. On November 11, 2019, the Republic of The Gambia, acting on behalf of the 57 Member States of the Organization of Islamic Cooperation (OIC), filed a case at the ICJ alleging that Myanmar failed to fulfill its obligations to prevent and punish acts of genocide committed against the Rohingya people of Rakhine State, as mandated under the Genocide Convention of 1948.[140] The ultimate objective of The Gambia's Application is to petition the Court to declare that Myanmar has breached its obligations under the Genocide convention, requesting the ending of any wrongful act and the performance of reparations to the victims of genocidal acts.[141] Moreover, Myanmar must ensure the persons committing these acts to be punished by the competent tribunals, including international penal tribunals.[142] In this Application, The Gambia states that the Burmese State has failed its obligations under the Genocide Convention of which both States are parties[143] and acknowledges the *prima facie* jurisdiction of the ICJ on this matter relying upon Article IX of the Convention, stipulating 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

[138] Ibrahim, 2018, p.109
[139] Jones, A. 2008. 'Genocide and Mass Killing'. *In:* Williams, P. D. (ed.) *Security Studies: An introduction.* London: Routledge.
[140] *ICJ - The Gambia v. Myanmar*, Independent Investigative Mechanism for Myanmar
[141] International Court of Justice. (2020). Reports of judgments, advisory opinions and orders: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). Request for the indication of provisional measures, Order of 23 January 2020, para. 2
[142] ibid.
[143] Myanmar ratified the Convention on 14 March 1956, making reservations to articles VI and VIII. The Gambia ratified it on 29 December 1978, without entering any reservations.

> 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.

On these bases, The Gambia petitions the Court to indicate provisional measures in order to protect the Rohingya against further, irreparable harm to their rights.[144] On January 23, 2020, the Court issued such provisional measures, instructing Myanmar to

> 'take all measures within its power 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 serious bodily or mental harm to the 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; and (d) imposing measures intended to prevent births within the group.'[145]

Additionally, under these provisional measures, the Burmese State must ensure the preservation of any evidence related to the allegations raised by The Gambia and submit reports on the actions taken to implement them on a semiannual basis until a final decision is reached by the Court.[146] These arguments were followed by Myanmar's submission of its preliminary objections, which primarily related to the proper functioning of the international dispute settlement system.[147] Among other objections, the main appeal of the Burmese State contended that The Gambia, as a non-injured Party to the Genocide Convention, lacked the right to bring a case against Myanmar, as the Convention does not provide for the possibility of an *actio popularis*.[148] However, in 2022, the ICJ dismissed Myanmar's preliminary objections underlining that the Convention's central purpose is the 'common interest' of all signatories in preventing and punishing genocide, and The Gambia has the right to initiate a proceeding to safeguard said 'common interest'. The ICJ is currently expected to consider the parties' arguments concerning the merits of the case. Nonetheless, in analyzing whether the acts perpetrated by the State of Myanmar against the Rohingya people constitute the crime of genocide, it is noteworthy that, after considering the allegations made by The Gambia, the objections raised by Myanmar, and the evidence brought forward by a UN

[144] ibid. 141, para. 115
[145] ibid. 141, para. 79
[146] ibid. 141, para. 82
[147] International Court of Justice. (2021). Case concerning application of the convention on the prevention and punishment of the crime of genocide (The Gambia v. Myanmar): Preliminary objections of the Republic of the Union of Myanmar, 20 January 2021, para. 20
[148] ibid. para. 27

independent Fact-Finding Mission[149] which stated that "on reasonable grounds [...] the factors allowing the inference of genocidal intent [were] present,"[150] the Court deemed all the facts and circumstances mentioned above to be sufficient to conclude the rights claimed by The Gambia were 'plausible'[151].

2.5 Conclusion

Providing an overview of the history of the Rohingya people and a meticulous examination of crimes against humanity and genocide under international law, this second chapter analyzed the actions committed by the State of Myanmar against the Rohingya minority, revealing a systematic pattern of persecution, murder, displacement, torture and sexual violence. These criminal actions, which have only been exacerbated by the arbitrary deprivation of nationality of this minority, undeniably align with the criteria describing crimes against humanity, underscoring the urgent need for accountability and justice within the international legal framework. Moreover, despite the complexities involved in definitively labeling these actions as genocide, this chapter underlined how the deliberate deprivation of rights and policies aimed at inhibiting births within the Rohingya community raise serious concerns suggestive of genocidal motives, and how the current proceeding of the ICJ of The Gambia v. Myanmar further supports these concerns. The subsequent chapter will delve to a greater extent into the response of the international community to these acts, focusing mainly on the International Criminal Court's involvement in the Rohingya crisis, in the possible legal challenges it may face persecuting the perpetrators of these atrocities and finally on the potential strategies it may employ to ensure justice and accountability for the victims.

[149] United Nations, Report of the Independent International Fact-Finding Mission on Myanmar
[150] United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441
[151] International Court of Justice. (2020). Reports of judgments, advisory opinions and orders: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). Request for the indication of provisional measures, Order of 23 January 2020, para. 56

3. The International Criminal Court and the Rohingya Crisis

3.1 Introduction

The involvement of the International Criminal Court (ICC) in addressing the Rohingya crisis marks a significant chapter in the pursuit of international justice. This chapter analyzes the legal actions initiated by the ICC following the waves of violence that took place in August 2017 in Myanmar's Rakhine State analyzed in the previous section, the challenges these legal actions entail and the potential strategies for a comprehensive and effective resolution of the Rohingya crisis. Central to this analysis are the two initiatives of the ICC's Prosecutor Fatou Bensouda respectively aimed at defining the Court's jurisdiction over the case of the Rohingya[152] and initiating an investigative process in this regard.[153] However, as subsequently explained, the eventual process of accountability of individuals responsible for crimes falling under the jurisdiction of the ICC is not free of challenges. These include potential reversals of rulings by subsequent ICC Chambers, Myanmar's persistent non-cooperation, and the broader issue of enforcing ICC rulings in a non-Party State. These obstacles underscore the complexities of pursuing justice on the international stage. Subsequently, this chapter explores potential ICC's strategies in facing these challenges and the international community's role in supporting the Court's efforts, considering complementary actions of other entities such as Argentina operating under the principle of universal jurisdiction or the ongoing proceedings of The Gambia v. Myanmar at the ICJ. Through this analysis, this chapter aims at providing a thorough examination of the ICC's involvement in the Rohingya crisis, addressing both the attainments and challenges encountered in the pursuit of accountability and justice for the Rohingya population. Finally, this chapter underlines the importance of a collective effort from the international community in the resolution of the Rohingya crisis.

[152] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 09 April 2018, Office of the Prosecutor
[153] Request for authorisation of an investigation pursuant to article 15, ICC-01/19-7, 04 July 2019, Office of the Prosecutor

3.2 ICC's Involvement in the Rohingya crisis

The legal actions undertaken by the ICC in regards to the Rohingya crisis began subsequent to the waves of violence that took place in August 2017 in the Rakhine State. At the time, more than 700 thousands Rohingya had been forcibly displaced in the neighboring State of Bangladesh,[154] and a comprehensive report[155] published by a UN Human Rights Council Fact-Finding Mission delineated the systematic and widespread human rights violations committed against the Rohingya population by the authorities in Myanmar. Following these facts, the international community urged a response from mechanisms of international accountability to prosecute the perpetrators of such actions, given the absence of significant measures undertaken by the State of Myanmar to hold them accountable.[156] Since Myanmar is not a party to the Rome Statute, the International Criminal Court lacked jurisdiction to directly adjudicate the case. Therefore, the most effective and comprehensive route to accountability would have been represented by the United Nations Security Council through a potential referral of the situation to the ICC.[157] However, such a course of action seemed highly unlikely as political actors, including Russia and China, blocked any proposal of action submitted by other members of the Council concerning this matter.[158] Nonetheless, action was taken by Gambian lawyer Fatou Bensouda, Prosecutor of the ICC at the time. On April 9, 2018, the Prosecutor filed a request pursuant to article 19(3)[159] of the ICCRSt, seeking a ruling from the Pre-Trial Chamber on the question of whether the ICC could exercise its jurisdiction under article 12(2)(a)[160] over the alleged illegal deportations of members of the Rohingya people from Myanmar to Bangladesh, as the

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[154] Safi, *Myanmar treatment of Rohingya looks like 'textbook ethnic cleansing', says UN*. The Guardian (11 September 2017)
[155] *Report of Independent International Fact-Finding Mission on Myanmar (27 August 2018)*, 2018
[156] Ahmed, 2019, p. 23
[157] Article 13(b), ICCRSt
[158] Šturma & Lipovský, 2022, p. 235
[159] Art. 19(3), ICCRSt: "*The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility*. [...]"
[160] Art. 12(2)(a), ICCRSt: "*In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) 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; [...]*"

latter is a signatory State of the Rome Statute.[161] In rendering its decision, the Pre-Trial Chamber I took into consideration the observations of the State of Bangladesh,[162] confidentially submitted on June 11, 2018, together with several other submissions from various organizations such as The International Commission of Jurists[163] and the Women's Initiatives for Gender Justice.[164] The Chamber also considered a submission filed by Global Rights Compliance on behalf of 400 Rohingya women and children allegedly victims of the crime of deportation.[165] Given Myanmar's decision not to engage with the ICC through a formal reply, the Chamber considered in its decision a statement made by the Office of the State Counsellor of Myanmar, which reads:

"The Government of Myanmar expresses serious concern on the news regarding the application by the International Criminal Court (ICC) Prosecutor to claim jurisdiction over the alleged deportation of the Muslims from Rakhine to Bangladesh. Myanmar is not a party to the Rome Statute. The proposed claim for extension of jurisdiction may very well reap serious consequences and exceed the well enshrined principle that the ICC is a body which operates on behalf of, and with the consent of State Parties which have signed and ratified the Rome Statute. […] Nowhere in the ICC Charter does it say that the Court has jurisdiction over States which have not accepted that jurisdiction […]"[166]

In this instance, the jurisdiction of the Court might be subject to dispute but, as established by the principle of international law known as *la compétence de la compétence* in French or *Kompetenz-Kompetenz* in German, any international tribunal has the power to ascertain the extent of its own jurisdiction. Therefore, it is in the hands of the ICC to determine whether the Court holds jurisdiction over the alleged deportations of the Rohingya people.[167] In its deliberation, Pre-Trial Chamber I referenced Article 34 of the Vienna Convention on the Law of Treaties, to which

[161] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 09 April 2018, Office of the Prosecutor, paras 1 and 63
[162] Observations of the People's Republic of Bangladesh Pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-14-Conf, with one confidential annex.
[163] Pre-Trial Chamber I, Decision on the "Request for Leave to Submit Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules)", 29 May 2018, ICC-RoC46(3)-01/18-7.
[164] ibid.
[165] Submission on Behalf of the Victims Pursuant to Article 19(3) of the Statute, ICC-RoC46(3)-01/18-9, with two public annexes ("Global Rights Compliance Submission on Behalf of Alleged Victims").
[166] Prosecution Notice of Documents for Use in Status Conference, ICC-RoC46(3)-01/18-27, Annex E, ICC-RoC46(3)-01/18-27-AnxE
[167] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 06 September 2018, Pre-Trial Chamber I

Myanmar is a party, stating that "[a] treaty does not create either obligations or rights for a third State without its consent."[168] However, the Court subsequently proceeded by analyzing the crimes that fall under its statutory jurisdiction. Specifically, the Court interpreted Article 7(1)(d)[169], which lists "deportation or forcible transfer of population" among the crimes against humanity within the jurisdiction *ratione materiae* of the Court. The Chamber interprets this article as setting forth two separate crimes: deportation, inherently linked to the destination of another State, and forcible transfer, linked to the destination of another location within the same State.[170] Furthermore, the article does not limit the crime of deportation from one State Party to another, but rather refers to the displacement of individuals from "the area in which they were lawfully present"[171] to "another State".[172] Moreover, the Chamber held that various types of conducts resulting in the deportation or forcible transfer of a population may qualify as coercive acts for the purpose of the crime of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.[173] The Court then proceeded to analyze Article 12(2)(a) ICCRSt, and recognized that under this provision, the preconditions for the Court's jurisdiction are fulfilled if *at least* one element of the crime was committed on the territory of a State Party.[174] Such an interpretation was based, among other considerations, on the fact that several national legislative frameworks and international instruments have adopted the principle that criminal jurisdiction may be asserted if even only part of a crime occurs on the territory of a State.[175] Following these considerations, given the *inherently transnational nature* of the crime of deportation, the Court deliberated that it holds jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.[176] Furthermore, the Pre-Trial Chamber posited that, should it eventually be established that the members of the Rohingya people were deported from Myanmar to Bangladesh on any of the grounds enumerated in article 7(1)(h) and (k), the Court shall have jurisdiction pursuant to article 12(2)(a) ICCRSt also over the crime

[168] Vienna Convention on the Law of Treaties, 1969
[169] ibid. 167 , para. 52
[170] ibid. 167 para. 55
[171] ibid. 167 para. 55
[172] ibid. 167 para. 55
[173] ibid. 161 para. 9
[174] ibid. 167 para. 64
[175] ibid. 167 para. 66
[176] ibid. 167 para. 73

against humanity of persecution and other inhumane acts, considering that an element or part of this crime took place on the territory of a State Party. This decision prompted severe criticism from the State of Myanmar, which defined it as "the result of faulty procedure and [...] of dubious legal merit."[177]

Following this unprecedented decision by the Court, the OTP requested an authorization to proceed with a full investigation on the situation between Bangladesh and Myanmar[178], in pursuant to Article 15 of the Statute. Specifically, the Prosecutor sought an authorization to investigate crimes falling within the jurisdiction of the Court wherein at least one element occurred on the territory of Bangladesh in the context of the waves of violence arose in Rakhine State between 2016 and 2017.[179] As stated in her petition, in formulating her request the Prosecutor collected an extensive array of reports, academic articles, legal documents, public statements by intergovernmental, nongovernmental and governmental actors, and extensively relied on the Report of the Independent International Fact-Finding Mission on Myanmar.[180] The Chamber then proceeded in assessing the Prosecutor's request,[181] also taking into consideration the reports of victims alleging coercive acts, killings, arbitrary arrests, sexual violence and discrimination which forced them to seek refuge in Bangladesh. In its response to the Prosecutor's request, the Pre-Trial Chamber III stated that

> "[...] the Chamber accepts that there exists a reasonable basis to believe that since at least 9 October 2016 widespread and/or systematic acts of violence may have been committed against the Rohingya civilian population, including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation. Given that there are many sources indicating the heavy involvement of several government forces and other state agents, there exists reasonable basis to believe that there may have been a state policy to attack the Rohingya."[182]

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[177] Statement from the office of Myanmar's President Win Myint retrieved from "*Myanmar says International Criminal Court has no jurisdiction in Rohingya crisis*", Reuters, 2018
[178] Request for authorisation of an investigation pursuant to article 15, ICC-01/19-7, 04 July 2019, Office of the Prosecutor
[179] ibid. para. 20
[180] ibid. paras. 27 and 29
[181] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 14 November 2019, Pre-Trial Chamber III, para. 19
[182] ibid. para. 92

For this reason, the Chamber authorized the initiation of the Prosecutor's investigation in relation to *any crime* within the jurisdiction of the Court committed *at least in part* on the territory of Bangladesh[183] after June 1, 2010 – the date of entry into force of the ICCRSt for Bangladesh.[184] This judgment delineated a sentence with extremely broad parameters, "sending a positive signal to the victims of atrocity crimes in Myanmar and elsewhere."[185] The Prosecutor welcomed this decision and commenced her investigation, seeking to "uncover the truth and focus [...] on ensuring the pursuit and success of [the] independent and impartial investigation."[186] Since this sentence, the OTP has been conducting its investigation by collecting evidence and interviewing witnesses of the alleged crimes committed against the Rohingya. However, these efforts have not come without difficulties. Since the start of the investigation, the State of Myanmar underwent a *coup d'état* which resulted in the establishment of a military *junta* led by Senior General Min Aung Hlaing. The forced deposition of the former government resulted in mass protests that escalated into an armed uprising repressed with force, disproportionately affecting the Rohingya people.[187] These developments, together with several other factors, constitute several challenges for the purpose of the Prosecutor's investigation. Said elements will be thoroughly analyzed in the following section.

3.3 Possible Legal Challenges in Prosecuting Perpetrators

The previously analyzed judgments, rendered by the Pre-Trial Chambers I and III of the ICC respectively, concluded that the Court has jurisdiction over the crimes of deportation, persecution and other inhumane acts occurring between Myanmar and Bangladesh[188] and that the OTP may initiate an investigation in relation to any crime falling within the jurisdiction of the Court committed, at least in part, on the territory of

[183] ibid. para. 126
[184] ibid. para. 132
[185] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar, 22 November 2019
[186] ibid.
[187] Shamim, "How is renewed violence in Myanmar affecting the Rohingya?", Al Jazeera, 2024
[188] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 09 April 2018, Office of the Prosecutor

Bangladesh[189] after June 1, 2010. These judgments resulted from the broad interpretation of the Rome Statute, and more specifically of Article 12(2)(a) ICCRSt, on the part of the Pre-Trial Chamber I, which unprecedentedly conferred jurisdiction upon the Court over a non-signatory State of the Statute.[190] An expanded jurisdiction over Non-Party States may be deemed essential for the Court to function in accordance with its objectives and obligations outlined in the Preamble of its Statute,[191] thereby establishing itself as a truly universal tribunal. Indeed, such a teleological interpretive approach of Article 12(2)(a) ICCRSt ensures the fulfillment of the Court's mandates,[192] contributing to the end of legal impunity at the international level.[193] For this reason, the rulings of the Pre-Trial Chambers have gathered significant support from international actors advocating for a more universal ICC, especially in light of the OTP's investigation into the Bangladesh-Myanmar situation.[194] Notably, in this regard the European Union has expressed its support towards the Court's decision and the Prosecutor's investigation in the Burmese State in a 2019 parliamentary resolution.[195] However, despite the comprehensive scope of the Court's decisions, several challenges may impede the effective exercise of this extended jurisdiction. These challenges range from the difficulties the Prosecutor may face during investigations to the obstacles the Court may encounter in enforcing eventual judgments. Such difficulties may raise doubts upon the Court's effectiveness and, consequently, its social legitimacy.[196]

3.3.1 Uncertainties and Potential Reversals in Prosecuting Rakhine State Crimes

The first obstacle the Court may face in prosecuting alleged perpetrators of crimes against humanity in Rakhine State regards the non-binding nature of the Pre-Trial

[189] Request for authorisation of an investigation pursuant to article 15, ICC-01/19-7, 04 July 2019, Office of the Prosecutor
[190] Takemura, 2023, p. 46
[191] ICCRSt, 1998, Preamble: "[...] with jurisdiction over the most serious crimes *of concern to the international community as a whole*, [...]."
[192] Hale & Rankin, 2018, pp. 1-7
[193] ibid. 190
[194] ibid. 190
[195] European Parliament resolution of 19 September 2019 on Myanmar, notably the situation of the Rohingya (2019/2822(RSP))
[196] Foysal, 2022, pp. 73-95

Chambers' rulings on the other Chambers of the ICC.[197] As has happened in the past,[198] during the continuation of the proceedings other benches of the ICC might reach different conclusions from those of the Pre-Trial Chambers, leading therefore to different outcomes. Furthermore, under the Rome Statute, Myanmar possesses the ability to challenge the admissibility of the case or the jurisdiction of the Court[199] and, later on in the proceeding, to move for appeal and revision of any decision of the Court.[200] For these reasons, the definite resolution of the case is uncertain, as further legal challenges or appeals may prolong the litigation process and result in additional legal proceedings.[201] Nonetheless, in the Rohingya case, given the existence of substantial evidence of misconduct,[202] the likelihood of an unforeseen reversal in the judgments of the ICC is extremely low. The latter element suggests that the main difficulties the Court may face in prosecuting perpetrators of crimes against humanity in Rakhine State regard the execution of the Prosecutor's investigation and the effective implementation of subsequent eventual decisions by the ICC.

3.3.2 Challenges to the Prosecutor's Investigation

The difficulties the OTP and the Court might face, respectively, in conducting a thorough investigation and in exercising its extended jurisdiction stem from Myanmar's refusal to accept the Pre-Trial Chambers' decisions and provide cooperation to the Prosecutor's investigation. Regarding the latter point, in fact, under Article 87(5)(a) of the ICCRSt "The Court may *invite* any State not party to this Statute to provide assistance [...]" but non-party States "may decide to [provide such assistance] *on a voluntary basis*."[203] Since the State of Myanmar has denied the jurisdiction of the Court on multiple occasions and views the decision of the Pre-Trial Chamber I as a "result of faulty procedure and [...] of dubious legal merit,"[204] the Burmese State has refused to

[197] Article 21(2), ICCRSt (1998)
[198] See *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15
[199] Article 19, ICCRSt (1998)
[200] Articles 81, 82, ICCRSt (1998)
[201] Aditya Oikya, 2021, p. 243
[202] ibid.
[203] Questions and Answers, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19
[204] ibid. 185

provide cooperation to the Prosecutor's investigation. Consequently, the current Chief prosecutor Karim Ahmad Khan will have to confine his investigatorial activities to the territory of Bangladesh, as he will not be let into Myanmar's territory to gather corroborative evidence.[205] The non-cooperation of the Burmese State may result in serious complications for the Prosecutor's work, as has happened in previous cases. Notably, in 2014 the ICC was forced to drop all charges against Kenyan President Uhuru Kenyatta as the Kenyan government refused to provide the evidence essential for the Prosecutor to eventually prove the President's culpability.[206] As of today, the investigation of the OTP in Bangladesh is still ongoing, with the Prosecutor and his team visiting several Rohingya refugee camps on the territory of Bangladesh to hear testimony from the survivors of alleged crimes against humanity.[207] As the Rohingya crisis has been under preliminary examination and investigation at the ICC since 2018, the lengthy duration of the investigation process has striked the attention of various voices within the international community,[208] accusing the Court of favoring other cases over the one of the Rohingya for political reasons.[209] The Prosecutor has responded to these allegations by underlining the difficulty that denied access to Myanmar territory represents in the gathering of important evidence but nonetheless stressing the necessity for efforts to bring justice for the Rohingya people to be accelerated.[210] The only method through which the State of Myanmar couldn't dispute ICC's jurisdiction over the Rohingya situation and deny cooperation to the Prosecutor's investigation would be through a resolution of the UN Security Council adopted under Chapter VII of the UN Charter[211] referring the situation to the ICC. Such a resolution would in fact "over-ride or take precedence over all other existing mechanisms, including national mechanisms envisaged under the complementarity principle."[212] Also, each Member State of the United Nations – including the State of Myanmar – is obliged under the UN Charter to

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[205] Foysal, 2022, p. 241
[206] BBC, "ICC drops Uhuru Kenyatta charges for Kenya ethnic violence", 2014
[207] *ICC Prosecutor, Karim A. A. Khan QC, Concludes First Visit to Bangladesh, Underlines Commitment to Advance Investigations Into Alleged Atrocity Crimes Against the Rohingya*, 2022; see also *ICC Prosecutor Karim A. A. Khan KC Concludes Second Visit to Bangladesh: "The Rohingya Must Not Be Forgotten. Together, We Can Deliver on Their Legitimate Expectations of Justice."*, 2023
[208] "*What of the Rohingya? The ICC, Ukraine, and Limits of "International" Justice*," Lowy Institute, 2023; see also: *"Has the ICC lost traction on Rohingya genocide case?"*, The Daily Star, 2023.
[209] ibid.
[210] Regan & Mon, 2023
[211] Ahmed, 2019, p. 27
[212] Nsereko, 2013, p. 431; *see also* Arts. 2(7) and 103 of the UN Charter, 1945

agree with and effectively carry out the resolutions of the Security Council.[213] Nonetheless, as previously mentioned, it is extremely improbable for such a resolution to be adopted by the UNSC given that some of the permanent members of the Council consistently use their veto power to block such proposals.[214] The most prominent actors in the blockage of a possible resolution on the ICC's jurisdiction over the State of Myanmar are Russia and China, who support the position of the State of Myanmar and therefore make it impossible for any actions to be taken by the Council.[215] In the last years, these two powers have blocked several meetings where the Council was supposed to resolute on the Rohingya crisis,[216] motivated by the protection of their interests and the limitation of Western influence in Southeast Asia.[217] Furthermore, without a referral from the UNSC, not only can the State of Myanmar refuse to cooperate with the Prosecutor's investigation, but the scope of the latter will also remain constrained to crimes of deportation, persecution and other inhumane acts. This limitation prevents the Prosecutor from considering other significant allegations against the Burmese State, including the accounts of genocide or other crimes against humanity that did not occur on the territory of a State Party, as highlighted by numerous international actors.[218] Until such difficulties undermining the very objective of the Security Council under the UN Charter[219] and of the ICC under the Rome Statute[220] are overcome, the possibility of a truly comprehensive accountability of all the crimes allegedly committed by the State of Myanmar remains challenging. Nevertheless, it is noteworthy that, after the 2021 *coup* where a military *junta* led by Senior General Min Aung Hlaing seized power in the Burmese State, the dynamics between the ICC and the former government has changed, as the ousted regime demonstrated more willingness to cooperate.[221] In fact, on July

[213] Article 25, Charter of the UN, 1945.
[214] Šturma & Lipovský, 2022, p. 235
[215] The Irawaddy, "Analysis: China Backs Myanmar at UN Security Council," 2017
[216] ibid.
[217] ibid.
[218] e.g. international NGOs such as Amnesty International and Human Rights Watch, who have accused the State of Myanmar of numerous crimes against humanity and possibly genocide; see also The Gambia, acting on behalf of the 57 MS of the OIC, alleging that Myanmar failed to fulfill its obligations to prevent and punish acts of genocide committed against the Rohingya people of Rakhine State in front of the ICJ.
[219] Charter of the United Nations, 1945, Chapter V, Article 24: "[...] Members confer on the Security Council *primary responsibility for the maintenance of international peace and security* […]"
[220] Rome Statute, 1998, Preamble: "Determined [...] to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community *as a whole."*
[221] Takemura, 2023, p.50

2021, the deposed President Duwa Lashi La of the Republic of the Union of Myanmar lodged a declaration with the Registrar of the ICC in accordance with Article 12(3) of the Statute[222] in which he accepted the jurisdiction of the ICC with respect to international crimes committed in Myanmar since July 1, 2002.[223] Neither the ICC nor the OTP took any significant action in response to this declaration as the *de facto* control over the country is held by the military *junta* and the international community is divided in the recognition of the new regime.[224] Notably, the ICJ let the *junta* represent the State of Myanmar in the proceeding of The Gambia v. Myanmar. It was the first time that a different government represented the same Member State before the General Assembly and the ICJ during the same Assembly session.[225] At the same time however, on February 11, 2021, the European Union adopted a resolution in which the parliament "strongly condemn[ed] the military takeover of 1 February 2021 [...] as a *coup d'état* and call[ed] on the Tatmadaw[226] to fully respect the outcome of the democratic elections of November 2020."[227] For this reason, while the declaration made by the deposed President may offer a glimmer of hope for future justice among the displaced Rohingya people, the current uncertainty surrounding Myanmar's government internal and external representation has led to a hesitant response from the ICC towards this statement.

3.3.3. Challenges to the Eventual Enforcement of ICC's Decisions

A further potential challenge the ICC may face in the prosecution of individuals allegedly responsible for the crime of deportation, persecution and other inhumane acts between Myanmar and Bangladesh concerns the eventual enforcement of an ICC's warrant or ruling over the matter. These issues stem from the Court's lack of an

[222] Article 12(3), ICCRSt: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. [...]"
[223] Min AM (2021), Twitter. The Minister of Human Rights for the National Unity Government of Myanmar. https://twitter.com/aung_myo_minn/status/1428680811574972416
[224] Takemura, 2023, p.51
[225] Amirfar, Zamour & Pickard, 2022
[226] The name "Tatmadaw" literally means "Royal Armed Forces" in the Burmese language, and refers to the military apparatus of Myanmar.
[227] European Parliament resolution of 11 February 2021 on the situation in Myanmar (2021/2540(RSP)

independent mechanism to enforce its decisions, consequently rendering it completely reliant on State Parties to enforce its willings.[228] This characteristic of the Court entails that, for example, once the Court releases one or more arrest warrants against one or more suspects, State Parties are mandated to enforce said warrants by arresting and transferring the suspected individuals to The Hague.[229] Since the State of Myanmar is not a State Party of the Rome Statute and has refused to cooperate with the Court, the question of the eventual effectiveness of a Court's ruling rightfully surges. In fact, in this scenario, Burmese individuals eventually convicted by the Court would only be arrested by authorities of other State Parties to the Rome Statute. However, this eventuality remains remote as only by being on a State Party territory a suspected individual might be arrested and, even in that case, past precedents have cast negative shadows on the very legitimacy of the ICC mechanism of individual accountability, with numerous suspects with issued arrest warrants remaining at liberty.[230] In this regard, Myanmar's military regime maintains good relations with various countries in the Southeast Asia region, including ICC State Parties like Japan and South Korea,[231] raising doubts about their willingness to enforce an eventual warrant from the Court.

In conclusion, the challenges faced by the ICC in prosecuting alleged perpetrators of crimes against humanity between Myanmar and Bangladesh underscore the complexities regarding justice achievement on the international stage. Despite the Court's expansive interpretation of its jurisdiction, significant obstacles remain, from the refusal of the State of Myanmar to cooperate to the limitations of enforcement mechanisms within a non-Party State to the Rome Statute. These challenges not only make the pursuit of accountability quite arduous but also raise fundamental questions about the effectiveness and legitimacy of international criminal justice mechanisms. In the following section, such doubts will be addressed together with an examination of the possible measures needed to overcome mentioned difficulties.

[228] Article 103, ICCRSt (1998)
[229] Article 89, ICCRSt (1998)
[230] *See* Defendants, International Criminal Court, available online at https://www.icc-cpi.int/defendants?page=0
[231] Aditya Oikya, 2021, p. 241

3.4 Potential Strategies for Action

In the previous paragraph, an analysis of the potential legal challenges the ICC may encounter in prosecuting alleged perpetrators of crimes against humanity against the Rohingya people was undertaken. This analysis showed how the effectiveness of the ICC proceeding is undermined by various obstacles that need to be overcome in order for the alleged perpetrators of said crimes to be brought to justice. Such obstacles not only regard the possible actions the ICC may undertake in the development of the proceeding, but also those of its Member States. For this reason, it could be argued that the possibility for the Rohingya people to obtain justice will necessarily entail a comprehensive and coordinated approach involving both the Court and its State Parties.[232] In fact, the legal pathways these actors may pursue in the quest for justice are complementary and mutually reinforcing in nature[233] and, if adopted together, may broaden the geographical and material scope of accountability of Myanmar's crimes.[234] This final paragraph therefore analyzes the concerted actions said stakeholders should undertake in order to ensure justice for the Rohingya population and to end impunity in the State of Myanmar.

3.4.1. Potential Actions for the ICC

The proceeding regarding the ongoing situation between Myanmar and Bangladesh at the ICC has the possibility to prosecute and punish the top military and civilian leaders of Myanmar for the crimes falling under its jurisdiction.[235] However, as previously analyzed, such a proceeding presents as many possibilities as limitations. In fact, the scope of the present investigation of the Prosecutor remains limited to the territory of Bangladesh and to those crimes committed at least in part within this territory.[236]

[232] Zakaria, 2023
[233] Uma, 2021
[234] Kewlani, 2022
[235] Uma, 2021
[236] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 06 September 2018, Pre-Trial Chamber I; *see also* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's

Despite this still being remarkable, said crimes only represent a small part of the alleged crimes committed against the Rohingya people. Additionally, the enforcement of an eventual resolution of the ICC remains challenging, as the ICC doesn't possess any individual enforcement mechanism. Nonetheless, it is important to notice that from a procedural point of view the ICC has a robust mechanism for direct victim involvement in judicial proceedings. In fact, victims of international crimes are able to participate in the proceedings independently from the Prosecution and Defense in cases before the ICC.[237] The victim participation procedures of the ICC have been included into a report issued by an Independent Expert Review[238] established by the Assembly of the State Parties to the Rome Statute (ASP) in 2019 with the mandate to produce "concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court."[239] The report included over 380 recommendations, among which were those considered as necessary for the increase in effectiveness and efficiency of victim participation procedures. The involvement of the testimonies of victims and other individuals affected by the actions of Myanmar in the proceeding represents an extremely valuable asset to the case of the Prosecutor, as it will help in building a strong case in front of the Court. The inclusion of these testimonies will also reduce the likelihood of future Chambers or Appeal Chambers overturning their decisions for a lack of corroborative evidence.[240] Therefore, despite the ICC's jurisdiction being limited in respect to the entirety of crimes allegedly committed by the State of Myanmar against the Rohingya people, the proceeding initiated by the Prosecutor before the ICC still represents one of the most substantial opportunities to prosecute and punish Myanmar's top military and civilian leaders, even if only for a portion of their crimes.[241]

Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 14 November 2019, Pre-Trial Chamber III

[237] Zakaria, 2023

[238] The Assembly of States Parties of the International Criminal Court, Review of the ICC and the Rome Statute System, ICC-ASP/18/Res.7 (2019)

[239] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report (2020), p. 7, para. 6

[240] Foysal, 2022, pp. 73-95

[241] Uma, 2021

3.4.2. Potential Actions for ICC Member States and the international community

In order to face the issues of effectiveness and limited jurisdiction of the Court's decisions, the ICC should prioritize the cooperation with its State Parties. In respect to the issue of effectiveness, as previously stated, under the Rome Statute[242] the State Parties have the responsibility to support the Court's judicial and prosecutorial functions by providing concrete cooperation at all stages of the proceeding, including investigations, arrest and transfer of suspects, access to evidence and witnesses, protection of individuals and enforcement of judicial decisions and sentences.[243] In this regard, in 2007 the ASP adopted a document[244] containing a comprehensive list of recommendations on cooperation among the Court and the State Parties, identifying key priority areas and challenges while suggesting possible remedies to overcome these challenges.[245] Among other things, this document underlines the necessity for the States to enact concrete arrest strategies following warrants issued by the Court and to support the Court's decisions through diplomatic and public support in national, bilateral, regional and international settings.[246] Only by respecting these guidelines will the States Parties to the Rome Statute ensure the efficiency of the Court's decisions and contribute to the ending of a culture of impunity in the international stage.

The importance of mutual support between the Court and its Member States extends beyond the aspect of effectiveness alone. In fact, the Court and the States also have the possibility to complement each other's jurisdiction in a positive way through mutual assistance and cooperation.[247] Member States of the ICC can bring perpetrators of non-Member States to justice or prosecute crimes inadmissible to the Court under the Rome Statute by appealing to the principle of universal jurisdiction.[248] As previously mentioned, the ICC can only prosecute nationals of non-State Parties if that State

[242] *See* Rome Statute (1998), arts. 86, 87, 88, and 93
[243] Recommendations on States' Cooperation with the International Criminal Court (ICC): Experiences and Priorities, International Criminal Court, 2022
[244] Strengthening the International Criminal Court and the Assembly of States Parties, Resolution ICC-ASP/6/Res.2, 2007
[245] Foysal, 2022, pp. 73-95
[246] ibid.
[247] Kewlani, 2022
[248] Dey, 2021, p. 61

accepted the jurisdiction of the Court with respect to the crime in question,[249] if the situation is referred to the Court by the UNSC[250] or if at least part of the conduct takes place in the territory of a State Party.[251] However, the limitations of the jurisdictional apparatus of the ICC or the non-referral of a situation cannot motivate the restriction of the national criminal jurisdiction when it comes to the prosecution of international crimes.[252] For this reason, States can actually investigate and prosecute said crimes under the authority of universal jurisdiction, which allows the State "to bring criminal proceedings in respect of international crimes irrespective of the location of the perpetration of the crimes and the nationality of the perpetrator or the victims"[253] The principle of universal jurisdiction offers the possibility to States to prosecute international crimes independently from any link to their territory or nationals, giving nonetheless the priority of prosecution to those States having a direct link to the crimes due to the territoriality or nationality of perpetrators.[254] States frequently exercise this jurisdiction to initiate measures bringing an end to international impunity. Notably, States such as Germany and France have initiated proceedings against Syrian officials under the principle of universal jurisdiction.[255] In relation to the case of the Rohingya, in 2019 the Burmese Rohingya Organization UK (BROUK) filed a case in an Argentinian national criminal court against Myanmar under the principle of universal jurisdiction, making allegations of genocide and crimes against humanity committed against the Rohingya people.[256] The petition made appeal to the responsibility of the Argentinian government to prosecute offenders under the Genocide Convention.[257] In this case, the alleged crime of genocide has neither taken place on Argentinian territory nor, possibly, by the hands of Argentinian nationals.[258] However, on the basis of universal jurisdiction, obligations were invoked. In 2021, the lower court dismissed the case because of the

[249] Article 12(3), ICCRSt, 1998
[250] Article 13(b), ICCRSt, 1998
[251] *See the* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, 27, para 61 (2019)
[252] Dey, 2021, pp. 63-64
[253] Zdzislaw Galicki, Preliminary Report of the Special Rapporteur on the Obligation to Extradite or Prosecute, International Law Commission U.N. A/CN.4/571, 6 (2006), available at https://digitallibrary.un.org/record/578129
[254] Hall, 2010, p. 205
[255] Dey, 2021, p. 65
[256] Kewlani, 2022
[257] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Articles 1 and 6.
[258] Uma, 2021

ongoing investigation at the ICC, but the plaintiffs appealed this decision arguing the ICC's investigation only related to those crimes that took place also on Bangladeshi territory, excluding those that were committed exclusively in Myanmar.[259] Upon appeal, the Argentine judiciary overturned the lower court decision and initiated an investigation into the Rohingya genocide in Myanmar. In the absence of ICC jurisdiction over crimes perpetrated in a non-Member State, Member States can therefore invoke universal jurisdiction and use their domestic judicial systems to prosecute the perpetrators.[260] Such a complementarity enhances the material and geographical jurisdiction of the ICC and the possibility of a more complete accountability mechanism for the alleged perpetrators of genocide and crimes against humanity in the territory of Myanmar against the Rohingya people. Nonetheless, just like the ICC, domestic courts also face numerous challenges in conducting a trial in an extraterritorial case, especially in a scenario – such as the one of Myanmar – of non-cooperation on the part of the territorial State[261] that may refuse to extradite alleged perpetrators or to collect and share important pieces of evidence. For this reason, a strong cooperation regime within Member States is essential in order to prosecute nationals of non-Member States within a domestic court.[262]

The eventuality of non-cooperation is therefore an issue both in cases of proceedings in front of the ICC and of those taking place in domestic courts under the principle of universal jurisdiction. As previously mentioned, an international organ who could effectively deal with crimes committed in States who do not cooperate with other Courts is the UNSC, that has the power to refer the situation to the ICC through a resolution adopted under Chapter VII of the UN Charter. However, the UNSC has not used this power due to the strategic and economic interests of some of its members.[263] Nonetheless, the state of emergency imposed in the Burmese State by the military on February 1, 2021, necessitated a response from the UNSC that, through a resolution,[264] expressed deep concern for the impact the emergency state might have on the people of

[259] ibid.
[260] Dey, 2021, p.79
[261] ibid.
[262] ibid.
[263] Ahmed, 2019, p.27
[264] Resolution 2669, UNSC, 2022

Myanmar and demanded the end to all forms of violence across the country. In addition, the UNSC underlined how this emergency *status* posed serious challenges for the safe and sustainable return of Rohingya people into the State[265] and encouraged "diplomatic efforts between the parties concerned to help address the issues facing Rohingyas."[266] Despite the resolution's symbolic importance, these conditions are not yet present on the ground[267] and are unlikely to be until a comprehensive and effective accountability mechanism is implemented. In this regard, when the UNSC is paralyzed under its own structural mechanisms, the UN General Assembly might take steps to address issues of international peace and security.[268] An eventual resolution of the Assembly would require a comprehensive action, as two-thirds of the members of the Assembly should vote in order for a resolution to pass.[269] Despite its non-binding nature, a resolution from the Assembly would hold incredible political weight and show the collective will of the international community, and might therefore influence the actions of the UNSC.[270]

In conclusion, it is evident that for the ICC to effectively address the sufferings of the Rohingya people and overcome the challenges it faces, strict collaboration with its Member States is essential. Despite its limited jurisdiction, the OTP holds a significant potential to build a substantial case before the Court, particularly through direct victims participation—a foundational aspect of ICC proceedings. Moreover, the focus on cooperation with its Member States would enhance the likelihood of their collaboration with the Court, thereby ensuring its efficiency. Furthermore, State Parties have the possibility to complement the Court's limited jurisdiction by invoking the principle of universal jurisdiction, as exemplified by the ongoing case in Argentina. Undoubtedly, a referral from the UNSC would greatly facilitate the prosecution of this case. Although such a referral is unlikely due to political and strategic considerations, a concerted action by the UN General Assembly could be impactful in this regard.

[265] ibid.
[266] ibid.
[267] Lee & Al-Nashif, 2023
[268] Nartey, 2022, p. 446
[269] Article 18, Charter of the United Nations, 1945
[270] Nartey, 2022, p. 446

3.5 Conclusion

By examining the interrelation between the ICC and the Rohingya crisis, this final chapter analyzed the ongoing involvement of the Court with the Rohingyas to this date. This analysis mainly took into consideration the decisions issued by the Pre-Trial Chambers I and III, that respectively believed the Court to have jurisdiction over the crimes of deportation, persecution and other inhumane acts occurring between Myanmar and Bangladesh[271] and gave permission to the OTP to initiate investigation in relation to any crime falling within the jurisdiction of the Court committed, at least in part, on the territory of Bangladesh after June 1, 2010.[272] The analysis of the ICC proceeding subsequently looked into the several challenges the ICC may face while holding perpetrators of crimes falling under its jurisdiction accountable. Said challenges mainly regarded the possibility of an overturn of the Pre-Trial Chamber's decision by subsequent Chambers, the reduced geographical and material jurisdiction of the Court and the effectiveness of an eventual decision of the ICC. As the analysis subsequently argued, these challenges might however be overcome through the help of direct victim involvement in the proceeding and the focus on the cooperation between the Court and its Member States. In reference to the latter, Member States have in fact the capability to ensure effectiveness of ICC proceedings by observing their obligations under the Rome Statute and to compensate for the Court's limited geographic and material jurisdiction by appealing to the principle of universal jurisdiction. Finally, the chapter underlined how a concerted effort by the international community through the petition mechanisms of the UN General Assembly could send a powerful message to the UNSC to take action, as such action may further facilitate the accountability of alleged perpetrators of crimes against humanity and genocide in Myanmar.

[271] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 06 September 2018, Pre-Trial Chamber I
[272] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 14 November 2019, Pre-Trial Chamber III

Conclusion

This thesis ultimately underlined the unique and essential role of the International Criminal Court (ICC) in addressing the currently ongoing Rohingya humanitarian crisis. In the first chapter, an overview of the Court's establishment, structure, jurisdiction and powers was provided, laying an indispensable foundation to understand the Court's possibilities in holding perpetrators accountable and delivering justice to the victims of alleged crimes against humanity committed in Rakhine State. In the second chapter, a detailed analysis of the Rohingya population's history and rights violations was undertaken. This analysis showed how the sufferings endured by the Rohingya population over the decades may amount to arbitrary deprivation of nationality, crimes against humanity and genocide under international law. The chapter thoroughly analyzed these three elements both from a juridical perspective and from a practical one, applying the legal framework to the case in question. Ultimately, this analysis highlighted the urgent need for international intervention and justice for the Rohingya people. In the third and last chapter, the research assessed the role of the ICC in the resolution of this international humanitarian crisis, examining both its potentialities and limitations. The Court's legal actions, notably the unprecedented judgments of the Pre-Trial Chambers that gave the Court jurisdiction over the nationals of a non-Party State, represent a crucial step towards universal criminal accountability. Nonetheless, significant challenges such as the non-cooperation from the State of Myanmar, the absence of a UN Security Council referral, and the potential limitations on investigation and implementation of an eventual Court's ruling or warrant may pose substantial doubts upon the Court's effectiveness. In order to overcome these obstacles, the thesis suggests for the Prosecutor to make use of the Court's direct victim involvement mechanisms in order to support his case and for the Court to foster greater cooperation with its Member States, who play a crucial role in the eventual implementation of the ICC's decisions.

Ultimately, the achievement of an inclusive future for the Rohingya people in Myanmar will require an immediate humanitarian relief and the safe, voluntary and dignified

repatriation of Rohingya refugees to Myanmar.[273] In order to have a comprehensive resolution of this crisis, in the long run the authorities of Myanmar will have to repeal all discriminatory legislation and give full legal recognition of the right to citizenship of the Rohingya people, issuing appropriate civil documentation, providing access to basic educational and health services, economic opportunities and freedom of movement.[274] To achieve such a resolution, the legal pursuit of justice and accountability at the international level for crimes committed against the Rohingya people proves to be essential.[275] Therefore, this thesis underlined how important it is for the international community to support the ongoing proceedings investigating the State of Myanmar in relation to the Rohingya people, notably the Prosecutor's work in Bangladesh, the previously analyzed case of The Gambia v. Myanmar at the ICJ and the case brought in front of the Argentinian court by the BROUK.[276] Each of these approaches complement each other and together will provide the comprehensive accountability of the crimes allegedly committed in the State of Myanmar.[277] Together with these legal actions, it is also essential for the State Parties to the Rome Statute to respect their obligations and of assistance and cooperation to the Court's work.[278]

In conclusion, this research defined the ICC's essential role in ensuring individual accountability in the State of Myanmar, being the only apparatus capable of prosecuting and punishing the top military and civilian leaders of Myanmar for crimes falling within its jurisdiction at an international level. Nonetheless, due to the Court's limitations, a sustainable resolution of the Rohingya crisis would necessarily require a concerted effort from the international community, namely the Member States of the Court, the UN Security Council and the UN General Assembly. It is only through collective and coordinated global actions that justice could be achieved, and the long-term rights and safety of the Rohingya people be ensured.

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[273] Zakaria, 2023
[274] Lee & Al-Nashif, 2023
[275] Zakaria, 2023, p. 5
[276] ibid.
[277] Kewlani, 2022
[278] *See* Recommendations on States' Cooperation with the International Criminal Court (ICC): Experiences and Priorities, International Criminal Court, 2022

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