Department of International Relations

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The Rohingya Crisis and Avenues for Accountability

State and Individual Criminal Responsibility: Pursuing Justice for Mass Human Rights Violations

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ACADEMIC YEAR 2023/2024

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Introduction

The Rohingya are a Muslim ethnic minority predominantly residing in Rakhine State, a coastal region in northwestern Myanmar.[1] As a community, they have been subjected to a prolonged history of systemic discrimination, institutionalized marginalization and persecution, largely on the basis of their ethnic and religious identity.[2] The exclusionary policies enacted by Myanmar's authorities have been described as part of a broader process of social and legal "othering" which has relegated the Rohingya to a status of severe vulnerability and statelessness.[3] Central to this situation is their lack of legal recognition at the national level.[4] In 1982, under the military rule of General Ne Win, Myanmar's legislative body enacted the Burma Citizenship Law, which, through its discriminatory provisions and subsequent implementation by State authorities, effectively stripped the Rohingya of their citizenship.[5] As a result, the overwhelming majority of Rohingya in Myanmar have been denied access to fundamental rights, including freedom of movement, education, healthcare and political participation. The deprivation of legal status has not only entrenched their statelessness but has also created conditions of extreme precarity, compelling many Rohingya to flee the country, particularly to neighboring Bangladesh.[6]

While persecution and systematic discrimination against the Rohingya have persisted for decades, the crisis reached an unprecedented level of violence and forced displacement in 2016 and again in August 2017.[7] These two periods, which are the focus of this thesis, saw the eruption of large-scale attacks against the Rohingya population, leading to mass exodus and what has been widely recognized as one of the gravest humanitarian crises in recent history.

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[1] Higgins, Elliot. "Transitional Justice for the Persecution of the Rohingya", (2018), 42, *Fordham International Law Journal*, p. 105.
[2] Independent International Fact-Finding Mission. "Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar", (18 September 2018), UN Doc. A/HRC/39/CRP.2, para. 458, (hereinafter "IIFFM Report 2018").
[3] Ibidem, para. 622.
[4] Ibidem, para. 459.
[5] Kyaw, Nyi Nyi. "Unpacking the Presumed Statelessness of Rohingyas", (2017), 15(3), *Journal of Immigrant & Refugee Studies*, p. 276–282; *Burma Citizenship Law,* 1982, ch. 2.
[6] Saliternik, Michal. "Myanmar's Rohingya Crisis and the Need for a Regional Response to Statelessness in Southeast Asia", (*EJIL: Talk!*, 30 October 2017), https://www.ejiltalk.org/the-rohingya-crisis-and-the-need-for-a-regional-response-to-statelessness-in-southeast-asia/; Independent International Fact-Finding Mission. "Detailed Findings of the Independent International Fact-Finding Mission on Myanmar", (16 September 2019), UN Doc. A/HRC/42/CRP.5, para. 202-205, (hereinafter "IIFFM Report 2019").
[7] Higgins, Elliot. "Transitional Justice for the Persecution of the Rohingya", (2018), 42, *Fordham International Law Journal*, p. 101-102.

On October 9th, 2016, the Arakan Rohingya Salvation Army (ARSA), an insurgent group formed in 2012 in response to escalating violence against the Rohingya, carried out an armed assault against three border guard police stations in northern Rakhine State.[8] This offensive resulted in the deaths of nine police officers and the seizure of weapons by ARSA fighters.[9] In retaliation, the Myanmar security forces, under the command of the Tatmadaw - the country's armed forces - initiated what they termed "clearance operations", ostensibly aimed at eradicating ARSA militants.[10] However, in practice, these operations overwhelmingly targeted Rohingya civilians, involving indiscriminate violence, mass killings and large-scale displacement.[11] The severity of the military response compelled approximately 87,000 Rohingya to flee into Bangladesh.[12]

A similar sequence of events unfolded in August 2017. On August 25th, ARSA launched another series of coordinated attacks against thirty security force stations and a military base in Rakhine State, leading to the deaths of twelve security personnel.[13] In response, the Tatmadaw, along with Myanmar's border police and certain local Rakhine militias, escalated their operations to an unprecedented level of brutality.[14] The crackdown, which lasted from August to at least October 2017, resulted in mass killings, sexual violence, village destruction and the forced displacement of hundreds of thousands of Rohingya.

The extent and nature of the atrocities committed during these operations have been extensively documented by international bodies, particularly the Independent International Fact-Finding Mission on Myanmar (IIFFM), established by the United Nations Human Rights Council in 2017 to investigate allegations of human rights violations. In its 2018 and 2019 Reports, the IIFFM provided detailed accounts of crimes committed against the Rohingya, including extrajudicial killings, systematic rape and sexual slavery, torture, forced disappearances, arson and large-scale destruction of villages.[15] The Fact-Finding Mission concluded that these acts, perpetrated primarily by the Tatmadaw, constituted international crimes, including crimes against humanity, war crimes and genocide.[16] Specifically, the IIFFM found that the military's actions met the legal definition of genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Report highlighted that Myanmar's armed forces deliberately engaged in conduct designed to

[8] United Nations Human Rights Council. "Report of the Independent International Fact-Finding Mission on Myanmar", (12 September 2018), UN Doc. A/HRC/39/64, para. 44, (hereinafter "HRC Report").
[9] Ibidem.
[10] Ibidem.
[11] Ibidem.
[12] Ibidem.
[13] IIFFM 2018 Report, para. 750.
[14] Ibidem, para. 751.
[15] IIFFM 2018 Report; IIFFM 2019 Report.
[16] IIFFM 2018 Report, para. 351.

destroy the Rohingya population, including mass killings, the infliction of serious physical and psychological harm and measures aimed at preventing births within the group.[17] Additionally, the IIFFM noted that the expulsion of Rohingya across the border into Bangladesh met the criteria for the crime against humanity of deportation, a charge that would later become central to legal proceedings at the International Criminal Court (ICC).[18]

The gravity of the allegations prompted renewed discussions on legal accountability at both the individual and State levels. In response to growing international calls for justice, the International Criminal Court took steps to assert its jurisdiction over crimes committed against the Rohingya. On April 9th, 2018, ICC Prosecutor Fatou Bensouda submitted a Request to the Pre-Trial Division seeking clarification on whether the Court had jurisdiction over the crime of deportation, given that Myanmar is not a State Party to the Rome Statute.[19] The Request was assigned to Pre-Trial Chamber I, which, on September 6th, 2018, issued a landmark ruling affirming that the ICC could exercise jurisdiction over deportation.[20] The Chamber reasoned that while the crime commenced in Myanmar (a non-State Party), its transnational nature meant that an essential element of the offense - crossing an international border - occurred in Bangladesh (a State Party).[21] The ruling further suggested that, should the necessary criteria be met, the Court could also examine other crimes committed as part of the broader context of the Rohingya crisis.[22]

Following this decision, the Prosecutor initiated a preliminary examination, which culminated in a formal request to open an investigation on July 4th, 2019.[23] On November 14th, 2019, the Pre-Trial Chamber authorized the investigation, focusing on the crimes of deportation and persecution.[24] However, neither the Prosecutor nor the Chamber explicitly addressed whether the investigation could extend to genocide. Myanmar's government categorically rejected the ICC's jurisdiction, arguing that, as a non-party to the Rome Statute, it was not bound by its provisions.[25]

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[17] Ibidem, para. 1392
[18] Ibidem, para. 751.
[19] International Criminal Court. *Situation in Bangladesh/Myanmar, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* (9 April 2018), No. ICC-RoC46(3)-01/18-1, (hereinafter "Request on Jurisdiction").
[20] International Criminal Court. *Situation in Bangladesh/Myanmar, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, (6 September 2018), No. ICC-RoC46(3)-01/18, para. 2, hereinafter "Decision on Jurisdiction").
[21] Ibidem, para. 71, 73.
[22] Ibidem, para. 74.
[23] Office of the Prosecutor. *Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15*, (4 July 2019), No. ICC-01/19-7.
[24] International Criminal Court. *Situation in Bangladesh/Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* (14 November 2019), No. ICC-01/19-27, para. 92, 108, 110, 126 (hereinafter "Authorisation of Investigation").
[25] Republic of the Union of Myanmar, Office of the President. "Press Release", (7 September 2018), https://x.com/pomyanmar/status/1038063247088267265/photo/1.

In a significant development, on November 27th, 2024, ICC Prosecutor Karim A.A. Khan KC filed an application for an arrest warrant against Senior General Min Aung Hlaing, the Commander-in-Chief of Myanmar's Defense Services.[26] The application asserts that there are reasonable grounds to believe that Min Aung Hlaing bears criminal responsibility for the crimes against humanity of deportation and persecution of the Rohingya, committed in Myanmar and, in part, in Bangladesh.[27]

While the International Criminal Court is solely mandated to prosecute individuals accused of committing international crimes, legal proceedings have also been initiated against the State of Myanmar concerning the actions of the Tatmadaw military during the so-called "clearance operations" against the Rohingya population. On November 11th, 2019, the Republic of The Gambia filed a case against Myanmar before the International Court of Justice (ICJ), alleging that the respondent State had violated its obligations under international law, specifically under the Convention on the Prevention and Punishment of the Crime of Genocide. The application asserted that Myanmar had engaged in or facilitated the commission of acts constituting genocide, stating that these actions were "adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group".[28]

According to The Gambia, the military operations carried out by the Tatmadaw in 2016 and 2017 against the Rohingya minority amounted to acts of genocide, as the conduct in question was deliberately directed at destroying the group, either in whole or in part.[29] The application further emphasized that these military actions were not isolated incidents but rather formed part of a broader and long-standing pattern of marginalization and persecution systematically imposed by Myanmar's authorities.[30] On this basis, The Gambia argued that Myanmar bore responsibility for the commission of genocidal acts and was, therefore, in breach of its international obligations under the Genocide Convention.[31] Accordingly, The Gambia requested that the ICJ declare Myanmar responsible for violating key provisions of the Convention, including Articles I, III(a), III(b), III(c), III(d), III(e), IV, V, and VI.[32] Additionally, The Gambia sought the imposition of provisional measures to prevent further harm to the Rohingya population and to ensure that the situation did not deteriorate further.[33]

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[26] Office of the Prosecutor. "Statement of ICC Prosecutor Karim A.A. Khan KC: Application for an arrest warrant in the situation in Bangladesh/Myanmar", (27 November 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-application-arrest-warrant-situation-bangladesh.
[27] Ibidem.
[28] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Application Instituting Proceedings and Request for Provisional Measures,* (11 November 2019), para. 2, https://www.icj-cij.org/case/178/institution-proceedings, (hereinafter "The Gambia Application").
[29] Ibidem, para. 2, 98, 116-117.
[30] Ibidem, para. 30-32.
[31] Ibidem, para. 2.
[32] Ibidem, para. 111-112.
[33] Ibidem, para. 132.

In response to this request, on January 23rd, 2020, the ICJ issued an order requiring Myanmar to implement specific provisional measures aimed at safeguarding the rights of the Rohingya and preventing further acts of genocide.[34] The Court's ruling affirmed the *prima facie* plausibility of The Gambia's claims and underscored the necessity of immediate protective measures to address the ongoing risks faced by the Rohingya community.[35]

In addition to The Gambia, several States have joined the proceedings, underscoring the case's international significance. In 2023, the Maldives, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom filed a joint declaration of intervention under Article 63 of the ICJ Statute.[36] Later, in December 2024, Belgium, the Democratic Republic of Congo and Slovenia also intervened. The ICJ accepted these requests, permitting these States to submit observations on the interpretation and application of the Genocide Convention.

Parallel to the proceedings before the ICJ and the ICC, legal action has also been pursued at the domestic level under the principle of universal jurisdiction, further expanding the avenues for accountability. In 2019, the Burmese Rohingya Organization UK (BROUK), a London-based advocacy group, filed a criminal complaint in Argentina against senior Myanmar officials, accusing them of genocide and crimes against humanity committed against the Rohingya.[37] Argentina, whose legal system explicitly recognizes universal jurisdiction for the gravest international crimes, became the first country to open a national investigation into the atrocities committed in Myanmar, demonstrating how domestic courts can complement international legal efforts when traditional mechanisms face jurisdictional or political constraints.

Initially dismissed on procedural grounds by a lower court, the case was reinstated in 2021 when the Federal Court of Appeals ruled in favor of proceeding with the investigation, emphasizing Argentina's obligation under international law to prosecute crimes of such magnitude.[38] Since then, Argentinian judicial authorities have gathered testimonies from Rohingya survivors and examined extensive documentation from human rights organizations and UN bodies. The proceedings have been further strengthened by contributions from the Independent Investigative Mechanism for

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[34] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order No. 178,* (23 January 2020), para. 60-61.
[35] Ibidem.
[36] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Canada, Denmark, France, Germany, the Netherlands, the United Kingdom (jointly) and the Maldives file declarations of intervention in the proceedings under Article 63 of the Statute,* (15 November 2023).
[37] Burmese Rohingya Organization UK. "Complainant Files a Criminal Complaint Of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar", (13 November 2019), https://burmacampaign.org.uk/media/Complaint-File.pdf.
[38] Independent Investigative Mechanism for Myanmar. "Universal Jurisdiction – The Case of Argentina", https://iimm.un.org/en/universal-jurisdiction.

Myanmar (IIMM), which has provided critical evidence regarding the scale and systematic nature of the crimes. Marking a major development in the case, in June 2024 Argentina's prosecutors requested the issuance of international arrest warrants for 25 Myanmar officials, including Min Aung Hlaing and Aung San Suu Kyi.[39]

Given that the ICC's jurisdiction is limited to crimes partially committed in Bangladesh, the Argentine case plays an important role in addressing offenses that took place entirely within Myanmar, particularly those linked to the charge of genocide. This case exemplifies the increasing role of universal jurisdiction in closing accountability gaps and ensuring that justice mechanisms remain accessible even when conventional judicial avenues are obstructed.

This dissertation critically examines the role of these three mechanisms - ICJ, ICC and universal jurisdiction - in addressing the Rohingya crisis, with particular attention to their legal frameworks, jurisdictional mandates, and potential impact on accountability and justice. It aims to answer two central research questions: how does the involvement of both the ICJ and the ICC, alongside proceedings based on universal jurisdiction, affect the significance and potential impact of international legal efforts in response to the Rohingya crisis? What outcomes can be anticipated from the ongoing proceedings within these different legal frameworks? By analyzing these questions, the dissertation seeks to provide a comprehensive understanding of the legal mechanisms available for addressing mass atrocities and the extent to which they can contribute to justice for the Rohingya people.

This research adopts a qualitative legal analysis approach, drawing on primary and secondary sources, including judicial decisions, international treaties, reports from United Nations bodies, academic literature and expert commentaries. Given the complexity of the Rohingya crisis and the multifaceted nature of international legal responses, the study employs a comparative approach, examining the respective roles and limitations of the ICJ, ICC and universal jurisdiction in addressing State and individual responsibility. The thesis begins with an exploration of the legal and political background of the Rohingya crisis, providing historical and contemporary context. It then delves into the legal proceedings at the ICJ concerning State responsibility, before shifting focus to the ICC's role in pursuing individual accountability. Within this discussion, the final section addresses the implications of universal jurisdiction, analyzing its potential contribution to justice efforts alongside the ICC's mechanisms. The concluding reflections assess the overall effectiveness and interplay of these legal avenues in addressing the Rohingya crisis.

[39] Ibidem.

By critically analyzing the interplay between these different legal mechanisms and institutions, this dissertation aims to contribute to the broader discourse on international justice and the evolving role of international courts and domestic jurisdictions in responding to mass atrocities.

Chapter 1 – The Rohingya Crisis

1.1 Who are the Rohingya? Demographics and Definitions.

The term "Rohingya" is generally used to denote a Muslim community primarily residing in Myanmar's Rakhine State – formerly known as Arakan, although members of this group are also present in other regions of the country and in refugee camps in neighboring nations, such as Bangladesh and Thailand. In the early 21st century, the Rohingya comprised approximately one–third of the population present in Rakhine State, while the remaining two–thirds consisted predominantly of Buddhists.[40] The Rohingya are regarded as one of the world's most persecuted minorities, with Myanmar's military and State authorities having consciously and systematically violated their fundamental human rights for decades, including through the denial of citizenship and the refusal to recognize them as an ethnic group.

The use of the term Rohingya is also highly contested in Myanmar: while Rohingya political leaders assert that they form a distinct ethnic, cultural and linguistic community with ancestry dating back to the late 7th century, the broader Buddhist population generally rejects this term, instead referring to them as "Bengalis" and viewing the community as largely composed of undocumented immigrants from present-day Bangladesh.[41]

The 2014 Population and Housing Census – Myanmar's first national census in thirty years, conducted by the Ministry of Immigration and Population in collaboration with the United Nations Population Fund – estimated Myanmar's population at 51,486,253.[42] This total includes 50,279,900 individuals counted through field data collection and an additional estimated 1,206,353 people identified through the Census mapping activity who were not directly counted.[43] Among these are approximately 1,090,000 individuals in Rakhine State (where the Rohingya predominantly reside), 69,753 in Kayin State and 46,600 in Kachin State.[44] The Census, however, does not document the composition or numbers of Myanmar's ethnic groups – a choice that reflects the intertwining of ethnic identity and citizenship within the country's ethno-political landscape. Since 1962, various military-backed governments, predominantly led by officials from the Bamar ethnic group – which constitutes

[40] Chan, Elaine. "Rohingya", *Encyclopedia Britannica*, (22 October 2024), https://www.britannica.com/topic/Rohingya.
[41] Ibidem.
[42] Kittichaisaree, Kriangsak. *The Rohingya, Justice and International Law*, (Routledge 2021), p. 4, (hereinafter "The Rohingya, Justice and International Law").
[43] Ibidem.
[44] Ministry of Immigration and Population, Union of Myanmar. *Census Report Volume 2: 2014 Myanmar Population and Housing Census,* (May 2015), p. 12.

the 68% of the total population[45] - have upheld the concept of Myanmar as a unitary State, unified by a kinship among the family of "national races" that historically inhabited the Bamar-populated central plain and river valleys, in which power has been condensed.[46] In contrast, non-Bamar communities and organizations have typically viewed ethnic and nationality identities as the foundation for demands for autonomy and political rights, advocating instead for a decentralized or federal system of government.[47] A diverse array of ethnic minorities has traditionally inhabited the peripheral areas encircling the country's central plains in a horseshoe configuration: this ethnic diversity includes significant groups, with the Shan making up 9% of the population, the Karen 7%, and the Rakhine 4%. Chinese and Indian communities represent 3% and 2%, respectively, while the Mon account for 2%. Various other ethnicities collectively form around 5%.[48]

As of October 15th, 2024, The World Factbook by the U.S. Central Intelligence Agency reports that the Myanmar government officially recognizes 135 "indigenous ethnic groups". According to data from the 2014 Census, Buddhist comprise 87.9% of Myanmar's population, while Christians make up 6.2%, Muslims 4.3%, Animists 0.8%, Hindus 0.5%, with 0.2% identifying as other religions and 0.1% declaring no religious affiliation. However, by December 2019, it is estimated that Muslims account for less than 3% of the total population, largely due to the significant migration of the Rohingya population since 2017.[49]

Tying citizenship and rights to ethnic identity in an ethnically diverse nation like Myanmar has deepened ethnic divisions and fueled the rise of ethnic non-State armed groups, often regarded as rebels by the Bamar-majority government.[50] There are approximately twenty "ethnic armed groups" in Myanmar with both political and military branches, alongside hundreds, possibly thousands, of armed militias.[51] These militias range from small village defense forces to large entities boasting thousands of fighters, often surpassing the strength of many ethnic armed groups.[52] Almost all of these militias are ethnically based, established either by or in alliance with Myanmar's military, the Tatmadaw, and are nominally under its command. However, the actual degree of control the Tatmadaw exerts over these groups varies substantially across different regions and units.[53]

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[45] Central Intelligence Agency. *The World Factbook: Burma*, https://www.cia.gov/the-world-factbook/countries/burma/#people-and-society.
[46] *The Rohingya, Justice and International Law*, p. 4.
[47] Transnational Institute. *Ethnicity without Meaning, Data without Context: The 2014 Census, Identity and Citizenship in Burma/Myanmar, Myanmar Policy Briefing No.13* (February 2014), p. 3.
[48] Central Intelligence Agency. *The World Factbook: Burma*.
[49] Ibidem.
[50] *The Rohingya, Justice and International Law*, p. 5.
[51] International Crisis Group. *Identity Crisis: Ethnicity and Conflicts in Myanmar, Report N.312/Asia* (28 August 2020), p. 2.
[52] Ibidem.
[53] Ibidem.

As previously noted, a primary point of tension lies in the Rakhine State, where Rohingya leaders, who self-identify as such, pursue formal recognition and full citizenship for their community. However, among the ethnic Bamar and Rakhine political élites - and much of the predominantly Buddhist population - there is little willingness to regard them as anything other than Bengalis and illegal migrants.[54]

In its Order of January 23rd, 2020, concerning the request for provisional measures made by the Gambia, further analyzed in the present dissertation, the International Court of Justice (ICJ) has referenced the "Rohingya" as "the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar".[55] Most countries indeed recognize the Rohingya as a population residing within Myanmar; however, the Myanmar government and its officials refrain from referring to members of this group as "Rohingya".[56]

An alternative perspective on the matter is presented by the Advisory Commission on Rakhine State, chaired by former UN Secretary-General Kofi Annan ("the Annan Commission"). At the request of Aung San Suu Kyi, the Annan Commission avoided using the terms "Bengali" or "Rohingya", instead referring to this population as "Muslims" or "the Muslim community in Rakhine".[57] Notably, this designation excludes the Kaman Muslims - primarily residing in Rakhine State and officially recognized as one of Myanmar's 135 ethnic groups - who are referred to separately as "Kaman".[58]

The fundamental driver of the oppression faced by the Rohingya is their lack of legal recognition. Over time, laws and policies governing citizenship and political rights have increasingly adopted exclusionary frameworks, marked by arbitrary and discriminatory enforcement. As a result, the majority of Rohingya have been rendered stateless, stripped of their citizenship without justification. At the heart of this issue lies the emphasis on the notion of "national races" and the accompanying rhetoric of exclusion. Indeed, in Rakhine State the precarious status of the Muslim population has been directly exacerbated by the 1982 Citizenship Law and its enforcement: it was introduced during the regime of Ne Win's Burma Socialist Programme Party and it delineated different classifications of citizenship within Myanmar, significantly constraining the conditions

[54] Chan, Elaine. "Rohingya". *Encyclopedia Britannica*, (22 October 2024).
[55] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order No. 178,* (23 January 2020), p. 10, para. 15.
[56] *The Rohingya, Justice and International Law*, p. 5.
[57] Advisory Commission on Rakhine State. *Towards a peaceful, fair and prosperous future for the people of Rakhine: final report of the advisory commission on Rakhine State,* (2017), p. 12.
[58] *The Rohingya, Justice and International Law*, p. 6.

under which it could be obtained.[59] This legislation has been critically evaluated as discriminatory toward the Rohingya, as Section 3 excludes them from the list of 135 recognized ethnic groups, effectively denying them access to citizenship.[60]

The law is still in force and establishes three distinct categories of citizenship: full citizens, associate citizens and naturalized citizens.[61] These distinctions predominantly align with ethnic and religious divides, institutionalizing the exclusion and discrimination of minority groups through their citizenship status.[62] The existence of different categories of citizenship has made the question of whether this population's history in Myanmar predates the colonial period, thereby qualifying them for the t*aing-yin-tha* status, a crucial factor in determining their legal recognition and rights.[63] Individuals who qualify as citizens by birth are exclusively those born to two taing-yin-tha parents.[64] They represent the sole category of citizens whose citizenship cannot be revoked by the State.[65] For individuals designated as non taing-yin-tha, there is no automatic pathway to citizenship by birth, each citizenship status is postponed pending individual assessment. Instead of addressing their situation by acknowledging their connection to Myanmar and building on their participation in society prior to 1982, the law and the subsequent documentation processes have perpetuated their indeterminate status, further exacerbating inter-communal violence.[66] At the individual level, gaps in the law have created significant barriers to accessing citizenship. Specifically, the law and its associated procedures operate on the assumption that the identity and citizenship status of both parents are always known and documented.[67] This presumption poses challenges in cases where one or both parents are either unknown or lack documentation. Additionally, the documentation system has proven cumbersome in addressing the needs of migrants and children born abroad.[68] In 1989, the government began issuing Citizens Scrutiny Cards to residents, designating them by color: pink for full citizens, blue for associate citizens, and green for naturalized citizens, and the Rohingya were not

[59] Brett, Peggy and Hlaing, Kyaw Yin. "Myanmar's 1982 citizenship law in context", *TOAEP Policy Brief Series*, No. 122 (2020), p. 1.
[60] Ibidem; Haque, Md. Mahbubul. "Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma", (2017), 37(4), *Journal of Muslim Minority Affairs*, p. 457.
[61] Takemura, Hitomi. *The Rohingya crisis and the International Criminal Court*, (Springer Nature 2023), p. 2, (hereinafter "The Rohingya crisis and the International Criminal Court")
[62] Brett, Peggy and Hlaing, Kyaw Yin. "Myanmar's 1982 citizenship law in context", *TOAEP Policy Brief Series*, No. 122 (2020), p. 3.
[63] Ibidem, p. 4.
[64] Rhoads, Elizabeth L. "Citizenship denied, deferred and assumed: a legal history of racialized citizenship in Myanmar", (2022), 27(1), *Citizenship Studies*, p. 46. *Taingyintha* or "son of the territory" is usually translated as "national races" or "ethnic nationalities" see Cheesman, Nick. "How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya", (2017), 47(3), *Journal of Contemporary Asia*, p. 461.
[65] *Burma Citizenship Law,* 15 October 1982, s. 8(b).
[66] Brett, Peggy and Hlaing, Kyaw Yin. "Myanmar's 1982 citizenship law in context", *TOAEP Policy Brief Series*, No. 122 (2020), p. 4.
[67] Ibidem.
[68] Ibidem.

granted any of such cards.[69] Only after the pressing of the UNHCR, the Rohingya were issued Temporary Registration Cards. However, this category of card does not specify nationality and, consequently, cannot be utilized as valid evidence of citizenship.[70] This statelessness condition bans a big part of the Rohingya population from voting, studying, working, traveling, marrying or practicing their religion. As of today, the majority of stateless Rohingya refugees lives in Bangladesh and Malaysia (98%).[71]

Myanmar is not a party to the 1954 Convention relating to the Status of Stateless Person nor to the 1961 Convention on the Reduction of Statelessness. Furthermore, it has not ratified the 1951 Convention relating to the Status of Refugees or the 1967 Protocol. However, this situation is not uncommon in the Asia-Pacific region, where the majority of States remain outside the framework established by the Refugee Convention.[72] While the jurisprudence and refugee policies of nations such as Bangladesh, Indonesia and Thailand have been shaped by the Refugee Convention regime,[73] Bangladesh has only sporadically recognized Rohingya migrants as "refugees", predominantly categorizing them as "Undocumented Myanmar Nationals".[74] Consequently, the Rohingya's stateless status complicates the willingness of many countries to accept them as refugees. For instance, Japanese courts have exhibited caution in determining whether discrimination against the Rohingya as stateless individuals constitutes persecution warranting protection under the Refugee Convention.[75]

Myanmar's ratification of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide underscores an additional layer of international obligations, yet the country's history has been characterized by intricate inter-ethnic conflicts. Additionally, the nation has a background of different foreign interventions. The current Rohingya crisis has intensified primarily due to the regime's treatment of the ethnic group, resulting in a substantial number of Rohingya refugees.[76] This situation prompts critical inquiries regarding the avenues available for holding states and individuals accountable for inhumane actions in such circumstances.

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[69] *The Rohingya crisis and the International Criminal Court*, p. 2.
[70] Ibidem.
[71] UNHCR, *Rohingya Emergency*, (2019), https://www.unrefugees.org/emergencies/rohingya-refugee-crisis/.
[72] Moretti, Sébastien. "Southeast Asia and the 1951 Convention Relating to the Status of Refugees: Substance without Form?", (2021), 33(2), *International Journal of Refugee Law*.
[73] Ibidem; *The Rohingya crisis and the International Criminal Court*, p. 2.
[74] Janmyr, Maja. "The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda", (2021), 33(2), *International Journal of Refugee Law*, p. 206.
[75] Arakaki, Osamu and Akiyama, Hajime. *Statelessness conventions and Japanese laws*, (UNHCR Representation in Japan, Tokyo 2016), p. 85.
[76] *The Rohingya crisis and the International Criminal Court*, p. 2.

1.2 Historical Background to the Rohingya Crisis

The designation "Rohingya" is believed to have derived from the ancient name of the Arakan Kingdom, known as Rohang or Roshang, thereby denoting its inhabitants.[77] While its origins are debated,[78] one theory traces the term back to 1799,[79] though its contemporary usage is thought to have emerged in the 1950s.[80] This post-World War II period also marked the onset of efforts by this group to gain recognition as Muslims within the context of what was then Burma.[81] However, the Rakhine Burmese community and Myanmar's State authorities often regard the Rohingya as immigrants introduced to their country during the British colonial rule in the 19th and 20th centuries.[82] Conversely, the Bangladeshi government denies that the Rohingya population originate from Bangladesh.[83] These conflicting perspectives on the historical origins of the Rohingya are further complicated by the low level of archeological testimonies, which restricts access to conclusive evidence.[84]

Rohingya historical narratives uniformly strive to establish the Rohingya as an indigenous community with ancient roots in the Arakan region, claiming that a Muslim presence in northern Rakhine State originated well before the arrival of the ethnic Rakhine in the ninth or tenth centuries,[85] and thus also predating the arrival of the Burman population into Burma.[86] Proponents of this narrative assert that numerous waves of settlers have been integrated over the centuries into a cohesive ethnic identity, characterized by a profound historical connection to the land and a unique language, culture and history that are indigenous to the region. Historically, Arakan occupied a pivotal position at the juncture of Muslim sultanates to the west and Buddhist kingdoms to the east, and accordingly to these narratives, this geographical context fostered a prolonged period of largely peaceful coexistence between Muslim and Buddhist communities.[87] This perspective posits that historically,

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[77] *The Rohingya crisis and the International Criminal Court*, p. 12; Velath, Priyanca Mathur and Chopra, Kriti. "The stateless people: Rohingya in Hyderabad", in Chaudhury S.B.R. and Samaddar, R. (eds) *The Rohingya in South Asia: people without a state,* (Routledge, London 2018), p. 75.
[78] Ibidem.
[79] De Lang, Niki Esse. "The Rohingya and other Muslim minorities in Myanmar: human rights and the marginalisation of the most vulnerable", in De Varennes, Fernand and Gardiner, Christie M. (eds), *Routledge handbook of human rights in Asia* (Routledge, London 2019), p. 159.
[80] Leider, Jacques. "Rohingya: the history of a Muslim identity in Myanmar", in Ludden, David (ed), *Oxford Research Encyclopedia of Asian History* (Oxford University Press, Oxford 2018).
[81] Leider, Jacques. "Rohingya: the foundational years*", TOAEP Policy Brief Series, No. 123* (2020), p. 1.
[82] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 2.
[83] Farzana, Kazi Fahmida. *Memories of Burmese Rohingya refugees: contested identity and belonging,* (Palgrave Macmillan, New York 2017), p. 2.
[84] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" conflict*, (Oxford University Press, New York 2018), p. 78.
[85] Gutman, Pamela. *Ancient Arakan: With Special Reference to its Cultural History between the 5th and 11th Centuries*, (Ph.D. thesis, Australian National University 1976).
[86] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" conflict*, (Oxford University Press, New York 2018), p. 78.
[87] Ibidem, p. 79.

Arakan served more as a frontier region of India and the Bengal region than as a boundary of Burma, facilitating the interaction between these two worlds and acting as a conduit for the transmission of medieval Muslim scholarship into Burma.

A widely accepted interpretation of Rohingya origins identifies four distinct waves of Muslim migration and settlement in the region:[88] these narratives aim to provide a historical basis for the Rohingya's claim to indigenous status in the Arakan.[89] In 1826, Arakan was ceded to Great Britain as the result of British victory in the First Anglo-Burmese War (1824–26).[90] Following their liberation from Burmese oppression, the Arakanese pledged allegiance to the British.[91]

1.2.1 Colonial Period

During the British colonial period, Burma experienced its fifth wave of migration, which exacerbated preexisting animosities between the Burmese and Arakanese ethnic groups.[92] Following a series of Anglo-Burmese wars (1824–26, 1852–53, and 1885), Britain consolidated control over Burma, establishing a colonial government in Akyab (modern-day Sittwe), now the capital of Rakhine State.[93] Seeking to increase agricultural productivity in Arakan, the British encouraged migration from Chittagong, leading to a significant increase in the Muslim population.[94]

The arrival of economic migrants from the British Raj created substantial friction with the indigenous Burmese population, who were already facing unemployment and viewed the newcomers as competitors.[95] Tensions escalated further after Burma formally separated from India in 1937, with a surge in anti-colonial and anti-Muslim sentiment.[96]

These hostilities were compounded during World War II, when the Japanese invasion polarized the region: while many Muslims in Arakan remained loyal to the British, the Rakhine people often sided with Japanese forces, who supported the Burmese Independence Army under General Aung San.[97] This divide led to widespread violence, with the Japanese army reportedly targeting Rohingya who aligned with the British.[98] The British, in response, organized the so called "V Force" a guerrilla

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[88] Ibidem, p. 78.
[89] Ibidem, p. 79.
[90] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 27.
[91] Farzana, Kazi Fahmida. *Memories of Burmese Rohingya refugees: contested identity and belonging,* (Palgrave Macmillan, New York 2017), p. 44; *The Rohingya crisis and the International Criminal Court*, p. 15.
[92] Chowdhory, Nasreen and Mohanty, Biswajit. *Contextualizing citizenship, nationalism and refugeehood of Rohingya: an introduction*, (Springer, Singapore 2020), p. 41.
[93] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 9.
[94] Ibidem, p. 28.
[95] Ibidem, p. 62.
[96] Chowdhory, Nasreen and Mohanty, Biswajit. *Contextualizing citizenship, nationalism and refugeehood of Rohingya: an introduction*, (Springer, Singapore 2020), p. 41.
[97] Ibidem.
[98] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 12.

unit composed of Arakanese Muslims, exacerbating the already fraught relations between Muslim and Buddhist communities.[99] The ethnic conflict of colonial origin resulted in substantial casualties on both sides and fostered long-lasting distrust.[100]

Following an agreement with British Prime Minister Clement Atlee, promising Burmese independence on January 27th, 1947, Aung San, recognizing the importance of uniting the country's various ethnic groups, organized the Patlong Conference: he envisioned a post-independence Burma that would embrace all citizens equally.[101] The Panglong Conference was then held on February 12th, 1947 and produced the Panglong Agreement.[102] The Accord's preamble emphasized that the Shans, Kachins and Chins would achieve freedom more swiftly through cooperation with the Interim Burmese Government; however, other groups, including the Karen, Mon and Arakanese, were neither represented at the conference nor signed the Accord.[103] Following this, a Constituent Assembly was elected in April 1947, and the new Constitution promulgated by it included provisions for the autonomy of ethnic minorities, although not mentioning the Rohingya.[104]

The legacy of British colonialism, coupled with wartime migration and divisive colonial policies, entrenched deep-seated ethnic divisions. These factors have contributed significantly to the complexities of Burma's modern-day Rohingya crisis, with Britain's historical role as a colonial power — and its position as a permanent member of the UN Security Council — highlighted as grounds for a moral responsibility to engage actively in addressing and resolving this ongoing issue.[105]

1.2.2 Post – Independence

Following the Japanese withdrawal in 1945, Burma gained independence from the British rule on January 4th, 1948, under the Panglong Agreement. In the 1950s, Prime Minister U Nu's administration recognized the Rohingya as an indigenous group,[106] granting them political rights and parliamentary representation until a military coup in 1962 - initiated by General Ne Win - began a gradual erosion of their rights. [107]

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[99] Ibidem.
[100] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" Conflict*, (Oxford University Press, New York 2018), p. 15.
[101] Ibrahim, Azeem. *The Rohingyas: Inside Myanmar's Hidden Genocide*, (Hurst & Company, London 2016), p. 36.
[102] Ahmed Kawser and Mohiuddin Helal, *The Rohingya Crisis* (Lexington Books, Maryland 2020) p. 112.
[103] Clarke Sarah L, Myint Seng Aung Sein and Siwa Zabra Yu, *Re-examining Ethnic Identity in Myanmar* (Centre for Peace and Conflict Studies, Siem Reap 2019) p. 20; *The Rohingya crisis and the International Criminal Court*, p. 18.
[104] The Burma Constitution. (1948), 2, *Australian Journal of International Affairs*.
[105] *The Rohingya crisis and the International Criminal Court*, p. 19.
[106] Ibidem.
[107] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 14.

Under Ne Win's socialist junta, Burma was reshaped as a one-party State under the Burma Socialist Programme Party (BSPP), and the 1974 Constitution formalized the exclusion of the Rohingya, who were revoked of the status granted to them since independence.[108] This led to Operation Nagamin – or Dragon King - in 1978, a citizenship registration operation that displaced up to 250,000 Rohingya to Bangladesh within three months.[109] Although they were allowed to return the following year under international pressure, the government's stance against the Rohingya remained rigid.[110] As previously mentioned, in 1982, the Burmese Citizenship Law legally excluded the Rohingya from the list of 135 recognized ethnic groups, marking them as foreigners or Bengalis.[111]

In 1988, a wave of student-led protests against Ne Win's authoritarian regime erupted into the 8888 Uprising,[112] and as domestic unrest intensified, Ne Win stepped down in July.[113] One month later, on September 18th, 1988, General Saw Maung took control through a coup, dismantling the BSPP and establishing a new military regime known as the State Law and Order Restoration Council (SLORC).[114] The SLORC not only suspended the 1974 Constitution but also began altering the nation's identity, including replacing many names of Burmese origin, including the country's name from Burma to Myanmar in 1989.[115]

SLORC held a general election in May 1990,[116] where the National League for Democracy (NLD), led by Aung San Suu Kyi, won by a landslide.[117] However, SLORC refused to acknowledge the election results until a new Constitution was implemented,[118] and the subsequent protests were quashed. This political repression fueled the mobilization of Rohingya militias,[119] prompting a brutal crackdown by the Tatmadaw in 1991–92, which led around 250,000 refugees to flee to Bangladesh.[120] In April 1992, the military operation was interrupted and, with changes in leadership,[121] General Than

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[108] Ibrahim, Azeem. *The Rohingyas: inside Myanmar's hidden Genocide,* (Hurst and Company, London 2016), p. 8.
[109] Thawnghmung, Ardeth Maung. "The politics of indigeneity in Myanmar: competing narratives in Rakhine State", (2016), 17(4), *Asian Ethnicity*, p. 531-532.
[110] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 15.
[111] See 2(e) of the Burmese Citizenship Law (1982).
[112] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction*, (Kube Publishing, Markfield 2018), p. 16.
[113] Clarke, Sarah L., Myint, Seng Aung Sein and Siwa, Zabra Yu. *Re-examining ethnic identity in Myanmar,* (Centre for Peace and Conflict Studies, Siem Reap 2019), p. 26.
[114] Ibidem.
[115] Ibidem.
[116] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 16.
[117] Ibidem.
[118] Clarke, Sarah L., Myint, Seng Aung Sein and Siwa, Zabra Yu. *Re-examining ethnic identity in Myanmar,* (Centre for Peace and Conflict Studies, Siem Reap 2019), p. 26; *The Rohingya crisis and the International Criminal Court*, p. 21.
[119] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" Conflict*, (Oxford University Press, New York 2018), p. 78.
[120] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction*, (Kube Publishing, Markfield 2018), p. 16; *The Rohingya crisis and the International Criminal Court*, p. 21.
[121] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" Conflict*, (Oxford University Press, New York 2018), p. 17.

Shwe replaced Saw Maung,[122] initiating the drafting of a new Constitution, a process that took from 1993 to 2007.[123] SLORC was also rebranded as the State Peace and Development Council (SPDC). In 2003, Aung San Suu Kyi's convoy was attacked, the NLD was suppressed, and she was placed under house arrest.[124] Rising anti – government sentiment intensified following gas and oil price hikes and culminated in demonstrations of Buddhists against the junta, in the so called "Saffron Revolution".[125] In order to answer the demonstrations, the SPDC introduced a conclusive draft of the Constitution in February 2008, which was approved through a popular referendum with the support of more than 90 percent of the population [126] – in this occasion also the Rohingya were allowed to participate to the vote.[127]

Prior to the 2010 elections, two political parties were established to represent the interests of Muslims in Rakhine State: the National Democratic Party for Development (NDPD) and the Democracy and Human Rights Party (DHRP). In 2010, Myanmar's military leaders also established the Union Solidarity and Development Party (USDP).[128] The NLD chose to boycott the election, leading to a dominant victory for the USDP, which secured nearly 80% of the seats in both legislative chambers. The United Nations raised concerns over the legitimacy of the electoral process and Western nations dismissed the results as fraudulent.

In 2012, violent confrontations erupted between Buddhists and Rohingya in Rakhine State, leading to the imposition of a state of emergency and triggering a new wave of Rohingya refugees.[129] In 2013, the Rohingya established the Arakan Rohingya Salvation Army (ARSA) - Harakat al-Yakin- in a bid to address their ongoing plight.[130] The ARSA, reportedly led by individuals from Pakistan and Bangladesh, had fewer than six hundred active members at the time.[131] Instead, on the Rakhine side various non-State armed groups, both nationalist and communist, have resisted the Myanmar

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[122] Clarke, Sarah L., Myint, Seng Aung Sein and Siwa, Zabra Yu. *Re-examining ethnic identity in Myanmar,* (Centre for Peace and Conflict Studies, Siem Reap 2019), p. 27.
[123] Ibidem.
[124] Ewing-Chow, Michael. "First do no harm: Myanmar trade sanctions and human rights" (2007), *Northwestern University Journal of International Human Rights*, p. 154; *The Rohingya crisis and the International Criminal Court*, p. 21.
[125] Steinberg, David. "Globalization, dissent, and orthodoxy: Burma/Myanmar and the Saffron Revolution" (2008), 9(2), *Georgetown Journal of International Affairs*, p. 53; *The Rohingya crisis and the International Criminal Court*, p. 22.
[126] Nardi, Dominic J. "Finding Justice Scalia in Burma: constitutional interpretation and the impeachment of Myanmar's constitutional tribunal" (2014), 23(3), *Pac Rim Law & Policy Journal*, p. 650; *The Rohingya crisis and the International Criminal Court*, p. 22.
[127] Haque, Mahbubul. "A future for the Rohingya in Myanmar", in Norman K. Swazo, Sk. Tawfique M. Haque, Md. Mahbubul Haque, Tasmia Nower (eds), *The Rohingya crisis: a moral, ethnographic, and policy assessment*, (Routledge, Abingdon 2020), p. 65.
[128] Kipgen, Nehginpao. "The 2020 Myanmar election and the 2021 coup: deepening democracy or widening division" (2021), 52(1), *Asian Affairs*, p. 3.
[129] Clarke, Sarah L., Myint, Seng Aung Sein and Siwa, Zabra Yu. *Re-examining ethnic identity in Myanmar,* (Centre for Peace and Conflict Studies, Siem Reap 2019), p. 45; *The Rohingya crisis and the International Criminal Court*, p. 23.
[130] *The Rohingya crisis and the International Criminal Court*, p. 23.
[131] Ibidem.

Army since the country gained independence.[132] The most prominent Rakhine insurgency today is the Arakan Army (AA), an ethnic Rakhine and Buddhist group established in Kachin in 2009, which has since expanded its influence and operational strength across Rakhine.[133] Over recent years, the AA has reportedly caused the deaths of numerous Myanmar security personnel.[134]

The NLD won the 2015 elections, leading to the formation of a new government in March 2016.[135] Following Aung San Suu Kyi's appointment as State Counsellor, her office, in collaboration with the Kofi Annan Foundation, established an Advisory Commission on Rakhine State to analyze the challenges affecting the region.[136] In August 2017, the Commission submitted its final report to the Myanmar government, though no progress was achieved in the repatriation of Rohingya refugees.[137] Instead, the government intensified its crackdown on the ARSA during 2016-17,[138] officially designating the group as a terrorist organization.[139]

In the general election of November 8th, 2020, held amid the COVID-19 pandemic, the NLD won a new five-year term.[140] However, on February 1st, 2021, just hours before the National Assembly was set to convene, the military staged a coup, detaining NLD leaders.[141] Claiming allegations of electoral fraud, the military's action was widely seen as a regression from Myanmar's democratic progress and a setback for peace negotiations with the country's ethnic minorities.[142]

Following the military takeover in February 2021, over 1.3 million people were displaced in Myanmar due to the increased violence, bringing the total number of internally displaced persons in the country to more than 2.6 million.[143] Additionally, over 1.3 million refugees and asylum seekers from Myanmar are hosted abroad, including nearly 1 million stateless Rohingya refugees in Bangladesh.[144] The majority reside in Kutupalong and Nayapara refugee camps in Cox's Bazar, some of the world's largest and most densely populated refugee camps.[145] More than half of the camp

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[132] *The Rohingya, Justice and International Law*, p. 8.
[133] Ibidem.
[134] Advisory Commission on Rakhine State. *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (2017); *The Rohingya, Justice and International Law*, p. 19.
[135] Bari, Muhammed Abdul. *The Rohingya crisis: a people facing extinction,* (Kube Publishing, Markfield 2018), p. 21.
[136] Ibidem; *The Rohingya crisis and the International Criminal Court*, p. 23.
[137] Ibidem.
[138] Parveen, Sanjida and Mehebub, Sahana. "Identity and Humanitarian-Based Approach: Resolution and Resolving the Rohingya Refugee Crisis", in Bülbül, Kudret, Islam, Md. Nazmul and Khan, Md. Sajid (eds), *Rohingya Refugee Crisis in Myanmar: Ethnic Conflict and Resolution* (Palgrave Macmillan, Singapore 2022), p. 362.
[139] Lee, Ronan. "Myanmar's Arakan Rohingya Salvation Army (ARSA): an analysis of a New Muslim Militant Group and its strategic communications" (2021), *Perspectives on Terrorism*, p. 61.
[140] Kipgen, Nehginpao. "The 2020 Myanmar election and the 2021 coup: deepening democracy or widening division" (2021), 52(1), *Asian Affairs*, p. 1.
[141] Ibidem, p. 12.
[142] Ibidem, p. 14.
[143] UNHCR. "Rohingya Refugee Crisis Explained" (22 August 2024), https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/.
[144] Ibidem.
[145] Ibidem.

population is under 18 and women and children constitute over 75% of the refugee population, with the Rohingya refugees now making up a third of Cox's Bazar's area total population.[146]

Beyond Bangladesh, Rohingya refugees have also sought refuge in neighboring countries, including Malaysia (168,400), India (93,100), Thailand (84,000), and various other locations throughout the region.[147]

1.2.3 Allegations Regarding the Plight of the Rohingya

The conflict in Rakhine State has often been described as a clash of narratives, with both Burmese Buddhists and Muslims attempting to legitimize their political claims and their residency status in the region.[148] Myanmar, a multi-ethnic country, has long struggled with governance, especially as military power has grown over time. Historical events such as British colonial rule and the Japanese occupation during World War II have contributed to indifference among the Burmese majority toward the ongoing Rohingya crisis.[149]

The true history of the Rohingya remains difficult to discern and the situation mirrors the broader complexity of Myanmar's multi-ethnic society, which lacks a unified historical narrative. However, this does not justify the ongoing subjugation and persecution of minorities. In fact, Myanmar's complicated history underscores the necessity for a path toward peaceful coexistence.

Since the 1960s, Myanmar has experienced frequent armed clashes between the military junta and various ethnic minorities, particularly in Kachin and Shan States.[150] While the challenges faced by Myanmar's minorities are significant, the international attention drawn by the persecution of the Rohingya highlights the severity of their plight. The 2021 military coup, however, has taken the crisis further from any potential political resolution, leaving the international community's efforts to address the issue under intense scrutiny.

In 2012, the gang rape and murder of a Rakhine woman by three Rohingya individuals led to retaliatory attacks and coincided with a surge in military-led violence targeting the Rohingya

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[146] Ibidem.
[147] Ibidem.
[148] Advisory Commission on Rakhine State. *Towards a peaceful, fair and prosperous future for the people of Rakhine: final report of the advisory commission on Rakhine State* (2017), p. 19; *The Rohingya crisis and the International Criminal Court*, p. 24.
[149] Parveen, Sanjida and Mehebub, Sahana. "Identity and Humanitarian-Based Approach: Resolution and Resolving the Rohingya Refugee Crisis", in Bülbül, Kudret, Islam, Md. Nazmul and Khan, Md. Sajid (eds), *Rohingya Refugee Crisis in Myanmar: Ethnic Conflict and Resolution* (Palgrave Macmillan, Singapore 2022), p. 360-361.
[150] Ochi, Megumi and Matsuyama, Saori. "Ethnic Conflicts in Myanmar: The Application of the Law of Non-International Armed Conflict", in Linton, Suzannah, McCormack, Tim and Sivakumaran, Sandesh (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press, Cambridge 2019), p. 340.

community.[151] The retaliatory attacks prompted Rohingya residents in the town of Maungdaw to riot, resulting in property destruction and loss of life.[152] In response, the government declared a state of emergency in Rakhine, granting the military authority to intervene.[153] This escalation led to numerous human rights violations against the Rohingya, including excessive use of force, torture, property destruction and forced internal displacement.[154] The widespread inter-communal violence in Rakhine resulted in at least 192 deaths, with 134 Muslims and 58 Rakhines among the casualties.[155] While both communities suffered significantly, property destruction was disproportionately severe for Muslims, who lost 7,422 of the 8,614 homes destroyed—approximately 86 percent. Furthermore, over 95 percent of the estimated 140,000 internally displaced persons were Muslims, with around 120,000 still confined to inadequate IDP camps.[156] In response to the violence, the ARSA emerged as a resistance organization.[157]

On October 9th, 2016, the ARSA carried out a significant assault on government security forces, marking one of the most extensive Muslim - led attacks on Myanmar's government forces in recent memory.[158] After the attack on Myanmar border police, the military launched a sweeping crackdown against the Rohingya population: the clearance operations – as Myanmar officials and government define it - led to an exodus of approximately 87,000 Rohingya, who fled to Bangladesh seeking refuge from the escalating violence.[159] It has also been estimated that between 25th August 2016 and 24th September 2016, at least 21.5% of the newly displaced population were subjected to violence.[160] The same tactics and violations were later repeated on a larger scale during the events of 2017.[161]

As in 2012, the violence of 2016 led to an escalation of oppressive measures targeting the Rohingya.[162] Security forces intensified their presence, with an increase in camps and checkpoints, further restricting the Rohingya's already limited freedom of movement.[163] Daily life became

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[151] Human Rights Watch, *"The Government Could Have Stopped This": Sectarian Violence and Ensuing Abuses in Burma's Arakan State* (1 August 2012), ISBN 1-56432-922-4, p. 18.
[152] Ibidem.
[153] Ibidem, p. 19.
[154] Wheeler, Caleb H. "Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation" (2019), 17(3), *Journal of International Criminal Justice.*
[155] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 9-10.
[156] Ibidem.
[157] HRC Report, para. 44, p. 10.
[158] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 9-10.
[159] Ali, Marium and Duggal, Hanna. "Rohingya Exodus Explained in Maps and Charts" (Al Jazeera, 25 August 2022), https://www.aljazeera.com/news/2022/8/25/rohingya-exodus-explained-in-maps-and-charts.
[160] Médecins Sans Frontières, *"No One Was Left": Death and Violence Against the Rohingya in Rakhine State* (March 2018), p. 11.
[161] HRC Report, para. 44, p. 10.
[162] Ibidem, para. 45, p. 10.
[163] Ibidem.

intolerable as protective fences around their homes were dismantled, and knives along with other sharp tools were confiscated. Incidents of security patrols, house searches and acts of violence such as beatings, theft and extortion rose significantly. Hundreds of men and boys were detained, often focusing on the most educated and influential individuals within the community. Many detainees were subjected to abuse or torture while in custody, and while some were released upon payment of bribes, others remain missing to this day. Women and girls faced horrific acts of sexual violence, including gang rape, further compounding the suffering endured by the Rohingya.[164]

At the same time, authorities intensified efforts to enforce the issuance of the National Verification Card upon the Rohingya.[165] This card, widely rejected by the community, was viewed as a symbol of a discriminatory system designed to solidify their classification as "Bengali immigrants".[166] Gradually, the card became mandatory for passing through checkpoints, accessing farmland and engaging in fishing activities. The process was marked by intimidation and coercion, including community meetings held under the presence of police and military personnel, where threats were issued at gunpoint.[167]

The biggest exodus faced by the Rohingya began in August 2017, when ARSA attacked some military positions in Rakhine State and the government started an indiscriminate retaliation on the Rohingya civil population.[168] Reports indicated that during the crackdown the Myanmar military systematically burned numerous Rohingya villages and fired indiscriminately at unarmed civilians, including men, women and children. This time around 742,000 people were forced to flee to Bangladesh.[169] Although the Government asserted that the "clearance operations" had concluded on the 5th of September, military activities persisted until well into October.[170] Freedom of movement for the remaining Rohingya was further curtailed, confining them to their homes with limited access to markets and sources of livelihood, thereby worsening malnutrition.[171] Humanitarian assistance was heavily restricted or entirely blocked. Meanwhile, no measures were taken to protect the Rohingya from vigilante attacks, nor from the theft of their property, livestock, and other possessions by members of other ethnic groups.[172] The majority of those fleeing arrived within the first three months of the crisis, with women and children comprising the bulk of those reaching Bangladesh: over 40%

[164] Ibidem.
[165] Ibidem, para. 46, p. 10.
[166] Ibidem.
[167] Ibidem.
[168] Ibidem.
[169] UNHCR, "Rohingya Refugee Crisis Explained" (22 August 2024), https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/.
[170] HRC Report, para. 49, p. 10.
[171] Ibidem.
[172] Ibidem.

of this group are estimated to be under the age of twelve.[173] As previously mentioned, they are labelled as "Undocumented Myanmar nationals" and lack a legal status in Bangladesh. The authorities' refusal to issue birth registrations or other civil documentation further complicates efforts to accurately assess the scope of their humanitarian needs. Without legal recognition, the Rohingya are barred from accessing education and formal employment, leaving them vulnerable to exploitation and significant protection risks.[174]

The mass displacement and destruction of Rohingya villages were followed by the systematic seizure of the vacated land.[175] Bulldozers were used to flatten burned, damaged, and even intact structures and vegetation, erasing all traces of Rohingya communities while also eliminating potential evidence of crimes.[176] Entire Rohingya villages have disappeared, replaced by new structures, including security force posts and housing allocated to other ethnic groups. Government "resettlement" plans indicate that nearly all newly constructed housing for displaced communities is intended for non-Rohingya residents.[177] Additionally, infrastructure projects such as roads and mines are being developed on appropriated Rohingya lands.

Although the Government has nominally committed to the repatriation of Rohingya refugees, there is no evidence so far that this process will uphold human rights standards.[178] The repatriation process mandates acceptance of National Verification Cards and involves processing in reception centers enclosed with barbed wire.[179] The root causes of the exodus, including state-sanctioned oppression and exclusionary, divisive rhetoric, are denied but remain unaddressed.[180] The same security forces responsible for gross human rights violations, carried out with impunity, are designated to oversee the safety of returnees.

1.3 Criticism and International Reactions

Before proceeding to a detailed analysis of the cases brought before the International Court of Justice and the International Criminal Court, it is worth to present the various perspectives that have been articulated regarding the Rohingya crisis.

The Myanmar junta's repeated and severe human rights violations prompted the United Nations to respond by establishing mechanisms for oversight and intervention. Between 1992 and March

[173] UNHCR, *Rohingya Emergency* (2019), https://www.unhcr.org/emergencies/rohingya-emergency.
[174] Ibrahim, Azeem. *The Rohingyas: Inside Myanmar's Hidden Genocide* (Hurst & Company, London 2016), p. 51.
[175] HRC Report, para. 50, p. 11.
[176] Ibidem.
[177] Ibidem.
[178] HRC Report, para. 51, p. 11.
[179] Ibidem.
[180] Ibidem.

2021, the United Nations Commission on Human Rights (UNCHR), later replaced by the United Nations Human Rights Council (HRC) in March 2006, appointed six special rapporteurs on the human rights situation in Myanmar.[181] Additionally, since 2018, the UN Secretary-General has appointed a special envoy tasked with facilitating dialogue between Myanmar and other concerned parties.

This progression highlights how the HRC's involvement grew in response to escalating abuses against the Rohingya.[182] The crisis garnered further attention after the above - mentioned incident of May 28th, 2012, when the 27-year-old woman was killed in southern Rakhine State.[183] On June 5th, Myanmar's state-run newspaper, *The New Light of Myanmar*, reported that the case involved alleged rape and murder, attributing the crime to suspects described as "Bengali/Muslim."[184] This event is widely considered the catalyst for the most recent atrocities against the Rohingya.[185]

In June 2013, the UNHRC expressed grave concern over widespread human rights abuses targeting Muslims in Myanmar, particularly the Rohingya in Rakhine State, and urged the Myanmar government to halt the violence and violations immediately.[186] However, during an interactive dialogue as part of Myanmar's Universal Periodic Review (UPR) by the HRC, the Myanmar government maintained that "[i]n Myanmar, there was no minority community under the name of "Rohingya"."[187]

1.3.1 The Annan Commission

The Advisory Commission on Rakhine State, headed by the former UN Secretary – General Kofi Annan – the Annan Commission – was an international advisory commission set up in order to promote the social and economic well – being of both the Buddhist and Rohingya communities in Myanmar's conflict area of Rakhine State. Its mandate was to investigate the complex issues facing Rakhine State and propose viable solutions. Consequently, the commission's mandate was not to conduct criminal investigations into specific cases but instead to focus on identifying the structural

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[181] United Nations Commission on Human Rights, *Report on the Situation of Human Rights in Myanmar*, UN Doc. E/CN.4/1992/58 (3 March 1992), para. 3; *The Rohingya Crisis and the International Criminal Court*, p. 28. The special rapporteurs in order of appointment are Yozo Yokota of Japan (1992-1996), Rajsoomer Lallah of Mauritius (1996-2000), Paulo Sergio Pinheiro of Brazil (December 2000-April 2008), Tomás Ojea Quintana of Argentina (2008-2014), Yanghee Lee of the Republic of Korea (2014-2020), and Thomas Andrews of the United States (2020-).
[182] United Nations Human Rights Council, *Resolution on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/RES/13/25 (15 April 2010), para. 12.
[183] IIFFM Report 2018, para. 625, p. 147.
[184] Ibidem.
[185] Ibidem.
[186] United Nations Human Rights Council, *President's Statement, Situation of Human Rights of Muslims in Myanmar* (2013), UN Doc. A/HRC/23/L.26; *The Rohingya crisis and the International Criminal Court*, p. 29.
[187] United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc. A/HRC/31/13 (2015), p. 11, para. 133.

challenges that hinder the establishment of peace in Rakhine.[188] The interpretation offered by the work of the Annan Commission offers an influential perspective, as it was chaired by the esteemed Nobel Peace Prize laureate Kofi Annan and established with the formal endorsement of the Myanmar government. Indeed, in response to a request from the then – State Counsellor Aung San Suu Kyi, the Kofi Annan Foundation and Myanmar's Office of the State Counsellor formed the Commission in September 2016. It consisted of nine members – six Myanmar nationals and three international figures, including Annan himself, Professor Ghassan Salamé from Lebanon, and former Dutch Ambassador Laetitia van den Assum. Although international members participated, the Commission remained essentially a national initiative, reporting directly to Myanmar authorities.[189] The commissioners conducted extensive consultations, engaging with political and religious leaders, civil society groups and various communities throughout Rakhine State.[190] They met with Myanmar's Commander-in-Chief of the Armed Forces, members of parliament, the Central Committee for Peace, Stability and Development in Rakhine, Union ministers, local officials in Rakhine, religious communities, NGOs, Myanmar's international and regional allies, as well as independent experts.[191]

In August 2017, the Annan Commission submitted its 63-page Final Report titled *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine.*[192] The Commission's report was crafted aligning with the preferences of Aung San Suu Kyi in her capacity as Chief State Counselor:[193] as previously mentioned, the report avoided using the terms "Bengali" or "Rohingya", opting instead for terms like "Muslims" or "the Muslim community in Rakhine".[194]

The report identified three primary crises affecting Rakhine State: a development crisis, a human rights crisis and a security crisis.[195] Regarding the grievances of the Muslim population, which feels particularly vulnerable due to its lack of documentation and freedom of movement,[196] it outlined significant measures to address core issues of citizenship, documentation, rights and equality before the law. In the short term, it called for an accelerated citizenship verification process, in accordance with Myanmar's 1982 Citizenship Law.[197] The Myanmar Government should create a clear strategy and timeline for this process, communicated through an extensive outreach campaign, and those who

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[188] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 13.
[189] *The Rohingya, Justice and International Law*, p. 6.
[190] Ibidem.
[191] Ibidem.
[192] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017).
[193] *The Rohingya, Justice and International Law*. Routledge, p. 6.
[194] Ibidem.
[195] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 9-10.
[196] *The Rohingya, Justice and International Law*, p. 8.
[197] Ibidem, p. 9.

have been verified should be immediately granted all the benefits, rights and freedoms associated with citizenship. Any complaints regarding the verification process should be addressed promptly by an independent government authority. The rights of individuals whose citizenship applications are denied should also be clarified.[198] The Commission further suggested revisiting the law, urging the Myanmar Government to align it with international standards, reconsider the connection between citizenship and ethnicity, and explore provisions that allow for naturalization, particularly for stateless individuals.[199] The rights of non-citizens living in Myanmar should be clearly defined and residency rights should be clarified.[200] Pending such a review, the Commission called on the Myanmar Government to interpret and apply existing laws in a non-discriminatory manner.[201]

The Annan Commission also highlighted the restrictions on movement affecting both Rakhines and Muslims, with Muslims, particularly internally displaced persons, being disproportionately impacted.[202] It is recommended that the Myanmar Government ensures freedom of movement for all people, regardless of religion, ethnicity, or citizenship status.[203] This involves mapping all existing movement restrictions, including informal obstacles such as unofficial payments and arbitrary roadblocks, and introducing measures to eliminate such inequalities.[204]

The Commission stressed the importance of promoting communal representation and participation, especially for underrepresented groups like ethnic minorities, stateless individuals and displaced communities.[205] Women should also be included in political decision-making processes. It recommended for household leaders, Village Administrators, and Village Tract Administrators to start being directly elected by the residents of each village or tract.[206]

Additionally, the Commission advocated for a comprehensive strategy to close all IDP camps in Rakhine state.[207] The Myanmar Government should work with international partners to ensure that returns or relocations are voluntary, safe, dignified and in line with international standards. In the meantime, while these camps are being closed, the Government should ensure dignified living

[198] Ibidem.
[199] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 31-32.
[200] *The Rohingya, Justice and International Law*, p. 9.
[201] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 31-32.
[202] Ibidem, p. 50
[203] *The Rohingya, Justice and International Law*, p. 9.
[204] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 34.
[205] Ibidem, p. 48
[206] Ibidem.
[207] *The Rohingya, Justice and International Law,* p. 9.

conditions within them, including improved shelter, water, sanitation, education and livelihood opportunities.[208]

The Commission acknowledged the potential threat of radicalization but advised against responding solely with security measures. Instead, it called for a balanced approach that combines political, developmental, security and human rights strategies to address the root causes of violence and reduce inter-communal tensions.[209] To strengthen and professionalize policing in Rakhine, the security infrastructure should be simplified by creating a unified agency for all policing in the State, with a single chain of command reporting directly to Myanmar's Police Force chief.[210] All security personnel should receive improved training in human rights, community policing, civilian protection, and language skills to enhance intelligence gathering and relations with local communities.[211] Additionally, the police force should reflect the diversity of the population, including women and minorities.[212] For this reason, the Annan Commission also emphasized the importance of enhancing inter-communal dialogue and reconciliation in order to ease tensions between Rakhine communities, as well as strengthening cooperation between local communities and both the Rakhine State and central government agencies.[213]

Although the report was described as "the best proposals to date towards resolution of the underlying issues and long-term drivers of the conflict".[214] It failed to address a crucial event, specifically the "clearance operations" launched against the Rohingya in northern Rakhine on August 25th, 2017, just two days after the report was submitted to the government.[215]

On April 26th, 2018, Secretary-General António Guterres appointed the Swiss diplomat Christine Schraner Burgener as the United Nations Special Envoy on Myanmar.[216] In this role, she facilitated shuttle diplomacy between Bangladesh and Myanmar, acting on the request of both governments, and urged Myanmar to cooperate more fully with the international community to implement the recommendations of the Annan Commission.[217] She also called for the Security

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[208] Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State* (August 2017), p. 36.
[209] Ibidem, p. 10.
[210] Ibidem, p. 55.
[211] Ibidem.
[212] *The Rohingya, Justice and International Law*, p. 10.
[213] Ibidem.
[214] Ware, Anthony and Laoutides, Costas. *Myanmar's "Rohingya" Conflict* (Oxford University Press, New York 2019), p. 198.
[215] United Nations Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.3 (12 September 2019), p. 37, para. 105; *The Rohingya Crisis and the International Criminal Court*, p. 30.
[216] United Nations, *Secretary-General Appoints Christine Schraner Burgener of Switzerland as Special Envoy on Myanmar*(Press Release, 2018).
[217] United Nations Security Council, *Meeting Record*, UN Doc. S/PV.8477 (28 February 2019), p. 2; *The Rohingya Crisis and the International Criminal Court*, p. 34.

Council to take action against the crisis in Myanmar, particularly after the 2021 coup.[218] However, the Council was unable to condemn the coup or take more decisive measures due to a veto by China.[219]

1.3.2 The Independent International Fact – Finding Mission on Myanmar

In March 2017, the United Nations Human Rights Council deployed the Independent International Fact – Finding Mission (IIFFMM) to investigate the facts and context surrounding alleged recent human rights violations and abuses committed by Myanmar's military and security forces, with a primary focus on Rakhine State.[220] It underlined that "The Rohingya are in a situation of severe, systemic and institutionalized oppression from birth to death. Their extreme vulnerability is a consequence of State policies and practices implemented over decades, steadily marginalizing the Rohingya and eroding their enjoyment of human rights. The process of othering the Rohingya and their discriminatory treatment started long before the period covered by the Mission".[221]

The IIFFMM noted that the clearance operations conducted by the Myanmar military indiscriminately targeted the Rohingya population as a whole, showing no attempt to differentiate between ARSA combatants and civilians, nor to specifically pursue a military target or counter any immediate threat.[222] Instead, the campaign was indiscriminate: individuals of all ages, including mothers, infants, pregnant women, the elderly and those with disabilities, were systematically victimized. The assault was marked by severe acts of sexual violence against women and girls, alongside widespread impacts on children, highlighting the brutality of the operations.

In September 2018, the IIFFMM published a comprehensive report detailing its findings on the crisis in Rakhine State, as well as conflicts in Kachin and Shan States. The classification of the Rohingya – whether they constitute an ethnic or religious group - is a crucial factor in determining whether acts against them qualify as persecution within crimes against humanity or as genocide.[223] The report implied that the Rohingya meet both ethnic and religious criteria, supporting this by affirming that they are indeed recognized as such a group: "[the lack of legal status and identity of

[218] United Nations News, 'Myanmar: Timely Support and Action by Security Council "Really Paramount," Says UN Special Envoy' (18 June 2021), https://news.un.org/en/story/2021/06/1094322.
[219] Mahaseth, Harsh and Tulsyan, Aryan. *The Myanmar Coup and the Role of ASEAN* (2022), p. 6.
[220] United Nations Human Rights Council, *Resolution on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/RES/34/22 (2017), para. 11, p. 3; *The Rohingya Crisis and the International Criminal Court*, p. 30.
[221] IIFFM Report 2018, p. 110, para. 458.
[222] IIFFM Report 2019, p. 31, para. 90.
[223] *The Rohingya crisis and the International Criminal Court*, p. 30.

the Rohingya] is State-sanctioned and in violation of Myanmar's obligations under international law because it discriminates on the basis of race, ethnicity and religion".[224] It also concluded that "the factors allowing the inference of genocidal intent are present".[225] It specifically underlined that "Destruction is understood to mean physical or biological destruction, rather than the disbandment or expulsion of the group"[226] and that "the actions of those who orchestrated the attacks on the Rohingya read as a veritable checklist" of what a State would have done if it had "wished to destroy the target group in whole or in part".[227]

The IIFFMM provided extensive, corroborated evidence of mass killings directed at the Rohingya population, revealing the systematic and methodical nature of these acts. In numerous villages, Tatmadaw soldiers reportedly conducted house-to-house operations, forcibly removing individuals from their homes to execute them, or shooting them within their dwellings or as they exited - often in the presence of family members.[228] The mission also confirmed a disturbing and deliberate pattern whereby soldiers pushed or threw individuals, including infants and young children, into burning structures, with particular attention given to targeting Rohingya children, exemplifying acts of severe brutality.[229]

In September 2018, the IIFFMM documented a communication from Myanmar's Foreign Ministry that included links to four videos relating to the August 2017 events in Rakhine State, each containing overtly anti-Muslim and anti-Rohingya rhetoric.[230] The report noted that Aung San Suu Kyi, despite her role as the de facto Head of Government and her considerable moral authority, did not take steps to halt or mitigate the events as they unfolded.[231] She did not pursue alternative measures to fulfill the government's responsibility to safeguard civilians, nor did she publicly condemn or expose the situation. Instead, civilian authorities perpetuated false and inflammatory narratives, denied any misconduct by the Tatmadaw, obstructed independent investigations - including that of the IIFFMM - and sanctioned the destruction of burned Rohingya villages, thereby eliminating crime sites and erasing evidence.[232]

In its final report to the Human Rights Council on 16th September 2019, the IIFFMM concluded that there remains a grave risk of recurring genocidal acts in Myanmar, underscoring Myanmar's

[224] IIFFM Report 2018, p. 118, para. 491.
[225] Ibidem, p. 364, para. 1441.
[226] Ibidem, p. 357, para. 1412.
[227] Ibidem, p. 364, para. 1440.
[228] *The Rohingya, Justice and International Law*, p. 16.
[229] Ibidem.
[230] IIFFM Report 2018, p. 343.
[231] Ibidem.
[232] Ibidem, p. 388, para. 1548.

ongoing failure to uphold its obligation to prevent genocide.[233] The IIFFMM further documented instances of widespread sexual violence deliberately aimed at contributing to the destruction of the Rohingya as a group and dismantling the Rohingya way of life. They found a "notable pattern" of "mass gang rape, involving multiple perpetrators and multiple victims in the same incident"[234], carried out "in open public spaces, in front of family and neighbors, within forested areas near the village; in large houses within the village; and during detention in military and police compounds"[235].

The IIFFMM also determined that the genocidal intent results particularly clear due to the lack of remorse or even recognition of any wrongdoing. Instead, the Tatmadaw's actions are praised in state-controlled media.[236]

This conclusion was reached following an exhaustive two-year investigation conducted by three prominent jurists. The Chairperson of the IIFFMM, Marzuki Darusman, is the former Attorney General of Indonesia. Other members include Radhika Coomaraswamy, the former Chairperson of the Sri Lanka Human Rights Commission, former UN Special Rapporteur on Violence against Women, and former UN Special Representative for Children and Armed Conflict, and Christopher Sidoti, the former Human Rights Commissioner of Australia. The investigation was supported by experts and advisers from the Office of the UN High Commissioner for Human Rights. During the investigation, more than 1,000 victims and witnesses were interviewed, and a large number of documents, photographs and videos were scrutinized.[237] Myanmar's refusal to cooperate or grant access to the IIFFMM did not hinder what the mission asserts was a comprehensive and impartial investigation. The IIFFMM also took the rare step of recommending that senior Tatmadaw generals, including Myanmar's Commander-in-Chief, Senior General Min Aung Hlaing, be investigated and prosecuted for genocide by an international criminal tribunal.[238] The UN Special Adviser on the Prevention of Genocide, Adama Dieng from Senegal, also concluded that Rohingya Muslims have been subjected to killings, torture, rape, burning alive and humiliation, solely because of their identity.[239] The perpetrators' actions appear to be aimed at eradicating the Rohingya from northern Rakhine state, with the intent to potentially destroy the Rohingya as a group. If these actions are proven, they would constitute the crime of genocide.[240]

The satellite imagery analysis conducted by the UN Operational Satellite Application Programme, released in October 2018, revealed that in northern Rakhine State, the Tatmadaw had

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[233] IIFFM Report 2019, p. 176.
[234] IIFFM Report 2018, p. 213, para. 931.
[235] Ibidem.
[236] *The Rohingya, Justice and International Law*, p. 17.
[237] Ibidem.
[238] Ibidem.
[239] Ibidem.
[240] Ibidem.

destroyed or partially destroyed 392 villages, including 37,700 homes and other structures.[241] However, approximately 600,000 Rohingya have remained in Myanmar and, according to the IIFFMM, they remain under significant threat of genocide due to the ongoing measures taken by the State, which continue to reflect the government's intent to eradicate the Rohingya as a group.[242] These actions have been documented by highly credible, independent investigators operating under the authority of the United Nations, intergovernmental bodies and human rights organizations. The first measure involves the forcible segregation and confinement of more than 20 percent of the Rohingya population in internment camps and ghettos, where they live in conditions of extreme vulnerability.[243] According to the IIFFMM, Myanmar forcibly relocated over 120,000 Rohingya men, women and children to displacement camps outside of Sittwe in central Rakhine state in June 2012.[244] For more than seven years, Myanmar has isolated the Rohingya from the outside world by erecting barriers such as barbed wire, police checkpoints and military posts;[245] their movements have been severely restricted, and they have endured both physical and psychological abuse, living in constant fear for their survival.[246] They remain confined in Rakhine state, vulnerable to further waves of mass killings, particularly as they are guarded by the very Tatmadaw responsible for the previous clearance operations.[247]

Myanmar asserts that the confinement of the Rohingya in displacement camps is intended for their protection, primarily to safeguard them from inter-communal violence between the ethnic Rakhine and the Rohingya.[248] However, as noted by the IIFFMM, Myanmar has not substantiated how any genuine threats justify such severe and indefinite restrictions on movement.[249] On certain occasions, Myanmar has even denied the existence of such restrictions imposed on the interned Rohingya population. The remaining 80 percent of the Rohingya continue to reside in villages, where they remain under the stringent surveillance of the Tatmadaw.[250] The Rohingya residing in these villages are compelled to obtain travel permits to leave their designated areas and are typically prohibited from traveling to ethnic Rakhine regions, including the principal towns and markets.[251]

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[241] United Nations Operational Satellite Applications Programme (UNOSAT), *Analysis of Destruction and Other Developments in Rakhine State, Myanmar* (17 September 2018); *The Rohingya, Justice and International Law*, p. 17.
[242] IIFFM Report 2019, p. 54, para. 158.
[243] *The Rohingya, Justice and International Law*, p. 17.
[244] IIFFM Report 2018, p. 164; *The Rohingya, Justice and International Law*, p. 17.
[245] IIFFM Report 2018, p. 124, para. 519.
[246] *The Rohingya, Justice and International Law*, p. 18.
[247] Ibidem.
[248] Ibidem.
[249] Ibidem.
[250] Ibidem.
[251] IIFFM Report 2018, p. 120.

The IIFFMM's report from September 2019 highlights that the restrictions on the movement of the Rohingya have intensified over the preceding year. It details how the Myanmar Government has implemented a series of measures, including local orders, verbal instructions, security checkpoints and the presence of soldiers and patrols, all of which work together to effectively confine the Rohingya to their villages and displacement camps.[252] This State-enforced segregation, the report asserts, creates a "conducive environment for dehumanization and hate campaigns and for wrong perceptions to be engrained in the minds of each community".[253]

The extermination of the Rohingya, confined to internment camps or tightly controlled ghettos and villages, could occur rapidly, at any moment, through a new "clearance operation" carried out by the security forces stationed in these areas. Alternatively, it could unfold gradually, by depriving them of food and other basic necessities for survival. The IIFFMM concluded that while the more immediate method of destruction could be reinstated at any moment, the gradual method is already underway. The report states that the Myanmar government "has severely restricted access to food for the Rohingya in Rakhine State", resulting in "food insecurity directly caused by government laws and policies".[254]Myanmar is implementing this policy of food denial through various means, including the widespread confiscation of agricultural lands on which the Rohingya relied to grow crops essential for their survival.[255] These land confiscations extend beyond the villages destroyed during the clearance operations.[256] Additionally, due to seizures the Rohingya are no longer permitted to consume products from their own land, and the Tatmadaw further exacerbates their deprivation by killing or confiscating their livestock without authorization or compensation.[257]

In recent years, Myanmar has established several commissions to investigate the genocidal acts reported by the IIFFMM and other international observers. However, none of these commissions has found any violations of internationally protected rights. As the UN High Commissioner for Human Rights concluded in 2019: "The establishment of commissions of inquiry has become routine after cyclical episodes of violence in Myanmar, with eight such commissions having been established since 2012 … None of the previous commissions has led to the prosecution of any Tatmadaw official; all have indeed exonerated the army".[258]Also considering this, the IIFFMM concluded that: "Myanmar is not meeting its obligations under the Genocide Convention to conduct an independent criminal

[252] Ibidem, p. 377.
[253] Ibidem, p.123, para. 516.
[254] IIFFM Report 2019, p. 53, para. 156.
[255] *The Rohingya, Justice and International Law*, p. 18.
[256] Ibidem.
[257] Ibidem.
[258] United Nations Human Rights Council, *Situation of Human Rights in Myanmar*, UN Doc. A/HRC/40/37 (11 March 2019), p. 13, para. 57.

investigation into allegations of genocide".[259] The IIFFMM reached this conclusion based on the Myanmar Government's consistent disregard for compelling evidence of genocide occurring on its territory, as well as its failure to establish independent, timely, thorough, effective, credible, and transparent investigative mechanisms.[260]

1.3.3. Myanmar's Independent Commission of Enquiry

On July 30th, 2018, just prior to the release of the IIFFMM's initial report, the Myanmar Government established the Independent Commission of Enquiry (ICOE) to investigate the 2017 events in Rakhine State. The ICOE included two national and two international members, none of whom appeared to possess expertise in complex human rights or criminal investigations.[261] Public statements from both Myanmar authorities and some Commission members indicated potential biases, which raised concerns about the Commission's impartiality from the outset. The ICOE's mandate was limited to recommendations for promoting peace, stability and adherence to law, rather than providing a pathway for accountability in cases of human rights abuses or breaches of international humanitarian law. The ICOE chairperson explicitly noted that the Commission was not designed as an accountability mechanism, describing such efforts as counterproductive and tantamount to "quarreling".[262]

One of the national members was the chief coordinator of the Union Enterprise for Humanitarian Assistance, Resettlement, and Development in Rakhine, a governmental initiative focused on implementing development projects in the region. This commissioner publicly dismissed claims of ethnic cleansing or genocide, adding to doubts about the commission's independence.[263] Given these factors, the IIFFMM ultimately determined "on reasonable grounds" that the ICOE was unlikely to serve as a credible avenue for accountability, even with some level of international involvement.[264]

On January 20th, 2020, the ICOE submitted its extensive 461 - page final report to Myanmar's President and Aung San Suu Kyi. The report indicates that the ICOE's evidence - collection teams interviewed approximately 1,500 witnesses from diverse communities in northern Rakhine, including Muslim and ethnic groups such as the Rakhine, Mro and Daingnet, as well as military and police

[259] IIFFM Report 2019, p. 73, para. 226.
[260] *The Rohingya, Justice and International Law*, p. 19.
[261] *The Rohingya, Justice and International Law*, p. 160.
[262] Ibidem.
[263] Ibidem.
[264] IIFFM Report 2018, p. 409, para. 1619.

personnel.[265] However, it does not mention any interviews conducted with Rohingya refugees residing in camps in Bangladesh.[266] The ICOE apparently found insufficient evidence to assert, let alone conclude, that the crimes committed against the Rohingya or other communities in northern Rakhine were carried out with genocidal intent or any requisite intent for the international crime of genocide.[267] Nevertheless, the commission did recognize that war crimes, severe human rights violations, and breaches of Myanmar's domestic laws occurred during security operations conducted between August 25th and September 5th, 2017.[268] While these offenses involved multiple actors, the ICOE determined there were credible grounds to believe that some members of Myanmar's security forces engaged in unlawful acts during operations responding to ARSA's attacks.[269] Specifically, the ICOE noted that killings of innocent civilians and the destruction of their homes resulted from the excessive use of force by certain security personnel amid internal armed conflict.[270] The Commission provided 22 recommendations, largely encouraging the Myanmar Government and Defense Services to advance their respective investigations. However, the military's coup d'état of February 2021 halted any progress toward accountability for the grave human rights abuses committed against the Rohingya.

1.3.3.1 Myanmar's Defense

As highlighted in the previous paragraphs, the stance of Myanmar's government on the Rohingya issue rejects accusations of ethnic cleansing and dismisses international criticism regarding its management of the crisis. This position has been sustained in different occasions by Aung San Suu Kyi, Myanmar's *de facto* leader at the time, before her government was overthrown by the military coup in February 2021. We could consider of particular relevance her oral arguments before the ICJ on 11th December 2019: during her visit to The Hague the Nobel Prize winner staunchly justified the military's clearance operations, asserting that they were essential for safeguarding Myanmar's security and maintaining the rule of law.[271] Her defense was widely perceived as a calculated move to protect both the nation's interests and the military.[272] The same military that until 2010, and yet

[265] *The Rohingya, Justice and International Law*, p. 161.
[266] Ibidem.
[267] Independent Commission of Enquiry (ICOE), "Executive Summary of the Final Report" (21 January 2020), https://reliefweb.int/report/myanmar/executive-summary-independent-commission-enquiry-icoe.
[268] *The Rohingya, Justice and International Law*, p. 161.
[269] Ibidem.
[270] *The Rohingya, Justice and International Law*, p. 161; Independent Commission of Enquiry (ICOE), "Executive Summary of Independent Commission of Enquiry" (21 January 2020).
[271] Simpson, Adam and Farrelly, Nicholas. "The Rohingya Crisis and Questions of Accountability" (2020), 74(5), *Australian Journal of International Affairs*, p. 489.
[272] Bowcott, Owen. "Aung San Suu Kyi Impassive as Genocide Hearing Begins" *The Guardian* (11 December 2019), https://www.theguardian.com/world/2019/dec/10/aung-san-suu-kyi-court-hague-genocide-hearing-myanmar-rohingya.

again now, tormented and captured her. Aung San Suu Kyi's position before the ICJ garnered a broad domestic support, with large public demonstrations backing her position, while only a small number of individuals expressed opposition to the atrocities that the Rohingyas have to endure.[273]

During her hearing she stated that: "It cannot be ruled out that disproportionate force was used by members of the Defense Services in some cases in disregard of international humanitarian law, or that they did not distinguish clearly enough between ARSA fighters and civilians. There may also have been failures to prevent civilians from looting or destroying property after fighting or in abandoned villages. But these are determinations to be made in the due course of the criminal justice process, not by any individual in the Myanmar Government."[274] This argument, which essentially attributed the crimes to isolated elements within the military rather than to a deliberate and systematic plan, has been thoroughly discredited.[275] Extensive evidence, including satellite imagery, demonstrated that the destruction of Rohingya communities has been systematic and intentional.[276] Furthermore, her justification of the use of the term "clearance operations" appears weak, as she stated: "The use of the term "clearance operation", *nae myay shin lin yeh* in Myanmar. Its meaning has been distorted. As early as the 1950s, this term has been used during military operations against the Burma Communist Party in Bago Range. Since then, the military has used this expression in counterinsurgency and counter-terrorism operations after attacks by insurgents or terrorists. In the Myanmar language, *nae myay shin lin yeh* literally means "clearing of locality" simply means to clear an area of insurgents or terrorists."[277]

Moreover, internal judicial mechanisms within Myanmar have proven largely ineffective. Numerous internal investigations have been conducted, yet all have exonerated the military of any systemic crimes, despite the overwhelming evidence of the contrary.[278] The government-established ICOE did challenge the traditional silence around military actions by acknowledging that both security forces and civilians committed war crimes and violated human rights in Rakhine. However,

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[273] Naw, Betty Han. "Standing with Mother Suu" *Frontier Myanmar* (2019), https://frontiermyanmar.net/en/standing-with-mother-suu.
[274] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record*, ICJ Doc CR 2019/19 (11 December 2019), p. 15, para. 15.
[275] Simpson, Adam. "The Folly of Aung San Suu Kyi's "Bad Apple" Defence" *East Asia Forum* (26 March 2020).
[276] Amnesty International, *Myanmar: Scorched-Earth Campaign Fuels Ethnic Cleansing of Rohingya from Rakhine State* (14 September 2017), https://www.amnesty.org/en/latest/news/2017/09/myanmar-scorched-earth- campaign-fuels-ethnic-cleansing-of-rohingya-from-rakhine-state/.
[277] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record*, ICJ Doc CR 2019/19 (11 December 2019), p. 15, para. 12.
[278] Simpson, Adam and Farrelly, Nicholas. "The Rohingya Crisis and Questions of Accountability" (2020), 74(5), *Australian Journal of International Affairs*, p. 489.

it maintained that these violations were the result of rogue individuals rather than a deliberate, systematic policy.[279]

Aung San Suu Kyi also strongly defended Myanmar's domestic criminal justice system stating that: "These ongoing criminal justice processes in Myanmar. They must be allowed to run their course. It is never easy for armed forces to recognize self-interest in accountability for their members, and to implement a will to accountability through actual investigations and prosecutions."[280]Further questioning the plausibility of genocidal intent on the part of a State investigating on the crimes, she stated: "Can there be genocidal intent on the part of a State that actively investigates, prosecutes and punishes soldiers and officers who are accused of wrongdoing? Although the focus here is on members of the military, I can assure you that appropriate action will also be taken against civilian offenders, in line with due process."[281] Suu Kyi went on to argue: "There are those who wish to externalize accountability for alleged war crimes committed in Rakhine, almost automatically, without proper reflection. This not only contradicts Article 20 (b) of the Constitution of Myanmar, it undercuts painstaking domestic efforts relevant to the establishing of co-operation between the military and the civilian government in Myanmar, in the context of a Constitution that needs to be amended to complete the process of democratization."[282]

In an op-ed article published in *The Financial Times* shortly before the ICJ's issuance of its Order on provisional measures on January 23rd, 2020, Aung San Suu Kyi asserted that the case brought against Myanmar before the ICJ, along with statements by the ICC Prosecutor and a private lawsuit filed in Argentina, are all largely founded upon the IIFFMM's findings.[283] She contended that these findings rest on "precariously dependent" testimonies obtained from refugees in camps located in Bangladesh.[284] The ICOE' final report suggested that some refugees may have provided inaccurate or exaggerated accounts.[285] According to Aung San Suu Kyi, this issue represents a "systemic challenge", as the international justice system "may not yet be equipped to filter out misleading information before shadows of incrimination are cast over entire nations and governments".[286] She expressed concern that human rights groups' critiques of Myanmar, based on unverified accounts and without thorough criminal investigation, have adversely affected the country's efforts to bring stability

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[279] Sithu, Aung Myint. "A Tatmadaw Taboo Breaks", *Frontier Myanmar* (21 February 2020), https://www.frontiermyanmar.net/en/a-tatmadaw-taboo-breaks/.
[280] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record*, ICJ Doc CR 2019/19 (11 December 2019), p. 16, para. 19.
[281] Ibidem, p.17 para 23.
[282] Ibidem, p.17 para 24.
[283] Financial Times, "Aung San Suu Kyi: Give Myanmar time to deliver justice on war crimes", (23 January 2020), https://www.ft.com/content/dcc9bee6-3d03-11ea-b84f-a62c46f39bc2.
[284] *The Rohingya, Justice and International Law*, p. 24.
[285] Independent Commission of Enquiry (ICOE), "Executive Summary of the Final Report" (21 January 2020).
[286] Financial Times, "Aung San Suu Kyi: Give Myanmar time to deliver justice on war crimes", (23 January 2020).

and progress to Rakhine.[287] These critiques, in her view, have undermined domestic efforts to foster cooperation between the military and civilian government, hindered Myanmar's ability to lay the groundwork for sustainable development in a diverse society, misrepresented Myanmar's situation, and strained its bilateral relations.[288] She argued that a fair assessment of Myanmar's capacity to address violations in Rakhine can only occur if sufficient time is afforded to allow domestic justice mechanisms to take their course.[289] Aung San Suu Kyi also emphasized that international justice should avoid becoming a "victim of the extreme polarization that characterizes discussions on the situation in Rakhine".[290] Building on this point, she cautioned against actions that could deepen divisions: "Feeding the flames of an extreme polarization in the context of Rakhine, for example, can harm the values of peace and harmony in Myanmar. Aggravating the wounds of conflict can undermine unity in Rakhine. Hate narratives are not simply confined to hate speech language that contributes to extreme polarization also amounts to hate narratives."[291]

The Rohingya crisis exemplifies a paradigmatic case of intersection between ethno-political marginalization and legal exclusion, culminating in systematic violations of fundamental human rights and breaches of international law. The statelessness imposed on the Rohingya, rooted in the exclusionary frameworks of Myanmar's citizenship laws, reflects a deliberate denial of legal recognition and protection. This has facilitated widespread atrocities - as abundantly testified by the investigations of the Annan Commission and of the International Fact-Finding Mission on Myanmar – comprising acts that may be defined as genocide under international legal standards.

These issues form the foundational premise for the subsequent analysis of Myanmar's obligations under international law and the potential accountability mechanisms available to address the severe violations documented. The subsequent chapter will delve into the legal framework governing State responsibility, particularly through the proceedings initiated at the International Court of Justice to hold Myanmar accountable for breaching its obligations under the Genocide Convention. It will also examine the interplay between the ICJ's proceedings and domestic narratives, highlighting how Myanmar's leadership has used legal arguments to defend its position on the international stage.

In the third chapter this thesis will explore two other avenues of accountability for the Rohingya: the International Criminal Court's efforts to investigate and prosecute individual criminal responsibility, and the exercise of universal jurisdiction in national courts, exemplified by the case brought in by Argentina. By analyzing these mechanisms, this work aims to demonstrate how they

[287] Ibidem.
[288] Ibidem.
[289] Ibidem.
[290] Ibidem.
[291] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record*, ICJ Doc CR 2019/19 (11 December 2019), p. 19, para. 29.

collectively contribute to addressing the multifaceted dimensions of justice and accountability in the Rohingya crisis, offering potential pathways for remedy and prevention.

Chapter 2 – State Responsibility: *The Gambia v. Myanmar* Case before the ICJ

In the face of grave human rights violations, the international community is compelled to identify appropriate mechanisms to achieve the cessation and redress of such unlawful acts, thereby ensuring accountability. One of the available avenues is invoking State responsibility before an international tribunal, with the International Court of Justice being the primary forum in this regard.

It is within this context that the case brought by The Gambia against Myanmar arises. The Gambia, a State not directly affected by the violations, initiated proceedings before the ICJ, alleging Myanmar's breach of the Convention on the Prevention and Punishment of the Crime of Genocide. This case not only raises fundamental questions concerning State responsibility for acts of genocide but also offers significant insights into the role of the international community in human rights protection and the *erga omnes* nature of obligations arising from international instruments such as the Genocide Convention.

The importance of the case lies, among other aspects, in the fact that the Court, by issuing provisional measures on January 23rd, 2020, recognized the *prima facie* existence of the Rohingya people's right to be protected from acts of genocide and the serious risk of further violations. The Court also affirmed The Gambia's standing to bring the action, based on the *erga omnes* nature of the obligations enshrined in the Convention, thereby acknowledging that the protection against genocide is an interest of the international community as a whole.

To fully understand the particularities of this proceeding and its multiple implications, both for the Rohingya population and for the development of international law, it is essential to first analyze the legal nature and institutional framework of the International Court of Justice. This chapter will provide a general overview of the ICJ, focusing on its jurisdiction and competence, before delving into the specifics of the Rohingya case and the potential legal and political implications it may entail.

2.1 The International Court of Justice as an accountability mechanism for serious human rights violations

The International Court of Justice is the principal judicial organ of the United Nations.[292] Established in June 1945 by article XIV of the Charter of the UN, the Court is based in The Hague, Netherlands,

[292] United Nations, *Charter of the United Nations* (1945), 1 UNTS XVI, Art. 92 (hereinafter "Charter of the United Nations")*.*

and comprises 15 judges elected for nine-year terms by the United Nations General Assembly and the Security Council.[293]

The framework and functioning of the ICJ are governed by three primary sources: the UN Charter (Chapter IV, Articles 92-96), the Statute of the Court (referenced in Article 92 of the UN Charter) and the Rules of Court, which are established by the Court under the authority granted by Article 30 of its Statute.

The ICJ exercises two functions: advisory and contentious. According to Article 96 of the UN Charter: "The General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."[294] Conversely, its contentious jurisdiction consists in solving legal disputes between States submitted to it by them.[295] Article 36 (1) of the ICJ Statute stipulates that: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".[296] Under this Article, the Court's jurisdiction extends to disputes arising under compromissory clauses, which are specific provisions incorporated into international treaties. These clauses constitute an expression of the States' *ex ante* consent to the Court's jurisdiction over any disputes relating to the interpretation or application of the treaty in question. By including a compromissory clause in a treaty, States agree in advance to submit future disputes to the ICJ, thereby obviating the need for a separate jurisdictional agreement at the time a dispute arises. This mechanism enhances legal certainty and predictability, providing States with a structured and impartial forum for the resolution of disputes grounded in treaty obligations.

The significance of compromissory clauses is particularly evident in cases such as *The Gambia v. Myanmar*, where the ICJ's jurisdiction was established based on Myanmar's ratification of the 1948 Genocide Convention, which contains a compromissory clause in Article IX. This provision grants the ICJ jurisdiction over disputes concerning the "interpretation, application or fulfillment" of the Convention, including disputes relating to the responsibility of a State for acts of genocide.[297] As a result, The Gambia was able to bring proceedings against Myanmar without the need for further

[293] International Court of Justice, *The Court* (2024), https://www.icj-cij.org/court.
[294] *Charter of the United Nations*, Art. 96.
[295] International Court of Justice, *The Court* (2024).
[296] United Nations, *Statute of the International Court of Justice*, Art. 36 (18 April 1946), (hereinafter "Statute of the International Court of Justice").
[297] United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948), Art. IX (hereinafter "Convention on the Prevention and Punishment of the Crime of Genocide").

jurisdictional negotiations, relying solely on Myanmar's prior acceptance of the Court's authority through its treaty obligations.

However, this point will be discussed in greater detail in the following sections, where the legal dynamics of the case and the critical role played by the Article IX of the Genocide Convention in determining access to the Court will be explored more comprehensively.

The disputes presented to the ICJ are settled by applying various sources of international law. These include international agreements, whether general or specific, which establish rules explicitly acknowledged by the disputing States; international customs that serve as evidence of general practice accepted as legally binding; and general principles of law recognized by civilized nations.[298] While bearing in mind that its ruling are binding only on the parties involved and solely for the specific case in question,[299] the ICJ may consider also judicial decisions and the works of esteemed legal scholars from different nations as supplementary tools for determining rules of law.[300]

Therefore, the Rohingya case before the ICJ constitutes a "state-to-state" litigation between UN member states, regulated by the provisions outlined in the UN Charter and the ICJ Statute. According to the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts,[301] the principles governing State responsibility largely reflect customary international law. A wrongful act giving rise to State responsibility occurs when two constitutive elements are met: the objective element, which refers to the breach of an international obligation attributable to the State, and the subjective element, which pertains to the conduct of individuals or entities acting on behalf of the State. Chapter II of the Articles regulating the attribution of conduct to a State, underlines how "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State".[302] Additionally, "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying the conduct".[303]

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[298] *Statute of the International Court of Justice*, Art. 38.
[299] Ibidem, Art. 59.
[300] Ibidem, Art. 38.
[301] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp.IV.E.1 (2001), https://www.refworld.org/legal/otherinstr/ilc/2001/en/20951.
[302] Ibidem, Art. 4.
[303] Ibidem, Art. 8.

In accordance with Article 94 of the UN Charter, all UN Member States are required to abide by the decisions of the ICJ in cases to which they are parties. Should a State fail to fulfill this obligation, the opposing party may appeal to the UN Security Council to take action to enforce the judgement against the non-compliant State.[304] However, pursuant to Article 27 (3), each of the five permanent members of the Security Council possesses the power of veto over any substantive decision made by the Security Council.[305]

Although the ICJ is not a specialized human rights tribunal, its broad jurisdiction has enabled it to address significant issues concerning the protection of fundamental rights under international law.[306] Pursuant to Article 34 of its Statute, the ICJ's jurisdiction is limited to disputes between States, thereby precluding individuals, non-governmental organizations and even international organizations from directly initiating proceedings before the Court.[307] Nevertheless, through its interpretation of key international treaties and the issuance of advisory opinions, the Court has made substantial contributions to the development and clarification of international human rights law. Its standing as the principal judicial organ of the UN, coupled with its authoritative pronouncements, has solidified its role as a primary forum for adjudicating disputes with far-reaching implications for the international human rights framework.

A fundamental mechanism that facilitates the ICJ's involvement in human rights-related disputes is the inclusion of compromissory clauses within multilateral treaties, ensuring a pre-established forum for legal recourse. As previously mentioned, a salient example is provided by Article IX of the Genocide Convention. The existence of such clauses underscores their critical role in ensuring State accountability for grave human rights violations by offering an avenue for legal adjudication grounded in binding international commitments.

The general jurisdiction of the ICJ, coupled with the binding nature of its rulings and its institutional prestige, renders it an essential instrument for addressing serious breaches of international law, including those pertaining to human rights. The Court's jurisprudence, respected and widely observed by the international community, not only reinforces compliance with human rights obligations but also contributes to the consolidation of legal norms and principles in this domain. Consequently, despite its limitations, the ICJ remains a vital forum for the pursuit of justice and accountability in the face of egregious violations of fundamental human rights.

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[304] *Charter of the United Nations*, Art. 94.
[305] Ibidem, Art. 27(3).
[306] Schwebel, Stephen M. "Human Rights in the World Court" (1991), 24, *Vanderbilt Law Review*, p. 945.
[307] *Statute of the International Court of Justice*, Art. 34.

2.2 The Gambia's Application to the ICJ

On 11th November 2019, the Republic of The Gambia ("The Gambia") submitted an Application to the Court's Registry, initiating proceedings against the Republic of the Myanmar (hereinafter "Myanmar") over alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[308] In accordance with Article 41 of the ICJ Statute, the Application also contained a request for the Court to order provisional measures to safeguard the rights asserted in the case of risk of immediate and irreparable prejudice to the asserted rights.[309]

The claim that Myanmar was accountable for genocide was supported by referencing to the findings of the IIFFMM.[310] Based on this factual evidence, The Gambia argued that the exclusion of the Rohingya from Myanmar's national races and their subsequent denial of citizenship were part of a broader pattern of discrimination.[311] This pattern also included measures such as limitations on their movement, confinement in displacement camps and a state-sponsored campaign of hate against the minority.

The Gambia also outlined the clearance operations of 2016 and 2017, during which "Myanmar forces systematically shot, killed, forcibly disappeared, raped, gang raped, sexually assaulted, detained, beat and tortured Rohingya civilians, and burned down and destroyed Rohingya homes, mosques, madrassas, shops and Qu'rans".[312] What is significant is that The Gambia highlighted the mass executions, the widespread sexual violence and the systematic destruction of Rohingya villages to assert that genocide had taken place in Myanmar, and that the responsibility for it lay with the State.

To assert the ICJ's jurisdiction in the matter, The Gambia highlighted that both disputing States are UN Members and therefore, being the ICJ an organ of the UN, both bound by the Statute of the Court.[313] Specifically Article 36(1), which establishes that the Court's jurisdiction "comprises … all matters specially provided for … in treaties and conventions in force".[314] The Applicant further argued that both nations were signatories to the Genocide Convention, noting that Article IX stipulates that: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for

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[308] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (3 July 2024), n. 178, p. 2.
[309] *Statute of the International Court of Justice*, Art. 41.
[310] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (3 July 2024), n. 178, p. 8, para. 10.
[311] Ibidem, p. 20, para. 30.
[312] Ibidem, p. 30, para. 48.
[313] Ibidem, p. 12, para. 16.
[314] *Statute of the International Court of Justice*, Art. 36(1).

any of the other acts enumerated in article III, shall be submitted to the ICJ at the request of any of the parties to the dispute".[315]

When Myanmar ratified the Genocide Convention in 1956, it maintained two reservations: one pertaining to Article VI and the other concerning Article VIII. Under article VI of the Genocide Convention, individuals accused of committing genocide or any of the acts listed in Article III "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[316] Myanmar's reservation states that nothing in Article VI shall be understood as restricting the authority of its own courts and tribunals or as conferring jurisdiction on foreign courts and tribunals over cases of genocide or other acts listed in Article III committed within its territory.[317]

According to article VIII of the Genocide Convention, "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."[318] Myanmar's reservation to Article VIII makes it not applicable to the State.

Unlike Myanmar, The Gambia acceded to the Genocide Convention in 1979, without any reservation.

In its Application to the ICJ, The Gambia argued that the actions carried out by the Tatmadaw forces against the Rohingya during the 2016 and 2017 "clearance operations" were genocidal, as they were aimed at destroying the Rohingya minority, either in whole or in part.[319] It affirmed that: "These acts are all attributable to Myanmar, which is thus responsible for committing genocide. Myanmar has also violated other fundamental obligations under the Genocide Convention, including by attempting to commit genocide; conspiring to commit genocide; inciting genocide; complicity in genocide; and failing to prevent and punish genocide".[320] After reiterating the obligation to prevent genocide under Article I of the Convention, as well as the responsibility to punish perpetrators outlined in Articles IV to VI, The Gambia condemned Myanmar's inability to adopt the required legislation to implement the Genocide Convention domestically and impose penalties on those responsible for genocidal acts.[321]

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[315] *Convention on the Prevention and Punishment of the Crime of Genocide*, Art. IX.
[316] Ibidem, Art. VI.
[317] *The Rohingya, Justice and International Law*, p. 75-76.
[318] *Convention on the Prevention and Punishment of the Crime of Genocide,* Art. VIII.
[319] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (3 July 2024), n. 178, p. 2.
[320] Ibidem, p. 4, para. 2.
[321] Ibidem, p. 56, para. 111-112.

Having argued that Myanmar had violated the Genocide Convention on all the aforementioned grounds and requested such a ruling from the ICJ, The Gambia asked the Court to affirm that the Respondent is obligated to cease the wrongful conduct, comply with the Genocide Convention and ensure that those responsible for genocidal acts are prosecuted by an appropriate national or international criminal tribunal.[322] It also sought a declaration from the Court regarding Myanmar's obligation to "perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group" and "offer assurances and guarantees of non-repetition of violations of the Genocide Convention".[323]

The Gambia's requests pertained to the secondary obligations that arose from the commission of an internationally wrongful act and should, therefore, be interpreted in the context of the pertinent provisions of the Draft Articles.[324] Notably, the Applicant advanced Myanmar's obligation to make reparations on behalf of the affected Rohingya community, marking an initial application of the principle that non-injured States may invoke international responsibility in the interest of individuals harmed by the violation of *erga omnes* obligations.[325]

Myanmar, for its part, asked the ICJ to: (1) dismiss the case from its List; or, (2) deny the Gambia's request for the indication of provisional measures.[326]

2.2.1 The Gambia's Legal Standing

The initial challenge The Gambia had to address has been establishing its legal standing *(locus standi)* to initiate proceedings against another State before the ICJ.

The Gambia's application was fundamentally based on the Genocide Convention's provisions. To substantiate its claims, the State explicitly cited the Court's declaration that all States parties to the Convention share a common interest in upholding the *erga omnes* rights it guarantees.[327]

"The Gambia, mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention, institutes the present proceedings to establish Myanmar's responsibility for violations of the Genocide Convention, to hold it fully accountable under international law for its genocidal acts

[322] Ibidem, p. 56-58, para. 112.
[323] Ibidem, p. 58, para. 112.
[324] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp.IV.E.1 (2001).
[325] Misretta, Virginia. "The Rohingya Crisis: Na International Law Perspective" (2020), *Luiss University*, p. 142.
[326] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) – Conclusion of the public hearings on the request for the indication of provisional measures* (12 December 2019), n. 178, 2019/54, https://www.icj-cij.org/node/105885.
[327] International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports, p. 23.

against the Rohingya group, and to have recourse to this Court to ensure the fullest possible protection for those who remain at grave risk from future acts of genocide."[328]

One of the initial disputed issues in this case concerned The Gambia's legal standing to initiate proceedings against Myanmar before the ICJ. The Gambia argued that, as every State Party to the Genocide Convention shares a common interest in ensuring compliance with its obligations, each is entitled to raise a claim regarding the cessation of an alleged violation by another State Party. In doing so, The Gambia sought to safeguard not only the rights of the Rohingya but also its own rights under the Convention.

In its Application, The Gambia stated that it seeks to assert the rights of "all members of the Rohingya group who are in the territory of Myanmar, as members of a protected group under the Genocide Convention", including the "rights of the Rohingya group to exist as a group", to be protected from acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide, in accordance with Article III of the Convention.[329] The Gambia added that it "also seeks to protect the *erga omnes partes* rights it has under the Convention, which mirror the *erga omnes obligations* of the Convention with which it is entitled to seek compliance".[330]

It is widely recognized that The Gambia's actions in this case were motivated not only by a desire to uphold the binding obligations established under the Genocide Convention but also by its membership in the Organization of Islamic Cooperation (OIC). Being the Rohingya an ethnic Muslim minority in Myanmar, it is quite linear to understand why the OIC has expressed solidarity with their plight.[331] Notably, during a meeting held on March 1-2, 2019, The Gambia, representing the OIC, called on Myanmar to "honor its obligations under International Law and Human Rights covenants, and to take all measures to immediately halt all vestiges and manifestations of the practice of […] genocide […] against Rohingya Muslims".[332] However, a fundamental distinction must be drawn between the motivations underlying The Gambia's decision to initiate the proceedings and its legal standing before the Court. The Gambia brought the case in its own right, as party to the Genocide Convention, which establishes obligations *erga omnes partes*. The possibility for a State not directly affected by a violation to initiate proceedings is provided for under Article 48 of the Articles on State

[328] Government of the Republic of the Gambia, *Application of the convention on the prevention and punishment of the crime of Genocide (the Gambia v. Myanmar)* (2019), Application instituting proceedings and request for provisional measures, para. 15.
[329] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)* (23 January 2020), n. 178, para. 45.
[330] Ibidem.
[331] *The Rohingya crisis and the International Criminal Court*, p. 65.
[332] Organization for Islamic Cooperation, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019).

Responsibility, which grants non-injured States certain prerogatives—among them, the right to invoke responsibility and to bring claims before international courts for breaches of such obligations.

It is without precedent that the ICJ has so clearly affirmed the standing of a non-injured State to bring a case for the breach of *erga omnes partes* obligations, as it did in *The Gambia v. Myanmar*. Prior to this, the ICJ had never unequivocally recognized standing on this basis for a non-directly injured State. While there had been borderline cases - such as *Belgium v. Senegal*, which touched upon the principle - the recognition had never been as clear and definitive. This case thus marks a significant milestone in the consolidation of the Court's jurisprudence on the standing of non-injured States, solidifying their right to act in defense of collective interests under treaties imposing *erga omnes partes* obligations.

The implications of this ruling extend beyond the specific context of the Rohingya crisis, as it has set a transformative precedent in international law, encouraging other States to invoke similar prerogatives in subsequent cases. Notably, after *The Gambia v. Myanmar*, several cases of the same nature have been brought before the ICJ, including the recent *South Africa v. Israel*, further reinforcing the Court's approach to standing and the enforcement of obligations *erga omnes partes*.

This approach by The Gambia blurs the distinction between the right to invoke another State's responsibility and the question whether a State has legal standing before the ICJ.[333] From Myanmar's perspective, it is not feasible to bypass the fundamental principle that it is the prerogative of an injured State to determine whether and how to call upon the responsibility of another State, with the right of non-injured States to invoke such responsibility considered secondary.[334]

Bangladesh, as a party to the Genocide Convention since 1999 and as the country that bears the greatest responsibility for hosting the Rohingya fleeing from Myanma and thus strongly affected by the events central to these proceedings, could not have initiated a case without Myanmar's consent due to its reservation to Article IX of the Genocide Convention. Bangladesh Reservation states that: "For the submission of any dispute in terms of this Article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case".[335] Therefore, Bangladesh cannot bring Myanmar before the ICJ without the latter's prior consent, which is unlikely to be granted. Bangladesh has presumably not withdrawn this reservation to protect itself from being unilaterally brought before the ICJ by another State Party without its prior consent.[336]

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[333] *The Rohingya, Justice and International Law*, p. 78.
[334] Ibidem.
[335] Repubblica Popolare del Bangladesh, *Reservation to the Convention on the Prevention and punishment of the Crime of Genocide*, Art. IX (1998).
[336] *The Rohingya, Justice and International Law*, p. 76.

None of Myanmar's neighboring States, except for Laos, could have initiated such proceedings, as each is either not a party to the Genocide Convention or has made a reservation limiting the application of Article IX, either excluding it entirely or requiring the consent of all parties to the dispute. If a State like The Gambia, which is not directly affected by the alleged breach of a treaty, is permitted to bring a case in a situation where a State that is directly affected cannot, it would significantly undermine the fundamental principles governing the consensual nature of the ICJ's contentious jurisdiction.[337] Myanmar argues that, due to its reservation to Article VIII, "not any Contracting Party" may bring a dispute before the ICJ involving Myanmar; only those Contracting Parties that are specifically affected by the alleged violations of the Genocide Convention are entitled to do so, provided the ICJ has jurisdiction under Article IX.[338]

The Gambia also referenced the principle established by the ICJ in *Belgium v. Senegal*, which asserts that "the common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party".[339] It further clarified that this reasoning "applies mutatis mutandis to the Genocide Convention", thereby affirming that The Gambia had a legal right to challenge Myanmar's violation of its erga omnes obligations.[340]

2.2.2 The Existence of a Dispute

Determining the existence of a dispute is a key factor in the ICJ's decision to assess whether it has the authority to exercise its contentious jurisdiction.[341] "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus, the existence of the dispute is the primary condition for the Court to exercise its judicial function".[342] The existence of a dispute serves as a general, preliminary requirement, such as legal standing, and should be distinguished from other preliminary matters like jurisdiction.[343] However, it remains essential for the Court's ability to carry out its judicial role.

[337] Ibidem, p. 78.
[338] Ibidem, p. 78.
[339] *The Gambia Application,* para. 124.
[340] Ibidem, para. 125.
[341] Bonafè, Beatrice. "Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications" (2017), p. 1.
[342] International Court of Justice, *Nuclear Tests (Australia v France, New Zealand v France), Judgment* [1974] ICJ Rep 253, para. 55.
[343] Bonafè, Beatrice. "Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications" (2017), p. 1.

The ICJ has defined a dispute as "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations",[344] or in another case as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two person".[345] In principle, the date for establishing the existence of a dispute is the date when the Application is filed with the ICJ, at which point the evidence must demonstrate that the parties hold clearly opposing views regarding the issue presented to the Court.[346]

In *Marshall Islands v. United Kingdom*, the ICJ underlines "that whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts".[347] It must be established that one party's claim is explicitly contested by the other. For a dispute to exist, the evidence must show that the respondent party "was aware, or could not have been unaware", that its views were in direct opposition to that of the applicant.[348] To determinate this, the ICJ considers statements or documents exchanged between the parties, as well as communications made in multilateral settings. In its analysis, the Court carefully examines the author of the statement or document, the intended or actual recipient, and the content of the communication.[349] The conduct of the parties may also be relevant, particularly in the absence of diplomatic exchanges.[350] Notably, the Court has previously determined that a dispute may be inferred from a State's failure to respond to a claim in situations where a response is warranted.

The Gambia bore the burden of proving that a dispute regarding the 1948 Genocide Convention existed between itself and Myanmar at the time it initiated proceedings before the ICJ on 11th November 2019. The fact that The Gambia was not directly affected by the alleged violations raised further discussions concerning the very existence of the dispute, as Myanmar challenged the notion that a State with no direct injury could credibly claim to be in dispute with the alleged perpetrator. This issue became intrinsically linked to the question of The Gambia's standing before the Court, as the two aspects were closely interwoven: the ability of a non-injured State to bring a claim under the Genocide Convention was not only a matter of procedural legitimacy but also one of substantive contention regarding the presence of an actual dispute between the parties.

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[344] International Court of Justice, *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion* (30 March 1950, first phase), [1950] ICJ Rep 65, p. 74.
[345] Permanent Court of International Justice, *Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment* (30 August 1924), [1924] PCIJ (Ser. A) No. 2, p. 11.
[346] *The Rohingya, Justice and International Law*, p. 81.
[347] International Court of Justice, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and Nuclear Disarmament (Marshall Islands v. UK)* (5 October 2016), p. 2.
[348] Ibidem.
[349] Ibidem.
[350] Ibidem.

As evidence of the existence of a dispute between the two States concerning the application of the Genocide Convention and Myanmar's obligations under its provisions, The Gambia asserted that it had "made clear to Myanmar that its actions constitute a clear violation of its obligation under the Convention"[351] but that "Myanmar has rejected and opposed any suggestions that it has violated the Genocide Convention".[352] In the Rohingya case initiated by The Gambia against Myanmar, The Gambia's objections to Myanmar's actions were primarily communicated through multilateral forums.

According to the Gambia, it had been accusing Myanmar of failing to fulfill its obligations under the Geocide Convention and of committing genocide against the Rohingya since early 2018. These accusations were made consistently through public and official statements.[353] Myanmar was well aware of The Gambia's position and opposed it by denying any responsibility for acts of genocide and rejecting claims of having violated the Genocide Convention.[354] Given the unresolved dispute between the parties, The Gambia brought the matter to the ICJ to safeguard its rights under the Genocide Convention. Myanmar had been notified of this dispute on multiple occasions and acknowledged receipt of such notices prior to The Gambia filing the case.

As supporting evidence, the Applicant referred to a series of instances in which it had condemned Myanmar's responsibility for genocide. This included, among other examples, the request made through the Organization of Islamic Cooperation Resolution N. 4/46-MM, which called upon Myanma to comply with its international obligations and to cease committing genocidal acts against the Rohingya,[355] the statement given on 31st May 2019, at the 14th OIC Summit Conference, where it reaffirmed its support for the ad hoc Ministerial Committee on Human Rights Violations against the Rohingyas in Myanmar and emphasized the urgency of "using all international legal instruments to hold accountable the perpetrators of crimes against the Rohingya".[356]

Furthermore, on 11th October 2019, The Gambia's Permanent Mission to the United Nations in New York transmitted a Note Verbale to Myanmar's Permanent Mission, addressing Myanmar's continued breach of its obligations under the Genocide Convention.[357] In this communication, The

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[351] *The Gambia Application*, para. 20.
[352] Ibidem.
[353] Ibidem, para. 21.
[354] Ibidem, para. 20.
[355] *The Gambia Application*, para. 21; Organization of Islamic Cooperation, *Resolution No. 4/46-MM on the Situation of the Muslim Community in Myanmar*, OIC Doc. OIC/CFM-46/2019/MM/RES/FINAL (1-2 March 2019), https://www.oic-oci.org/docdown/?docID=4447&refID=1250, p. 18, para. 11(a).
[356] *The Gambia Application*, para. 21; Organization of Islamic Cooperation, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc. OIC/SUM-14/2019/FC/FINAL (31 May 2019), https://www.oic-oci.org/docdown/?docID=4496&refID=1251, para. 47.
[357] *The Gambia Application*, para. 21; Note Verbale from Permanent Mission of the Republic of The Gambia to the United Nations to Permanent Mission of the Republic of the Union of Myanmar to the United Nations (11 October 2019).

Gambia expressed its concerns regarding the findings of the UN Fact-Finding Mission and Myanmar's rejection of these findings. The Gambia also drew Myanmar's attention to OIC Resolution N. 4/46-MM (2nd March 2019) and called upon Myanmar to take immediate action to comply with the Convention, provide repatriations to the victims, and issue assurances and guarantees of non-repetition.[358] Although the ICJ has previously held that a formal diplomatic protest is not a necessary requirement, in this case, such a protest exists, alongside direct statements and actions in multilateral settings.

The Applicant also referred to the announcement made by the Vice President of The Gambia during the 74th session of the UN General Assembly, in which he expresses the State's intention to "lead the concerted efforts for taking the Rohingya issue to the International Court of Justice".[359] In response, during the same session Myanmar characterized the findings of the IIFFMM as "biased and flawed".[360] The Applicant lamented Myanmar's denial of responsibility and argued that its criticism of the IIFFMM's reports, coupled with its failure to respond to The Gambia's Note Verbale, constituted clear evidence of the ongoing dispute concerning the interpretation, application and compliance with the Genocide Convention.[361]

Rebutting The Gambia, in its fourth preliminary objection, Myanmar maintained that the *erga omnes* nature of the obligations under the Genocide Convention would not entitle The Gambia to initiate these proceedings without the existence of a specific dispute between the two Parties currently before the ICJ. Myanmar further argued that The Gambia's lack of direct injury in the alleged violations not only undermined its standing but also called into question the very existence of a legal dispute between the two States. This argument underscored the interconnectedness of the issues of standing and dispute existence, with Myanmar asserting that a State not directly affected by the alleged breaches could not, by itself, establish the presence of a genuine dispute under international law.

According to Myanmar, the review of the facts presented by The Gambia failed to demonstrate that a dispute under the Genocide Convention existed between the Parties as of the date the Application was submitted, the 11th of November 2019. Myanmar argued that the resolutions previously adopted by the OIC, as well as the Final Communiqué of the 14th Islamic Sumit Conference issued on 31st May 2019, couldn't be considered evidence of a dispute's existence.

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[358] *The Gambia Application*, para. 21.
[359] United Nations General Assembly, *74th Session, 8th Plenary Meeting*, UN GAOR, UN Doc. A/74/PV.8 (26 September 2019), p. 31; see also *The Gambia Application*, para. 21.
[360] The Republic of the Union of Myanmar, *State Counsellor Office, U Kyaw Tint Swe, Union Minister for the Office of the State Counsellor and Leader of Myanmar Delegation to the 74th Session of the United Nations General Assembly Delivers Statements at High-Level General Debate* (29 September 2019), p. 11, https://www.statecounsellor.gov.mm/en/node/2551.
[361] *The Gambia Application*, para. 22-23.

Myanmar contended that these documents were not issued by The Gambia's official organs, were not directed to Myanmar and did not provide sufficient notice of specific claims alleging its State responsibility for violating the Genocide Convention.[362] The State asserted that these documents pertained to the criminal accountability of individuals rather than the State's responsibility for acts of genocide. Moreover, it argued that they were expressed as political declarations rather than legal claims detailed enough to establish the existence of a dispute.[363]

Regarding the IIFFMM's findings, Myanmar affirmed that the Reports cannot be used as evidence of a dispute between the Parties under the Genocide Convention, as these would represent the personal opinions of three individual members directed to the Human Rights Council, rather than reflecting The Gambia's legal position on Myanmar's responsibility under the Convention.[364] Furthermore, Myanmar highlighted that the 2018 report did not allege State responsibility for genocide under international law, while the 2019 one and its "Detailed Findings" were too broad to meet the criteria for a legal claim made by The Gambia.[365]

Myanmar also dismissed the significance of statements made by the Parties prior to the filing of the Application. It argued that the statement delivered by the President of The Gambia at the UN General Assembly (UNGA) on 25th September 2018 does not indicate that the OIC or The Gambia intended to assert a claim that Myanmar had violated its obligations under the Genocide Convention.[366] Similarly, it contended that the statement made by Gambia's Vice-President at the UNGA on 26th September 2019 was not directed at Myanmar, did not mention the Genocide Convention, and lacked sufficient specificity.[367] For these reasons, Myanmar also asserted that the statement of its own Union Minister for the Office of the State Counsellor, delivered at the UNGA on 29th September 2019, couldn't be interpreted as evidence of clear opposition between the Parties on a legal matter related to genocide or the Genocide Convention.[368]

Referencing the Note Verbale sent by The Gambia on 11th October 2019, Myanmar argued that it could not reasonably be interpreted as presenting a legal claim against it, considering the broader context. Myanmar asserted that the language of the Note Verbale resembled a political statement rather than a legal claim.[369] It contended that the Note Verbale did not articulate The Gambia's position with sufficient clarity or detail to conclude that Myanmar "could not have been unaware"

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[362] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Judgment on Preliminary Objections* (22 July 2022), para. 53.
[363] Ibidem.
[364] Ibidem, para. 54.
[365] Ibidem.
[366] Ibidem, para. 55.
[367] Ibidem.
[368] Ibidem.
[369] Ibidem, para. 56.

that a legal claim was being made under the Convention based on particular facts and evidence.[370] It referred only in a broad and general manner to the reports and findings of the IIFFMM and to OIC resolutions, making also generic references to the obligations under the Genocide Convention, customary international law and human rights treaties, without presenting any specific legal or factual claim that Myanmar could meaningfully contest.[371] Instead, it merely asserted a legal conclusion – that an ongoing genocide was occurring, for which Myanmar was allegedly responsible – without providing any supporting claim to substantiate this conclusion.

Moreover, Myanmar argued that the Note Verbale did not advance a legal claim to which it could provide a substantive response, as it provided no specific particulars if the facts alleged to constitute Myanmar's refusal to acknowledge and remedy its responsibility.[372] It maintained that no dispute between the Parties could be inferred from Myanmar's lack of reaction. Finally, Myanmar emphasizes that, even if a response had been required, it was entitled to a reasonable period to formulate a considered reply, arguing that the one-month timeframe was insufficient to interpret Myanmar's lack of response as indicative of the opposition to the generalized and vague claims of the Note Verbale.[373]

As we will analyze in paragraph 2.4.1, the Court rejected Myanmar's objection concerning the alleged non-existence of a dispute.[374]

2.3 The Genocide Convention

Being the ICJ case focused on State's responsibility, in the merits The Gambia must demonstrate that Myanmar violated the relevant provisions of the Genocide Convention by proving that acts of genocide, as prohibited under Articles II and III of the Convention, were carried out by specific individuals or groups and are attributable to the State of Myanmar.[375]

Article I of the 1948 Genocide Convention affirms that genocide, whether perpetrated in peacetime or wartime, constitutes a crime under international law, and its Contracting Parties commit to both preventing and punishing it.[376] Article II of the Convention defines genocide as "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

[370] Ibidem.
[371] *The Rohingya, Justice and International Law*, p. 89.
[372] Ibidem.
[373] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Judgment on Preliminary Objections* (22 July 2022), para. 56.
[374] Ibidem, para. 77.
[375] *The Rohingya, Justice and International Law*, p. 91.
[376] *Convention on the Prevention and Punishment of the Crime of Genocide*, Art. I.

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."[377] The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugislavia (ICTY) have clarified that "causing serious bodily or mental harm" in the context of genocide refers to harm so severe that it endangers the group's survival, either wholly or partially.[378] According to *Prosecutor v Seromba*, serious mental harm includes "more than a minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".[379] Indeed, almost every conviction for the causing of serious bodily or mental harm as an act of genocide involve rape or killings, with rape being a quintessential example of serious boy harm.[380]

The definition of genocide given in Article II involves assessing whether a protected group exists, whether acts from one or more of the specified categories have occurred, and whether those acts were carried out with the intent to commit genocide.[381]

In its September 2018 Report, the IIFFMM determined that all the abovementioned requirements were met.[382] It found that the Rohingya, "who predominantly live in Myanmar's Rakhine State, constitute a protected group. The Rohingya can be qualified as an ethnic ("members share a common language or culture"), racial ("based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors" or religious ("members share the same religion, denomination or mode of worship") group or a combination thereof."[383] The Report also emphasized that "The Rohingya also consider themselves as a distinct group, as do the Myanmar authorities and security forces."[384] It concluded that: "The differential treatment of the Rohingya, through the adoption of specific laws, policies and practices, supports the conclusion that they are a protected group as defined by the Genocide Convention."[385]

Regarding the physical violence, the IIFFMM Report states that: "The gross human rights violations […] include conduct that falls within four of the five categories of prohibited acts. Perpetrators have killed Rohingya, caused serious bodily and mental harm to Rohingya, deliberately

[377] Ibidem, Art. II.
[378] *The Rohingya, Justice and International Law*, p. 91.
[379] International Criminal Tribunal for Rwanda, *Prosecutor v. Seromba* (Case ICTR-2001-66-A, 12 March 2008), para. 46.
[380] Ibidem, para. 46.
[381] IIFFM Report 2018, p. 351-352, para. 1389.
[382] Ibidem, para. 1439-1441.
[383] Ibidem, para. 1391.
[384] Ibidem.
[385] Ibidem.

inflicted conditions of life calculated to bring about the physical destruction of Rohingya, and imposed measures intended to prevent births of Rohingya".[386]

Finally, to meet the specific intent requirement (*dolus specialis*), it must be demonstrated that the acts were carried out with the intent to destroy, in whole or in part, a protected group as such, in addition to proving the perpetrators' intent to commit the underlying acts.[387] In this regard, the IIFFMM evaluated the available evidence in light of relevant international tribunal jurisprudence and examined whether the factors present in the case of the Rohingya in Rakhine State allow for a reasonable inference of genocidal intent, consistent with other contexts and cases. The IIFFMM affirmed that "direct evidence of genocidal intent will rarely exist",[388] however, in the absence of direct proof, genocidal intent may be deduced from circumstantial evidence, that is, "all of the evidence taken together".[389] In order to establish the genocidal intent, the criminal standard of "beyond reasonable doubt" is needed, any inference drawn from circumstantial evidence must be the sole reasonable conclusion that can be derived from the acts in question.[390]

The IIFFMM determined that the actions brought forward against the Rohingya, such as "the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level",[391] allow the determination that a genocide intent was present.[392]

Other researches align with the IIFFMM's findings: Manti and Islam identify five primary factors that illustrate genocidal intent on the part of the Myanmar government.[393] The first is the widespread dissemination of propaganda driven by hostility toward the Rohingya.[394] The second involves specific statements made by Myanmar authorities, politicians, religious leaders and military

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[386] Ibidem, para. 1392.
[387] *The Rohingya crisis and the International Criminal Court*, p. 84.
[388] IIFFM Report 2018, para. 1415; International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana* (Case ICTR-95-1-A, Judgment, 1 June 2001), para. 159.
[389] IIFFM Report 2018, para. 1415; International Criminal Tribunal for the former Yugoslavia. *Prosecutor v. Karadzic* (Case IT-95-5/18-T, Judgment, 24 March 2016), para. 550, 2592; International Criminal Tribunal for the former Yugoslavia. *Prosecutor v. Popovic et al.* (Case IT-05-88-A, Judgment, 30 January 2015), para. 468; International Criminal Tribunal for Rwanda. *Prosecutor v. Hategekimana* (Case ICTR-00-55A-A, Judgment, 8 May 2012), para. 133.
[390] IIFFM Report 2018, para. 1415; International Court of Justice. *Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment* (27 February 2007), para. 373; International Criminal Tribunal for the former Yugoslavia. *Prosecutor v. Karadzic* (Case IT-95-5/18-T, Judgment, 24 March 2016), para. 2592; International Criminal Tribunal for the former Yugoslavia. *Prosecutor v Brdjanin*, (Case IT-99-36-T, Judgment, 1 December 2004), para. 970.
[391] Ibidem, para. 1440.
[392] Ibidem, para. 1441.
[393] Manti, NP and Islam, DNC. "Genocide, forced migration, and forced labor: a case study on Rohingya people under international law" in Bülbül, K, Islam, MN and Khan, MS (eds*) Rohingya refugee crisis in Myanmar: ethnic conflict and resolution* (Palgrave Macmillan, Singapore 2022), p. 28.
[394] Ibidem.

commanders before, during and after the atrocities.[395] The third pertains to government policies and plans aimed at altering the region's demographic composition.[396] The fourth highlights deliberate efforts by Myanmar authorities to erase the Rohingya identity from Rakhine State.[397] The fifth is the extreme violence characterizing the acts and operations against the Rohingya.[398] Based in these factors, Manti and Islam conclude that these actions were carried out with genocidal intent.[399]

Article III of the Genocide Convention describes such acts as punishable under the Convention: "(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide".[400] Article IV states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".[401] Article V bounds "the Contracting Parties to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III".[402]

According to Article VI, "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".[403] Therefore, if a genocide against the Rohingya has been committed in Myanmar, the perpetrators must be prosecuted either by a competent Myanmar tribunal or an international criminal court or tribunal with jurisdiction over the crime.[404]

Even if the intent to commit genocide against the Rohingya were not to be conclusively established, the human rights violations have been characterized as a "textbook example of ethnic cleansing"[405] and will, at a minimum, be classified as such. However, since ethnic cleansing is not recognized as a distinct crime under international law, it must be assessed whether it constitutes

[395] Ibidem, p. 29.
[396] Ibidem, p. 31.
[397] Ibidem, p. 32.
[398] Ibidem, p. 33.
[399] Ibidem.
[400] *Convention on the Prevention and Punishment of the Crime of Genocide*, Art. III.
[401] Ibidem, Art. IV.
[402] Ibidem, Art. V.
[403] Ibidem, Art. VI.
[404] *The Rohingya, Justice and International Law*, p. 99.
[405] Zeid Ra'ad Al Hussein. "Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries" (Opening Statement at the 36th Session of the Human Rights Council, 11 September 2017), https://www.ohchr.org/en/statements/2017/09/darker-and-more-dangerous-high-commissioner-updates-human-rights-council-human.

crimes against humanity or genocide under the Rome Statute.[406] Notably, the term ethnic cleansing has been used in practice within UN Security Council resolutions, and judgements and indictments of the ICTY.[407]

The methods employed in the ethnic cleansing of the Rohingya include detainment, deportation, murder, torture, arbitrary arrest and detention, rape, and other severe injuries.[408] This persecution is closely tied to Myanmarese nationalism and its nation-building agenda.[409] While ethnic cleansing does not constitute a legally recognized crime, its use carries significant moral and political implications, signaling that violations comparable to ethnic cleansing have occurred, even if genocide cannot be conclusively established.[410] Ultimately, the strict definition under the Genocide Convention and its legal acknowledgment relies on evidence and the determinations made by the ICJ and ICC.

2.3.1 Standard of Proof

While the international responsibility of a State for the criminal actions of its organ is undisputed, the issue of ascertaining whether a State itself has committed an internationally wrongful act remains more complicated. How will the ICJ evaluate if genocide or other acts specified in Article III of the Genocide Convention were committed in Myanmar and whether Myanmar failed to fulfill its obligations to prevent and punish such acts.

The matter was addressed by the ICJ in the *Bosnian Genocide* case, which involved Bosnia's allegation that Serbia (formerly the Federal Republic of Yugoslavia or FRY) was responsible for committing genocide against Bosnian Muslims within Bosnia and Herzegovina during the 1992-1995 conflict. This claim focused on actions carried out by the organs of the self-declared Republika Srepska and, specifically in the case of the Srebrenica massacre, by the Bosnian Serb forces (VRS). Regarding the matter, the ICJ faced the question whether it could determine that a State committed genocide without a prior conviction of an individual for genocide by a competent court.[411] The ICJ concluded that the distinct procedures and powers of the ICJ, compared to those of criminal courts and tribunal prosecuting individuals, do not establish a legal impediment to the ICJ itself finding that genocide or other acts listed under Article III of the Genocide Convention have occurred.[412] Under

[406] Khan, B. "Complexities and Challenges in Reconciling International Human Rights with International Criminal Law: An Introduction" in *Human Rights and International Criminal Law* (Brill, Leiden 2022), p. XXIII.
[407] Ibidem, p. 351.
[408] Ibidem, p. 355.
[409] Ibidem, p. 356.
[410] *The Rohingya crisis and the International Criminal Court*, p. 86.
[411] *The Rohingya, Justice and International Law*, p. 100.
[412] Ibidem.

the ICJ's Statute, the Court is empowered to address such matters, applying a standard of proof commensurate with the exceptional gravity of the allegations.[413]

As outlined in Article IX of the Genocide Convention, the ICJ has jurisdiction to hold a State accountable if genocide or other acts listed in Article III are carried out by its organs, or by individuals or groups whose actions can be attributed to the State.[414] Any alternative interpretation could result in a situation where there is no legal recourse under the Convention in certain foreseeable scenarios: genocide might be committed by a State's leaders who remain in power, controlling State's institutions like the police, prosecution services and courts, with no international criminal tribunal having jurisdiction over the crimes.[415] Alternatively, a State may acknowledge its violation without the conviction of an individual. Considering this, the ICJ concludes that a State can be held responsible under the Genocide Convention for genocide or complicitly in genocide even in absence of an individual being convicted by a competent court for the crime.[416]

The Applicant bears the burden of proof in establishing its case, and any party asserting a fact is required to substantiate it.[417] The ICJ has consistently held that cases involving allegations of exceptional gravity, such as charges of genocide, must be supported by evidence that is entirely conclusive.[418] The Court must be fully persuaded that the allegations – that genocide or other acts outlined in Article III of the Genocide Convention have occurred – are clearly proven. The same rigorous standard applies to establishing the attribution to such acts.[419] Regarding the Applicant's claim that the Respondent has violated its obligations to prevent genocide and to punish or extradite those accused of genocide, the ICJ requires as well proof with a high degree of certainty, in line with the seriousness of the allegation.[420] In terms of methods of proof, the parties in the *Bosnian Genocide* case presented a vast array of materials, including reports, resolutions, and findings from various UN bodies, documents from intergovernmental organizations, evidence and rulings from the ICTY, government publications, NGO documents, as well as media reports, articles and books. Additionally, they presented witnesses, experts and witness-experts. Ultimately, the ICJ is responsible for making its own factual determinations, which must align with the legal claims made by the Applicant regarding the Respondent's breach of obligations.[421]

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[413] Bills, A. "Revisiting the Standard of Proof for Charges of Exceptional Gravity before the International Court of Justice" (2023), 26(1) *Max Planck Yearbook of United Nations Law Online*, p. 111.
[414] *Convention on the Prevention and Punishment of the Crime of Genocide.*
[415] *The Rohingya, Justice and International Law,* p. 100-101.
[416] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (26 February 2007), para. 181-182.
[417] Ibidem, para. 204.
[418] Ibidem, para. 209.
[419] Ibidem.
[420] Ibidem, para. 210.
[421] Ibidem, para. 211-212.

Furthermore, the ICJ held that the specific intent to destroy a group, in whole or in part, must be convincingly demonstrated through specific circumstances, unless a general plan aimed at achieving that goal can be clearly established.[422] For a pattern of conduct to serve as evidence of such intent, it must be so unequivocal that it leaves no other plausible explanation than the existence of that intent.[423]

In the *Bosnian Genocide* case, the Court determined that, apart from the Srebrenica massacre, the criminal acts committed in Bosnia and Herzegovina during the conflict did not constitute genocide, as it had not been conclusively demonstrated that these acts were carried out with the necessary genocidal intent.[424] Regarding the Srebrenica massacre, the ICJ recognized the ICTY's finding that the VRS, led by General Mladic, had committed genocide against Bosnian Muslims.[425] However, the Court concluded that the massacre could not be attributed to Serbia, as the VRS were neither de jure organs nor de facto agents of the respondent State,[426] nor were they individuals acting under the directives or control of the Serbian government.[427] Additionally, the ICJ found that Serbia's complicity in genocide, as defined by Article III(c) of the Genocide Convention, could not be conclusively established, as there was insufficient proof that the assistance provided to the VRS was given with knowledge of their genocidal intent.[428] Consequently, the Court ruled out Serbia's responsibility for both committing and being complicit in genocide,[429] limiting its judgment to recognizing Serbia's failure to fulfill its obligations to prevent and punish genocide.[430]

In reaching these conclusions, the ICJ outlined the criteria for determining a State's responsibility for committing genocidal acts. It relied on the obligation to prevent and punish genocide enshrined in Article I of the Genocide Convention to assert that States are themselves obligated not to commit genocide.[431] The Court acknowledged that this provision does not explicitly require States to refrain from committing genocide.[432] However, it deduced such a duty as an inherent aspect of the obligation to prevent genocidal acts. The ICJ reasoned that "it would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is

[422] Ibidem, para. 373.
[423] Ibidem.
[424] Ibidem, para. 277, 319, 370-376.
[425] Ibidem, para. 291, 295, 297.
[426] Ibidem, para. 394-395, 413.
[427] Ibidem, para. 413-415.
[428] Ibidem, para. 418-424.
[429] Ibidem, para. 413, 424.
[430] Ibidem, para. 448-450.
[431] Ibidem, para. 167-168.
[432] Ibidem, para. 166.

attributable to the State concerned under international law".[433] This prohibition was found to extend not only to the direct perpetration of genocidal acts but also to the additional forms of liability outlined in Article III of the Genocide Convention, as reflected in the statutes of international criminal tribunals, including that of the ICC.[434]

These arguments enabled the ICJ to assert that international law operates under the principle of "the duality of responsibility",[435] which holds that "[…] the same acts may give rise to both individual criminal liability and state responsibility".[436] In response to Serbia's argument that international law does not recognize the criminal liability of States, the Court clarified that the responsibility of States for the acts prohibited under Article III of the Genocide Convention originates from international law itself, not from international criminal law.[437] Thus, the responsibility of States and individuals coexists on the international plane, as the provisions concerning individual accountability do not negate the separate obligations binding States to refrain from committing genocide or other acts outlined in Article III.[438] The Court concluded that "[…] if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred".[439] As this reasoning illustrates, a State's duty not to commit genocide is directly linked to the actions of its organs or individuals whose conduct is attributable to the State.[440] The underlying rationale is that a State can be held accountable for genocidal acts materially carried out by its organs or agents, based on the principles of attribution established under international law.

Despite the ICJ's affirmation that States can be held directly responsible for acts of genocide under the norms of attribution, a critical and complex issue persists regarding how the requirement of *dolus specialis* - a legal concept traditionally rooted in individual criminal responsibility - should be interpreted and applied in the context of State responsibility. While the Court recognized that genocide and the other acts prohibited under the Genocide Convention can be attributed to a State, it further emphasized that the existence of *dolus specialis*, or specific intent, must be "convincingly shown" for the State to bear international responsibility.

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[433] Ibidem.
[434] *Convention on the Prevention and Punishment of the Crime of Genocide,* Art. III.
[435] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (26 February 2007), para. 173.
[436] Cassese, Antonio. "On the Use of Criminal Law Notions in Determining State Responsibility for Genocide" (2007), 5(4) *Journal of International Criminal Justice*, p. 877.
[437]International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (26 February 2007), para. 170.
[438] Ibidem, para. 174.
[439] Ibidem, para. 179.
[440] Ibidem, para. 167.

In its reasoning, the Court identified two alternative bases for establishing the existence of a State's *dolus specialis*.[441] Upon rejecting the claim that Serbia could be held responsible for the commission of genocide, the Court clarified that "[t]he dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent".[442] This statement underscores that, to convincingly demonstrate a State's criminal intent, it must first be proven that the genocidal acts stemmed from a plan to annihilate the protected group. If the evidence fails to substantiate the existence of such a policy, genocidal intent may be deduced from the surrounding factual circumstances. These circumstances must reveal a pattern of behavior so unequivocal that it undeniably indicates the presence of the destructive intent.[443]

The standard of proof articulated by the ICJ was further refined in its 2015 judgment in *Croatia v* Serbia, which addressed the mutual allegations of genocide by the two States during the 1991–1995 Croatian War of Independence.[444] The Court clarified that the inference of *dolus specialis* on a factual basis hinges on the concept of "reasonableness," requiring the pattern of conduct to be such that the genocidal intent "[…] is the only inference that could reasonably be drawn from the acts in question".[445] The ICJ emphasized that this particularly stringent standard is warranted by the severity of the allegations, which demand fully conclusive evidence to establish genocidal intent attributable to the State.[446]

By requiring both the demonstration of *dolus specialis* and the existence of a clear genocidal intent, the ICJ combines these two criteria to determine whether Myanmar can be held internationally responsible for genocide, alongside the accountability of individuals who directly committed the acts constituting the crime.

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[441] Ibidem, para. 376.
[442] Ibidem, para. 373.
[443] Ibidem.
[444] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* [2015] ICJ Reports, p. 3; Paddeu, Federica. "Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia" (2015) 74(2) *Cambridge Law Journal*), p. 198-199.
[445] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* [2015] ICJ Reports, para. 148.
[446] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* [2007] ICJ Reports, para. 209.

2.3.2 The Gambia's Request for Provisional Measures

The Gambia's Application additionally called on the ICJ to order provisional measures to safeguard the rights of both the Rohingya group and The Gambia under the Genocide Convention, aiming to ensure that the dispute would neither worsen nor extend while awaiting the Court's final decision. The request was grounded in Article 41 of the ICJ Statute, which authorizes the Court to prescribe measures it considers necessary "to preserve the rights of either party".[447] This provision underscores the purpose of such measures: to safeguard the rights at issue in the judicial proceedings during the period required for the Court to deliver its judgment on the merits.[448] As has been observed, the issuance of an order for provisional measures aims to prevent any actions that could undermine the rights for which judicial redress is sought, thereby ensuring the effectiveness of the final judgment.[449]

Additional requirements for the issuance of provisional measures are outlined in the ICJ's Rules of Court. Article 73(1) of the Rules specifies that a party to the ICJ Statute may request a provisional measures order "during the course of the proceedings in the case in connection with which the request is made".[450] This provision establishes two key conditions: first, the request must be made within the context of proceedings already initiated before the ICJ, indicating that the Court must have been formally seized of the dispute for which the measures are sought;[451] second, the request must be directly relevant to the merits of the dispute.[452]

The ICJ's decision on a request for provisional measures is preliminary and does not prejudice the merits of the case. To indicate such measures, the ICJ must establish that it has *prima facie* jurisdiction over the issues raised in the Application.[453] This entails determining that the rights asserted by the requesting party on the merits, and which it seeks to protect, are "at least plausible".[454] Plausibility is established when the rights forming the basis of the Applicant's claim are supported by a credible legal foundation and when the claim itself appears credible — indicating that the rights asserted in the lawsuit likely exist in fact.[455] In essence, the claim brought before the Court must

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[447] *Statute of the International Court of Justice*, Art. 41.
[448] Rosenne, Shabtai. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press, Oxford 2012).
[449] Uchkunova, Inna. "Provisional Measures before the International Court of Justice" (2013), 12, *The Law and Practice of International Courts and Tribunals,* p. 392.
[450] International Court of Justice. Article 73(1) of the *Rules of Court of the International Court of Justice* (adopted 14 April 1978, entered into force 1 July 1978), https://www.icj-cij.org/en/rules.
[451] Shabtai, Rosanne. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (International Courts and Tribunals Series, Oxford University Press, 2005), p. 10.
[452] Ibidem.
[453] Ibidem.
[454] *The Rohingya, Justice and International Law*, p. 117.
[455] Miles, Cameron. "Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice" (2018) *British Yearbook of International Law*, p. 3.

demonstrate a reasonable probability of success for provisional measures to be granted.[456] In making this assessment, the Court considers the legal arguments presented by the parties and the evidence available at the time. Furthermore, it must ascertain a clear connection between the rights claimed and the provisional measures sought.[457]

Article 73(2) stipulates that the party requesting provisional measures must specify the measures sought, the reasons justifying the request and the potential consequences of their denial.[458] This requirement to outline the repercussions of rejecting the requested measures has been interpreted as embodying the condition of "urgency." In *Belgium v. Senegal*, the Court clarified that the urgency criterion is satisfied when "there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision".[459]

The harm that provisional measures aim to prevent must be "irreparable", meaning it cannot be remedied or reversed through ordinary means of reparation. Furthermore, the requirement of imminence pertains to the immediacy of the risk, which necessitates an interim decision to avoid it.[460] Importantly, the indication of provisional measures does not require a judicial determination of whether the alleged violation of international law has occurred. As affirmed in the *Bosnian Genocide* case, the Court's role is to assess whether, under the prevailing circumstances, provisional measures are necessary to safeguard the rights at issue in the main proceedings,[461] without rendering a definitive judgment on the facts or their attribution.[462]

The Gambia's request for provisional measures closely mirrors those indicated by the ICJ in its Order of 8th April 1993 in the *Bosnian Genocide* case.[463] In that order, the ICJ prescribed three key measures. First, it directed the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to immediately fulfill its obligations under the 1948 Genocide Convention by taking all actions within its power to prevent the commission of genocide. Second, the Court mandated that the government ensure military, paramilitary or irregular armed units under its control or influence, as well as organizations and individuals under its authority, refrain from committing genocide,

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[456] Uchkunova, Inna. "Provisional Measures before the International Court of Justice" (2013), 12, *The Law and Practice of International Courts and Tribunals*, p. 397.
[457] International Court of Justice. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009* [2009] ICJ Reports 139, p. 57, 60.
[458] International Court of Justice. Article 73(2) of the *Rules of Court of the International Court of Justice* (adopted 14 April 1978, entered into force 1 July 1978), https://www.icj-cij.org/en/rules.
[459] International Court of Justice. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009* [2009] ICJ Reports 139, para. 62.
[460] Uchkunova, Inna. "Provisional Measures before the International Court of Justice" (2013), 12, *The Law and Practice of International Courts and Tribunals,* p. 415.
[461] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, para. 46.
[462] Ibidem, para. 44.
[463] Ibidem.

conspiracy to commit genocide, direct and public incitement to commit genocide, or complicity in genocide, whether targeting the Muslim population of Bosnia and Herzegovina or any other national, ethnic, racial, or religious group. Third, both the Yugoslav and Bosnian governments were instructed to refrain from actions that could aggravate or extend the dispute over the prevention or punishment of genocide or complicate its resolution.

In addition, The Gambia elaborates the specific acts to be covered by the ICJ's Order as: extrajudicial killings or physical abuse; rape or other forms of sexual violence; burning of homes or villages; destruction of lands and livestock, deprivation of food and other necessities of life, or any other deliberate infliction of conditions of life calculated to bring about the physical destruction of the Rohingya group in whole or in part.[464]

The Gambia also requested three additional provisional measures:[465]

1- Myanmar must not destroy or render inaccessible any evidence related to the events outlined in the Application, including the remains of alleged victims or the physical sites of the alleged acts, ensuring that evidence remains intact and accessible.
2- Both Myanmar and The Gambia are required to submit reports to the ICJ within four months of the Order's issuance, detailing the measures taken to implement the Order.
3- Myanmar must grant access to, and fully cooperate with, all UN fact-finding bodies investigating alleged genocidal acts against the Rohingya, including the conditions to which they are subjected.

To substantiate its request, The Gambia argued that the genocide perpetrated against the Rohingya by Myanmar "is continuing"[466] and that the State "has no intention of ending these genocidal acts and continues to pursue the destruction of the [Rohingya] group within its territory".[467] These circumstances, The Gambia maintained, placed the Rohingya population at serious risk of renewed acts of genocide,[468] particularly given Myanmar's active efforts to demolish evidence of the crimes committed.[469]

Addressing the condition of *prima facie* jurisdiction required for a provisional measures order, The Gambia underscored that both parties to the dispute are UN member states, and as such, the ICJ, as a principal organ of the UN, has jurisdiction under Article 36 of its Statute.[470] Furthermore, it

[464] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order No. 178,* (23 January 2020), para. 12.
[465] Ibidem.
[466] *The Gambia Application,* para. 116.
[467] Ibidem, para. 117.
[468] Ibidem, para. 117-118.
[469] Ibidem, para. 118.
[470] Ibidem, para. 120.

recalled that both states are signatories to the Genocide Convention, with Article IX granting the ICJ jurisdiction over disputes concerning its interpretation and application, and neither party has lodged reservations to this provision.[471]

Regarding the plausibility of the rights in question, The Gambia clarified that the Court does not need to definitively establish the existence of the Rohingya's rights under the Genocide Convention;[472] it is sufficient that these rights could be considered grounded in a plausible interpretation of the Convention.[473] Notably, The Gambia also invoked *erga omnes* rights among those it sought to protect, reinforcing the principle that any State may act to uphold such obligations, even without having suffered direct injury as a result of their breach.[474]

Turning to the requirement of an imminent risk of irreparable harm, The Gambia highlighted that the Court has previously deemed provisional measures appropriate where past violations had occurred and where it was "not inconceivable" that such violations might recur.[475] Applying this standard, The Gambia argued that the Rohingya face a substantial risk of future genocidal acts due to Myanmar's persistent attempts to annihilate the minority. These ongoing brutalities, it contended, place the Rohingya under threat of "death, torture, rape, starvation, and other deliberate actions aimed at their collective destruction, in whole or in part".[476] Referring to the findings of the IIFFMM that "the Government continues to harbor genocidal intent"[477] The Gambia stressed the critical urgency of the situation, which it described as one that "literally cries out for the Court's protection".[478]

2.3.3 The ICJ's Ruling on Provisional Measures

The ICJ addressed The Gambia's request in its Order issued on January 23rd, 2020, assessing whether the preconditions for the indication of provisional measures had been met as outlined by the Applicant. The first ground tested was the Court's prima facie jurisdiction. After reiterating that the provisions forming the object of the claim must appear to provide jurisdiction on the merits of the case — without requiring a conclusive determination[479] — the ICJ held that the provisions invoked by The Gambia, namely Article 36 of the ICJ Statute and Article IX of the Genocide Convention,

[471] Ibidem.
[472] Ibidem, para. 126.
[473] Ibidem.
[474] Ibidem, para. 127.
[475] Ibidem, para. 130.
[476] Ibidem, para. 131.
[477] IIFFM Report 2019, para. 140.
[478] *The Gambia Application*, para. 131.
[479] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order No. 178,* (23 January 2020), para. 16.

established a prima facie basis for jurisdiction.[480] Article IX of the Convention, in particular, confers jurisdiction over disputes concerning compliance with its obligations. Since both parties to the dispute had ratified the Convention and neither had entered reservations to Article IX that could impede proceedings, the ICJ found no jurisdictional bar.[481] In response to Myanmar's claim that the ICJ lacked jurisdiction due to its reservations to Article VIII of the Genocide Convention, the Court clarified that Article VIII pertains to actions the UN may take to prevent and suppress genocide, rather than dispute resolution.[482] Consequently, Myanmar's reservations to Article VIII did not undermine the ICJ's jurisdiction under Article IX, nor did they preclude The Gambia from bringing the case to the Court.[483]

Having established a legal basis for jurisdiction, the ICJ proceeded to determine whether a dispute, as defined in Article IX of the Genocide Convention, existed between The Gambia and Myanmar.[484] The provision grants the Court jurisdiction over disputes concerning the application or interpretation of the Convention, and prima facie jurisdiction required evidence of such a dispute.[485] The ICJ emphasized that a dispute arises when States hold "clearly opposite views" on the performance of certain international obligations.[486]

Addressing Myanmar's argument that The Gambia had acted merely as a "proxy" for the Organization of Islamic Cooperation and thus lacked standing, the ICJ observed that The Gambia had instituted proceedings in its own name.[487] It further noted that support from other States or organizations did not negate the existence of a dispute between The Gambia and Myanmar.[488] The Court also pointed to The Gambia's statement at the 74th session of the UN General Assembly — announcing its intention to bring the Rohingya issue to the ICJ — and Myanmar's contemporaneous dismissal of the IIFFMM's findings as "biased and flawed" as evidence of a divergence of views.[489] This divergence, the ICJ held, sufficed to establish the existence of a dispute.[490] Moreover, the Court rejected Myanmar's contention that its silence in response to The Gambia's 2019 Note Verbale requesting Myanmar's compliance with the Genocide Convention negated the existence of a dispute.[491] The ICJ reiterated the principle that a dispute may be inferred from a State's failure to

[480] Ibidem, para. 17.
[481] Ibidem, para. 18-19.
[482] Ibidem, para. 35-37.
[483] Ibidem.
[484] Ibidem, para. 20.
[485] Ibidem.
[486] Ibidem.
[487] Ibidem, para. 25.
[488] Ibidem.
[489] Ibidem, para. 27.
[490] Ibidem.
[491] Ibidem, para. 28.

respond when circumstances warrant a reply, especially where the allegations are serious. In this case, Myanmar's silence in the face of The Gambia's allegations was deemed indicative of a dispute.[492]

The ICJ next examined whether the object of the dispute fell within the scope of the Genocide Convention: it noted that The Gambia's allegations pertained to Myanmar's responsibility for genocidal acts against the Rohingya community, as well as its failure to prevent and punish genocide, while Myanmar denied any breach of the Convention.[493] The Court concluded that "at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention".[494]

These considerations collectively led the ICJ to affirm the existence of a dispute between The Gambia and Myanmar regarding the application and fulfillment of the Genocide Convention, and that this dispute fell prima facie within the Court's jurisdiction.[495]

The Court then turned to the question of whether The Gambia had standing to bring the case. Myanmar contended that while The Gambia might have an interest in the Genocide Convention's compliance, such interest did not equate to a legal entitlement to initiate proceedings, as The Gambia was not affected in a special manner by the alleged violations.[496] However, the ICJ highlighted that all States parties to the Genocide Convention have a shared interest in preventing and punishing genocide, regardless of whether they are directly affected. It stated: "In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity".[497] The Court concluded that the erga omnes nature of the Convention's obligations grants any State party the right to invoke the responsibility of another State party for failing to fulfill its obligations, thereby confirming The Gambia's prima facie standing to bring the dispute before the ICJ.[498]

As to the plausibility of the rights invoked by The Gambia, Myanmar argued that a claim under the Genocide Convention required proof of genocidal intent.[499] The Court dismissed this contention, noting that at this preliminary stage, it was unnecessary to definitively establish the specific intent required for genocide.[500] Instead, the ICJ considered the findings of the UN General Assembly and the IIFFM on Myanmar, which credibly reported the commission of international crimes, including genocide, as sufficient to establish the plausibility of The Gambia's claims.[501]

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[492] Ibidem.
[493] Ibidem, para. 29.
[494] Ibidem, para. 30.
[495] Ibidem, para. 31, 37.
[496] Ibidem, para. 39.
[497] Ibidem, para. 41.
[498] Ibidem.
[499] Ibidem, para. 47.
[500] Ibidem, para. 56.
[501] Ibidem, para. 57.

Finally, the Court addressed whether the condition of "urgency" necessary for the issuance of provisional measures was satisfied.[502] Myanmar argued that no urgent situation existed, citing its ongoing negotiations for the Rohingya's repatriation, its efforts to stabilize Rakhine State and its commitment to prosecuting those responsible for crimes.[503] However, the Court observed that the rights protected by the Genocide Convention - particularly the right to existence - are of such fundamental nature that their violation is likely to result in irreparable harm.[504] Referring to the IIFFMM's findings, the Court noted that the conduct described in the Report was capable of affecting the Rohingya's right to existence.[505] It further emphasized that the Rohingya in Myanmar remained "extremely vulnerable", given the ongoing risk of genocide highlighted in the Mission's 2019 Report.[506] While acknowledging Myanmar's stated efforts toward repatriation and stability, the ICJ concluded that these measures were insufficient to mitigate the serious risk of irreparable damage to the Rohingya's rights under the Genocide Convention.[507] Consequently, the Court affirmed that the situation in Myanmar met the urgency condition for issuing provisional measures.[508]

Having determined that all requisite conditions were satisfied, the ICJ confirmed four of the six provisional measures requested by The Gambia. Specifically, the Court ordered Myanmar to:[509]

1- Prevent further acts of genocide against the Rohingya.
2- Ensure that the Tatmadaw and other security forces abstain from committing genocidal acts.
3- Prevent the destruction of evidence related to the proceedings.
4- Submit periodic reports to the Court detailing compliance with the provisional measures order.

However, the Court declined to grant two other requested measures: that both parties refrain from actions aggravating the dispute,[510] and that Myanmar grant access to UN bodies investigating alleged genocidal acts.[511] The ICJ provided limited explanation for these omissions, stating only that it found such measures unnecessary under the circumstances.[512]

The decision not to mandate access for UN investigative bodies was particularly significant, as it hindered the collection of evidence necessary to substantiate allegations of genocide. Myanmar's

[502] Ibidem, para. 65.
[503] Ibidem, para. 68.
[504] Ibidem, para. 70.
[505] Ibidem, para. 71.
[506] Ibidem, para. 72.
[507] Ibidem, para. 73.
[508] Ibidem, para. 75.
[509] Ibidem, para. 76-82.
[510] Ibidem, para. 83.
[511] Ibidem, para. 62.
[512] Boyle, Andrew. "ICJ Orders Preliminary Relief in the Myanmar Genocide Case", *Just Security* (blog, 28 January 2020), https://www.justsecurity.org/68379/icj-orders-preliminary-relief-in-the-myanmar-genocide-case/.

continued denial of responsibility and its obstruction of previous investigative initiatives further exacerbated this challenge, a situation worsened by the aftermath of the 2021 military coup. The lack of an order compelling access likely impeded efforts to document and address the alleged atrocities, delaying the broader process of holding perpetrators accountable for international crimes.[513]

The mandatory nature of provisional measures is confirmed by Article 94 of the UN Charter, which stipulates that all UN member States "undertake to comply with the decision of the International Court of Justice in any case to which it is a party".[514] However, what this entails in responding to a State's non-compliance remains unclear. Article 94(2) empowers the UN Security Council to adopt enforcement measures to ensure compliance with ICJ decisions, but this provision explicitly applies to judgments and not to orders indicating provisional measures. This distinction has led some to argue that interim orders fall outside the scope of enforceability under Article 94(2) and cannot be upheld through Security Council resolutions.[515] Even proponents of the Security Council's potential to enforce such measures acknowledge the improbability of this occurring, given the previous use of vetoes on the matter by Russia and China.[516]

In practice, the ICJ itself offers limited recourse in cases of non-compliance with interim orders. The Court typically evaluates such breaches alongside the substantive wrongdoing addressed in the case's merits, often resulting in no separate compensation for violations of provisional measures.[517] This approach was evident in *Bosnia v. Serbia*, where Serbia's disregard for the ICJ's 1993 Order did not result in an independent reparatory directive.[518] These uncertainties about enforcement cast doubt on the efficacy of provisional measures in preventing further genocidal actions, arguably granting Myanmar considerable discretion in their implementation. This concern is further amplified by the post-coup context in Myanmar, which has exacerbated institutional instability and diminished the likelihood of meaningful compliance with international directives.

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[513] IIFFM Report 2018, para. 24; IIFFM Report 2019, para. 222.
[514] *Charter of the United Nations,* Art. 94.
[515] Aysev, Uzay Yasar and Jordash, Wayne QC. "Seeing Through Myanmar's Fog: ICJ Instigates Provisional Measures", *UK Human Rights Blog* (blog, 31 January 2020), https://ukhumanrightsblog.com/2020/01/31/seeing-through-myanmars-fog-icj-instigates-provisional-measures/.
[516] Boyle, Andrew. "ICJ Orders Preliminary Relief in the Myanmar Genocide Case" *Just Security* (blog, 28 January 2020) https://www.justsecurity.org/68379/icj-orders-preliminary-relief-in-the-myanmar-genocide-case/; see also The Diplomat, "China, Russia Again Veto UN Statement on Myanmar Conflict", *The Diplomat* (blog, May 2022), https://thediplomat.com/2022/05/china-russia-again-veto-un-statement-on-myanmar-conflict/.
[517] Aysev, Uzay Yasar and Jordash, Wayne QC. "Seeing Through Myanmar's Fog: ICJ Instigates Provisional Measures", *UK Human Rights Blog* (blog, 31 January 2020), https://ukhumanrightsblog.com/2020/01/31/seeing-through-myanmars-fog-icj-instigates-provisional-measures/.
[518] Ibidem; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment* (26 February 2007), para. 469.

2.4 Myanmar's Preliminary Objections

On January 20th, 2021, Myanmar raised four preliminary objections to the jurisdiction of the ICJ and the admissibility of The Gambia's Application.[519] These objections had also been raised during the provisional measures' hearings held before the Court on 10th-12th December 2019. Public hearings on these objections were held from February 21st to February 28th, 2022. Notably, these proceedings took place after the February 2021 military coup in Myanmar. While the written submission of the objections had been prepared by the ousted civilian government under Aung San Suu Kyi, the military junta represented Myanmar during the hearings.

Firstly, Myanmar argued that the ICJ lacked jurisdiction or that the application was inadmissible because the real applicant was the Organization of Islamic Cooperation, not The Gambia.[520] Citing Article 34(1) of the ICJ Statute, which limits parties before the Court to States, Myanmar contended that the case could not proceed if it was effectively brought by an international organization.[521] Furthermore, Myanmar noted that the Genocide Convention, being open only to State signatories, precluded the OIC from invoking Article IX's compromissory clause.[522]

Secondly, Myanmar challenged The Gambia's standing as a non-injured State Party to the Genocide Convention, asserting that the treaty does not permit *actio popularis*,[523] which allows a State to act on behalf of a collective interest. According to Myanmar, Bangladesh, as the State directly affected by the alleged violations due to its hosting of Rohingya refugees, was the appropriate complainant. However, Bangladesh had entered a reservation to Article IX of the Genocide Convention upon ratification, effectively waiving its right to bring disputes under that provision to the ICJ.[524]

As third objection, Myanmar invoked its reservation to Article VIII of the Genocide Convention, which permits States to call upon the competent UN organs for measures to prevent and suppress genocide or any of the acts enumerated in Article III of the Genocide Convention.[525] Myanmar contended that this reservation limited The Gambia's ability to invoke the ICJ's jurisdiction, particularly when read alongside Article IX.[526]

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[519] Kapucu, Veysel T., "The Rohingya of Myanmar: R2P, International Justice and Accountability" in Ercan, Pinar Gözen (ed), *The Responsibility to Protect Twenty Years On: Rhetoric and Implementation* (Palgrave Macmillan, Cham 2022), p. 235.
[520] Republic of the Union of Myanmar, *Preliminary Objections of the Republic of the Union of Myanmar: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (International Court of Justice, 2021), p. 7, para. 25.
[521] Ibidem.
[522] Ibidem.
[523] Ibidem, p. 8, para. 27.
[524] Ibidem.
[525] Ibidem, p. 8, para. 28.
[526] Ibidem.

Finally, as anticipated in paragraph 2.2.2, in its fourth objection, Myanmar argued that no legal dispute existed between itself and The Gambia at the time of the latter's application to the ICJ on November 11th, 2019. Myanmar maintained that The Gambia's Note Verbale, sent on October 11th, 2019, and left unanswered, could not establish the existence of a legal dispute.[527] It further emphasized the importance of a strict interpretation of "pre-existing disputes",[528] insisting that mutual awareness of positively opposed legal claims between the parties was necessary to establish such a dispute.[529]

2.4.1 The ICJ's Decision on Myanmar's Preliminary Objections

On July 22nd, 2022, the Court issued its decision on Myanmar's preliminary objections. It unanimously dismissed the first, third and fourth objections, while the second objection was rejected by a majority of 15 to 1. The Court also ruled that it had jurisdiction over the case and deemed the application admissible.

The judgment first addressed the argument concerning the "real applicant" of the case, followed by the question of whether a legal dispute existed between the parties.[530] It then examined Myanmar's reservation to Article VIII of the Genocide Convention and concluded with its assessment of The Gambia's standing in the case.[531]

As outlined above, the first preliminary objection focused on whether The Gambia could be considered the "real applicant" in this case: Myanmar contended that the actual applicant was the Organization of Islamic Cooperation, rather than The Gambia. Regarding the matter, similarly to what the Court established in its Provisional Measures' Order,[532] it found that "The Gambia instituted the present proceedings in its own name, as a State party to the Statute of the Court and to the Genocide Convention".[533] The Court noted that "the fact that a State may have accepted the proposal of an intergovernmental organization […] does not detract from its status as the Applicant before the Court",[534] concluding that there was no basis to question The Gambia's initiation of proceedings

[527] Ibidem, p. 9, para. 31.
[528] Ibidem, p. 150, para. 491.
[529] Ibidem, p. 183, para. 575.
[530] International Court of Justice, *Judgment: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (The Gambia v. Myanmar)* (2022), p. 19, para. 33.
[531] Ibidem.
[532] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order No. 178,* (23 January 2020), para. 25.
[533] International Court of Justice, *Judgment: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (The Gambia v. Myanmar)* (2022), p. 19, para. 44.
[534] Ibidem, p. 19-20, para. 44.

against Myanmar in its own name. The ICJ therefore rejected Myanmar's first preliminary objection.[535]

The fourth preliminary objection raised by Myanmar centered on the absence of a dispute between the parties at the time The Gambia filed its Application to institute proceedings.[536] The Court reiterated the criteria for establishing a dispute under Article IX of the Genocide Convention.[537] It emphasized that, according to its consistent jurisprudence, a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between the parties.[538]

To determine the existence of such a dispute, the ICJ identified four relevant statements made by the parties' representatives at the United Nations General Assembly in September 2018 and September 2019, a Note Verbale sent by The Gambia to Myanmar's Permanent Mission to the United Nations on October 11th, 2019, [539] and found that the IIFFMM reports of 2018 and 2019 had sufficiently informed Myanmar of the allegations against it regarding breaches of the Genocide Convention. [540] The Court ultimately rejected Myanmar's fourth preliminary objection, concluding that a dispute over the interpretation, application, and fulfillment of the Genocide Convention existed at the time The Gambia filed its application on November 11th, 2019.[541]

Myanmar's third preliminary objection argued that its reservation to Article VIII of the Genocide Convention undermined the jurisdiction or admissibility of the case before the Court.[542] The ICJ addressed this claim by interpreting Article VIII as a provision "addressing the prevention and suppression of genocide "at the political level rather than as a matter of legal responsibility"."[543] The Court further explained that Articles VIII and IX of the Convention operate in distinct spheres.[544]

Article IX establishes the conditions under which the Contracting Parties may refer disputes to the ICJ as the principal judicial organ of the United Nations, whereas Article VIII allows any Contracting Party to seek intervention from other competent UN organs, regardless of whether a dispute exists with another party.[545] Based on this distinction, the Court concluded that Article VIII does not pertain to initiating proceedings before the ICJ. As such, Myanmar's reservation to Article

[535] Ibidem, p. 20, para. 50.
[536] Ibidem, p. 20, para. 51.
[537] Ibidem, p. 25, para. 63.
[538] Ibidem.
[539] Ibidem, p. 25, para. 65.
[540] Ibidem, p. 29, para. 76.
[541] Ibidem, p. 71, para. 29.
[542] Ibidem, p. 29, para. 78.
[543] Ibidem, p.31, para. 88.
[544] Ibidem, p. 32, para. 89.
[545] Ibidem.

VIII was deemed irrelevant for determining the Court's jurisdiction or the admissibility of the application.[546] Accordingly, this objection was also dismissed.[547]

The final preliminary objection addressed by the Court was Myanmar's second objection. The central issue in this objection was whether The Gambia could legitimately hold Myanmar accountable before the ICJ for alleged violations of obligations under the Genocide Convention.[548] The Court clarified that all States Parties to the Genocide Convention share a collective interest in the prevention, suppression and punishment of genocide. The Court held that these *erga omnes* obligations imply that any State Party has the right to ensure compliance with the Convention's provisions, without needing to demonstrate a specific or direct interest.[549] Therefore, it affirmed that responsibility for alleged breaches of these obligations could be pursued through proceedings before the ICJ, irrespective of whether the State invoking responsibility is directly affected.[550]

The ICJ acknowledged that Bangladesh is directly impacted by the Rohingya refugee crisis but determined that this fact does not diminish the right of other States Parties to invoke compliance with the Convention's obligations.[551] Consequently, the Court concluded that The Gambia, as a State Party to the Genocide Convention, had the standing to hold Myanmar accountable for the alleged breaches of Articles I, III, IV and V of the Convention.[552]

Myanmar's military junta expressed disappointment in a statement issued on July 23rd, acknowledging the rejection of its preliminary objections while noting the potential precedent-setting nature of the judgment as a source of international law.[553]

2.5 Third – party Interventions before the ICJ

This case represents an atypical scenario for the ICJ, as it does not involve a "standard" bilateral dispute between States. Instead, The Gambia - despite not being directly affected by Myanmar's alleged violations of the Genocide Convention - is pursuing the case based on the common interest of the parties in the compliance with its provisions. This approach inherently broadens the scope of the proceedings, as the tribunal is expected to consider not only the interests of the parties directly involved but also those of third States. In international dispute resolution, it is not uncommon for

[546] Ibidem, p. 32, para. 91.
[547] Ibidem, p. 32, para. 92.
[548] Ibidem, p. 35, para. 106.
[549] Ibidem, p. 35, para. 108.
[550] Ibidem, p. 35, para. 109.
[551] Ibidem, p. 37, para. 113.
[552] Ibidem, p. 38, para. 114.
[553] Ministry of International Cooperation of the Government of the Republic of the Myanmar, "Press Statement: Judgment of the International Court of Justice on the Preliminary Objections Raised by Myanmar" (2022), https://myanmar.gov.mm/home.

third parties to participate in cases where their interests may be affected.[554] However, the actual involvement of third parties in ICJ proceedings is rare, as the Court primarily adjudicates traditional inter-State disputes.[555]

The ICJ permits third-party interventions under Articles 62 and 63 of its Statute, as further detailed in Articles 81-85 of the Rules of Court.[556] Article 62(1) states that: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene".[557] Such requests are subject to the Court's approval, as provided in Article 62(2). Article 63(1) addresses situations where the interpretation of a convention to which other States are parties is at issue. In such cases, the Registrar must notify all affected States, granting them the right to intervene.[558] As outlined in Article 63(2): "Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith", and "Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it".[559] This provision establishes a right of intervention for interested parties, with the Court's judgment binding on all intervening States.[560] While litigant consent is not required for such interventions, ICJ approval must still be obtained in accordance with Article 84(1) of the Rules of Court.

In November 2023, Canada, Denmark, France, Germany, the Netherlands, the United Kingdom and the Maldives, filed declarations of intervention in accordance with Article 63 of the Court's Statute. In November 2024 Slovenia filed one as well, followed in December by the Democratic Republic of Congo, Belgium and Ireland.

Although all the intervening States are parties to the Genocide Convention, Myanmar raised objections regarding the admissibility of their interventions. Myanmar argued that the declarations of intervention went beyond the scope allowed by Article 63 of the ICJ Statute, as they addressed issues that were not related to the construction of the Convention's provisions.[561] Additionally, it contended

[554] *The Rohingya crisis and the International Criminal Court*, p. 66.
[555] Ibidem.
[556] Chinkin, Christine M., "Third-Party Intervention Before the International Court of Justice" (1986), 80(3), *American Journal of International Law,* p. 496.
[557] *Statute of the International Court of Justice*, Art. 62.
[558] Ibidem, Art. 63.
[559] Ibidem.
[560] Chinkin, Christine M., "Third-Party Intervention Before the International Court of Justice" (1986), 80(3), *American Journal of International Law,* p. 496.
[561] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Admissibility of the Declarations of Intervention* (3 July 2024), p. 8.

that the joint declaration addressed provisions of the Genocide Convention that were not in question in the case.[562]

As of today, despite these arguments, the Court declared the first round of interventions to be admissible. The Court concluded that there is no requirement under Article 63 of the ICJ Statute limiting interventions solely to points of interpretation in dispute between the parties.[563] Furthermore, while acknowledging that parts of the declarations of intervention addressed issues beyond the construction of the Genocide Convention, the Court clarified that it would not consider such matters but held that this did not render the interventions inadmissible in their entirety. The Court also affirmed that references to rules and principles of international law outside the Genocide Convention would only be considered if relevant to the construction of the Convention's provisions.[564] Consequently, the intervening States were permitted to file their observations on the interpretation of the relevant provisions of the Genocide Convention.[565]

2.6 What Can We Expect from the ICJ?

The case of *The Gambia v. Myanmar* represents a turning point in the jurisprudence of the International Court of Justice, outlining potential pathways to address grave human rights violations through the mechanism of State responsibility. The significance of this case lies not only in its focus on the Rohingya people, victims of systematic discrimination and violence, but also in its ability to shape the role of international law as a tool of accountability for crimes of global magnitude.

From a broader perspective, the recognition of the standing of a State not directly affected, such as The Gambia, sets a significant precedent for international law. The Court reaffirmed that *erga omnes* obligations, such as those enshrined in the Genocide Convention, entail a collective responsibility of the international community, expanding the scope of States' legal capacity to act. This decision consolidates the jurisprudence established in previous cases – *Belgium v. Senegal* - but goes further by strengthening the concept of common interest in preventing and punishing crimes of international relevance.

In terms of implications for the Rohingya, the proceedings before the ICJ have brought global attention to their suffering and the responsibilities of the Myanmar government. The Court's adoption of provisional measures in 2020 established an important symbolic safeguard, acknowledging the real risk of further acts of genocide and calling on Myanmar to fulfill its obligation to prevent such

[562] Ibidem.
[563] Ibidem.
[564] Ibidem.
[565] Ibidem, p. 10.

atrocities. However, the tangible impact of these measures has been limited by Myanmar's internal political instability, exacerbated by the 2021 military coup, which has further hindered compliance with international directives. This raises fundamental questions about the effectiveness of international legal instruments in contexts of fragile governance, highlighting the need for more robust enforcement mechanisms.

The judgment recognizing The Gambia's standing reinforces the idea that States not only have the right but also the duty to act against violations of collective obligations. This principle stems from the *erga omnes partes* nature of the obligations enshrined in the Genocide Convention, which establishes a collective responsibility among States to prevent and punish genocide. By affirming the standing of a non-injured State to bring a case before the ICJ, the Court implies that safeguarding the integrity of such obligations necessitates active vigilance by all State Parties. Consequently, the recognition of The Gambia's *locus standi* suggests not only a legal entitlement but also an implicit responsibility for States to intervene in cases of serious breaches of international law. This approach could encourage other States to undertake similar actions in the future, enhancing the Court's role as a guarantor of global justice. The application recently filed before the ICJ by South Africa against Israel, instituting proceedings concerning alleged violations of the Genocide Convention, highlights the expanding role of the Court in addressing contentious issues involving allegations of systemic violations of human rights. This case underscores the growing recognition of the ICJ as a pivotal mechanism for ensuring accountability and resolving disputes with global implications.

Nonetheless, significant challenges remain. The absence of an effective mechanism to enforce the Court's provisional measures and judgments, especially in the face of recalcitrant States, represents a critical limitation. Should the ICJ ultimately determine that Myanmar has violated and continues to breach its obligations under the relevant provisions of the Genocide Convention, such a declaration would, in itself, carry profound significance, offering a measure of satisfaction to both The Gambia and, crucially, the Rohingya community. However, the international community's inability to ensure compliance with the ICJ's decisions underscores the urgency of strengthening the links between international law and political enforcement mechanisms.

If the ICJ concludes that genocidal acts against the Rohingya are ongoing in Myanmar, it is anticipated that the Court will order an immediate cessation of such internationally wrongful conduct, requiring Myanmar to comply fully with its obligations under the Genocide Convention. At this stage, the UN Security Council holds the authority under Chapter VII of the UN Charter to refer the alleged genocide in Myanmar to the ICC Prosecutor for appropriate legal action against those responsible.[566]

[566] *The Rohingya, Justice and International Law*, p. 130-131.

Nevertheless, the effectiveness of this mechanism is at risk of being compromised by the discretion of the permanent members of the Security Council in exercising their veto power over resolutions aimed at enforcing the Court's ruling.[567] This discretionary power has, in fact, prevented the application of Article 94(2) of the UN Charter in practice. However, this poses complex questions about how Myanmar could be effectively coerced into compliance.[568]

The ICJ may also require Myanmar to provide reparations to the Rohingya victims of genocidal acts. Such reparations could include measures such as facilitating the safe and dignified return of forcibly displaced individuals, recognizing and upholding their full citizenship and human rights, and implementing protections against discrimination, persecution and other related abuses. These measures would align with Myanmar's obligations under Article I of the Genocide Convention to prevent and punish acts of genocide.

While the ICJ case is centered solely on the alleged crimes against the Rohingya, the Myanmar military's history of committing severe abuses extends across the country. Following the coup, ethnic groups have increasingly united in their quest for justice, recognizing parallels between the military's atrocities against the Rohingya and its widespread attacks on civilians nationwide.[569] The ICJ proceedings could serve as a precursor to broader examinations of the Myanmar military's persistent violations of international law. Stating Akila Radhakrishnan, president of the Global Justice Center: "As the Myanmar military continues to commit atrocities against anti-coup protesters and ethnic minorities, it should be put on notice there will be consequences for these actions - past, present and future. The ICJ's proceedings are laying the groundwork for accountability in Myanmar - not only for the Rohingya, but for all others who have suffered at the hands of the military".[570]

[567] Ibidem.
[568] Ibidem.
[569] Human Rights Watch, "Myanmar Rohingya Genocide Case: Steps Toward Justice" (14 February 2022), https://www.hrw.org/news/2022/02/14/myanmar-rohingya-genocide-case-steps-toward-justice.
[570] Ibidem.

Chapter 3 – Individual Criminal Responsibility: The Bangladesh – Myanmar Situation before the ICC

To fully grasp the context of the Bangladesh-Myanmar case before the International Criminal Court, it is crucial to examine not only the Court's institutional framework and procedural mechanisms but also the geopolitical and humanitarian complexities that have shaped this case. This chapter aims to provide a critical reflection on how the international justice system addresses systematic human rights violations in situations where non-State Parties to the Rome Statute are involved.

The Bangladesh-Myanmar situation stands as a stark example of the challenges in pursuing international criminal accountability when full cooperation from the concerned States is absent. The Rohingya crisis, which has drawn significant global attention, is not merely a humanitarian tragedy but also a test for the international community's capacity to ensure justice and accountability in the face of conflict. The military operations conducted in Myanmar in 2016 and 2017 led to the forced deportation of hundreds of thousands of Rohingya into Bangladesh, a process marked by systematic violence, village destruction and gross human rights abuses.

Beyond local dynamics, this case illustrates the structural and political challenges of an evolving international criminal justice system. While Bangladesh, as a State Party to the Rome Statute, has accepted the ICC's jurisdiction, Myanmar, as a non-signatory, has consistently rejected any responsibility for its actions. This duality creates a tension between national sovereignty and international obligations, requiring the ICC to navigate the principles of international law to assert its jurisdiction.

This chapter is structured into three main sections. The first part introduces the institutional structure of the ICC and the fundamental principles governing its jurisdiction, with a focus on the complementarity principle. The second section delves into the concept of individual criminal responsibility, examining both direct and superior responsibility. Finally, the chapter focuses on the specific case of Bangladesh and Myanmar, with particular attention to the key Pre-Trial Chamber decisions of the ICC and the broader implications of these decisions for the future of international justice.

3.1 Introduction to the International Criminal Court

Established through the 1998 Rome Statute,[571] which entered into force on 1st July 2002, the International Criminal Court is the world's first permanent international tribunal dedicated to criminal justice.[572] The Court is tasked with investigating and, when justified, prosecuting individuals accused of committing the most serious crimes of international concern, notably genocide, war crimes, crimes against humanity and the crime of aggression.[573] As a court of last resort, it operates to complement national judicial systems rather than supplant them.[574] Currently, 123 States are parties to the Rome Statute, and while Myanmar is not a signatory to the treaty, Bangladesh has ratified it.

The establishment of a permanent ICC stands as the most important development in the contemporary history of international criminal justice. It aimed to eliminate the need for ad hoc international criminal tribunals, such as the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East: both created by the Allied Powers following the Second World War to prosecute major Nazi and Japanese war criminals and often criticized for reflecting the idea of "victors' justice" and violating the principle that no one should be held criminally responsible for acts that were not defined as criminal under national or international law at the time they were committed *(nullum crimen sine lege)*.[575] Similarly, the UN Security Council's creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) is regarded as a unique precedent that has not been repeated due to geopolitical considerations: the veto power of the Council's permanent members and the significant financial burden such tribunals place on the UN's budget.[576] Furthermore, the establishment of special or hybrid courts - such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (the Khmer Rouge Tribunal) - which involve collaboration between foreign and national judges and prosecutors, is not always a practical or feasible solution for delivering criminal justice in determined States.[577]

The ICC, headquartered in The Hague, is composed of 18 judges elected from two lists of candidates who are nationals of States Parties to the Rome Statute.[578] In electing judges, States Parties are required to consider the representation of the world's principal legal systems, equitable

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[571] United Nations General Assembly. *Rome Statute of the International Criminal Court* (last amended 2010), ISBN 92-9227-227-6, UN Doc. A/CONF.183/9 (17 July 1998) (hereinafter "Rome Statute").
[572] International Criminal Court. "About the Court", https://www.icc-cpi.int/about/the-court.
[573] Ibidem.
[574] Ibidem.
[575] Onuma, Yasuaki. "The Tokyo Trial: Between Law and Politics" in Hosoya, Chihiro (ed), *The Tokyo War Crimes Trial: An International Symposium* (1986), p. 45; Sellars, Kirsten, "Imperfect Justice at Nuremberg and Tokyo" (2010), 21(4), *European Journal of International Law*, p. 1085.
[576] *The Rohingya, Justice and International Law*, p. 138.
[577] Ibidem.
[578] *Rome Statute*, Art. 36.

geographical distribution and a balanced representation of genders.[579] Additionally, two judges may not be nationals of the same State.[580] Judges serve a single nine-year term and are not eligible for re-election.[581]

The Court is organized into four primary organs: (a) the Presidency; (b) the Appeals Division, Trial Division, and Pre-Trial Division; (c) the Office of the Prosecutor; and (d) the Registry.[582] The Appeals Division consists of the ICC President and four other judges, while the Trial and Pre-Trial Divisions each include no fewer than six judges.[583] Judges are assigned to these divisions based on the nature of their respective functions and their expertise, ensuring an appropriate combination of skills in criminal law, procedural law and international law within each division.[584]

The Office of the Prosecutor (OTP) is an autonomous and distinct organ of the ICC.[585] Its mandate includes receiving referrals and credible information regarding crimes falling within the ICC's jurisdiction, conducting preliminary examinations, and carrying out investigations and prosecutions before the Court.[586] The OTP is led by the ICC Prosecutor, who is supported by one or more Deputy Prosecutors.

Regarding the applicable law, Article 21(1) of the Rome Statute outlines a hierarchical framework that the ICC must follow: "(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".[587]

Article 21(2) further permits the ICC to apply principles and rules of law as interpreted in its own prior decisions.[588] However, Article 21(3) stipulates that the interpretation and application of the law must align with internationally recognized human rights and avoid any adverse distinctions based on criteria such as gender, age, race, ethnicity, language, religion, political opinion or social status.[589]

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[579] Ibidem.
[580] Ibidem.
[581] Ibidem.
[582] Ibidem, Art. 34.
[583] Ibidem, Art. 39.
[584] Ibidem.
[585] Ibidem, Art. 42.
[586] Ibidem.
[587] Ibidem, Art. 21(1).
[588] Ibidem, Art. 21(2).
[589] Ibidem, Art. 21(3).

While the jurisprudence of international criminal tribunals, such as the ICTY and ICTR, is not binding on the ICC,[590] well-established decisions from these tribunals may serve as persuasive authority under Article 21(1)(b).[591]

The pursuit of individual criminal responsibility before the ICC constitutes a fundamental pillar in addressing violations of international law, particularly in instances where State officials are implicated in grave human rights abuses. While the evidentiary thresholds for establishing individual criminal responsibility differ from those applicable to State responsibility - reflecting the distinct nature and consequences of the respective legal frameworks - there exists a substantial convergence in the factual underpinnings of both forms of accountability. This intersection underscores the necessity of ensuring that individuals bearing the greatest responsibility for serious violations are brought to justice, even when they hold positions of authority within State institutions and seek refuge under the principle of State sovereignty.

The ICC's role is instrumental in bridging accountability gaps and combating impunity, particularly regarding high-ranking political and military figures responsible for grave violations of international law. However, the prosecution of such individuals poses significant political and practical challenges, as their apprehension and trial are often contingent upon profound shifts in domestic and international political dynamics. Furthermore, proceedings before the ICC are inherently protracted and may exert only limited immediate influence on ongoing conflicts and human rights abuses. Notwithstanding these challenges, the pursuit of individual criminal responsibility remains indispensable in upholding the rule of law and deterring future violations.

In light of the heightened attention accorded to the ICC following the outbreak of the armed conflict between Ukraine and Russia in 2022, it is imperative that the international community strengthens its support for the Court to ensure the effective prosecution of those responsible for the most serious crimes.[592] In the context of the Rohingya crisis, the ICC stands as one of the few viable avenues for securing justice, offering a robust legal framework through which individuals accountable for mass atrocities may be prosecuted.[593]

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[590] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74*, Case No. ICC-01/04-01/06, Section A.5.
[591] *The Rohingya, Justice and International Law,* p. 140.
[592] *The Rohingya crisis and the International Criminal Court,* p. 146.
[593] Ibidem.

3.1.1 Crimes within the Jurisdiction of the ICC

According to the Rome Statute, the ICC exercises jurisdiction over the crimes enumerated in Article 5, namely genocide, crimes against humanity and war crimes.[594] Additionally, as of 17th July 2018, the ICC's jurisdiction extends to the crime of aggression,[595] but only under specific conditions: either when a State Party has formally accepted the Court's authority over this offense or when the UN Security Council, acting under Chapter VII of the UN Charter,[596] refers the situation to the Prosecutor. The crime of aggression holds no relevance in the context of the Rohingya crisis.

As the crime of genocide has been thoroughly analyzed in the previous chapter, this section will provide a concise introduction to crimes against humanity and war crimes.

According to Article 7(1) of the Rome 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: (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 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".[597]

Article 7(2)(a) of the Rome Statute clarifies that, for the purposes of paragraph 1 of Article 7, an "attack directed against any civilian population" refers to "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".[598] The acts referenced need not to amount to a military attack. A "policy to commit such an attack" requires that the State or organization actively support or promote actions directed against a civilian population.[599] Such a policy, targeting civilians as the focus of the attack, would typically be executed through affirmative actions by the State or organization. In rare cases, however, it may be carried out through a deliberate

[594] *Rome Statute*, Art. 5.
[595] Ibidem.
[596] *Charter of the United Nations,* Chapter VII.
[597] *Rome Statute*, Art. 7(1).
[598] Ibidem, Art. 7(2).
[599] *The Rohingya, Justice and International Law,* p. 145.

omission, where inaction is intentionally aimed at fostering such an attack.[600] The existence of such a policy cannot be presumed solely based on the lack of action by the government or organization.

War crimes are offenses perpetrated in serious breach of the established rules of international humanitarian law, which governs conduct during armed conflicts.[601] The Rohingya context does not involve an international armed conflict. However, Myanmar has acknowledged that certain war crimes may have been committed by its security forces in the context of a non-international armed conflict, also referred to as an internal armed conflict.

According to Article 8(1), "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes".[602] Article 8(2)(a) enlists as war crimes the "grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages".[603]

Article 8(2)(c) defines war crimes in the context of armed conflicts not of an international character as "serious violations of Article 3 common to the four Geneva Conventions of 12th August 1949".[604] Specifically, "any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable".[605]

Article 8(2)(d) provides clarification that the provisions of Article 8(2)(c) pertain exclusively to armed conflicts not of an international character. Consequently, they do not extend to instances of

[600] Ibidem.
[601] Ibidem, p. 141.
[602] *Rome Statute*, Art. 8(1).
[603] Ibidem, Art. 8(2)(a).
[604] Ibidem, Art. 8(2)(c).
[605] Ibidem.

internal disturbances or tensions, such as riots, isolated acts of violence or other similar occurrences.[606]

Article 8(2)(e) further enumerates the following acts as war crimes in an internal armed conflict: "(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; (xiii) Employing poison or poisoned weapons; (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xvi) Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production; (xvii) Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays; (xviii) Employing laser weapons specifically

[606] Ibidem, Art. 8(2)(d).

designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.[607]

Article 8(2)(f) specifies that Article 8(2)(e) is applicable to armed conflicts of a non-international character and does not extend to situations involving internal disturbances and tensions, such as riots, isolated acts of violence, or similar events.[608] Additionally, Article 8(2)(e) applies to armed conflicts occurring within the territory of a State where there is prolonged armed violence between governmental authorities and organized armed groups or between such groups.[609] Article 8(3) further provides that nothing in paragraphs 2(c) and (e) of Article 8 diminishes a government's responsibility to maintain or restore law and order within the State or to defend its unity and territorial integrity using all "legitimate means".[610]

A State that ratifies the Rome Statute consents to the ICC's jurisdiction over the crimes outlined in Article 5.[611] Article 13 of the Statute specifies that the ICC may exercise its jurisdiction in: (a) A situation in which one or more of such crimes is referred to the Prosecutor by a State Party; (b) A situation in which one or more of such crimes is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) A situation in which the ICC Prosecutor initiates investigations *proprio motu* based on information about crimes within the Court's jurisdiction.[612] In the latter case, the Prosecutor needs to obtain an authorization from the Pre-Trial Chamber. Regarding the Bangladesh/Myanmar situation, the ex-ICC Prosecutor, Fatou Bensouda, has started investigations on her own initiative.

In accordance with Article 13(a) and (c) of the Rome Statute, Article 12(2) establishes that the ICC "may exercise its jurisdiction if one or more of the following States are parties to the 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; (b) The State of which the person accused of the crime is a national".[613] Additionally, Article 12(3) provides that a non-party State may accept the Court's jurisdiction for a specific crime by submitting a declaration to the ICC Registrar. In such cases, the State is required to cooperate fully with the ICC without exceptions or delays.[614]

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[607] Ibidem, Art. 8(2)(e).
[608] Ibidem, Art. 8(2)(f).
[609] Ibidem.
[610] Ibidem, Art. 8(3).
[611] *Rome Statute*, Art. 5.
[612] Ibidem, Art. 13.
[613] Ibidem, Art. 12(2).
[614] Ibidem, Art. 12(3).

3.1.2 The Complementarity Principle

The Preamble of the Rome Statute establishes that the ICC is intended to function as a complementary mechanism to national criminal justice systems.[615]

According to Article 17(1) of the Statute, the ICC "shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;[616] (d) The case is not of sufficient gravity to justify further action by the Court".[617]

Article 17(2) prescribes that: "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice".[618]

Furthermore, Article 17(3) adds that "in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".[619]

During the oral hearings before the ICJ in December 2019, The Gambia argued that the Myanmar Government lacked both the ability and the willingness to deliver justice for the

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[615] Ibidem, Preamble, para. 10.
[616] Art. 20(3) of the *Rome Statute* prescribes that: "No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the ICC with respect to the same conduct unless the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".
[617] Ibidem, Art. 17(1).
[618] Ibidem, Art. 17(2).
[619] Ibidem, Art. 17(3).

Rohingya.[620] In addition, both the IIFFMM's reports to the Human Rights Council in September 2018 and September 2019 highlighted the Tatmadaw's complete impunity, with no instances of accountability for its members' actions.[621] The Myanmar Government typically responded by denying, dismissing and obstructing allegations, while publicly praising the discipline of Myanmar troops and claiming their operations are conducted in full compliance with the law. Any investigation internally conducted until today has been superficial and carried out only when undeniable evidence has come to light publicly. In this situation, the Myanmar's government consistent failure to assign responsibility reinforces the message to troops that their actions will carry no consequences.

This pattern stems from Myanmar's political and legal framework, which grants the Tatmadaw immunity from civilian oversight and enshrines its constitutional authority to manage its own affairs independently.[622] Impunity is also systemic, embedded within the legal framework and governance structure, including Myanmar's 2008 Constitution: Article 343(b) of which reads that concerning military justice, "the decision of the Commander-in-Chief of the Defense Services is final and conclusive".[623] The documented history of crimes perpetrated by the Tatmadaw reveals a lack of accountable leadership and the absence of measures to prevent or address such crimes.[624] Justice has eluded victims in Myanmar for decades, as the authorities have consistently failed to denounce, investigate or prosecute those responsible.

As has been seen previously, the Myanmar authorities have resorted to establishing ad hoc inquiry commissions and boards in response to the Rakhine crisis. The IIFFMM reviewed eight such initiatives since 2012, concluding that none have met the criteria of being impartial, independent, effective or thorough human rights investigations.[625] None of these initiatives have resulted in prosecutions for serious human rights violations or provided redress for victims. The few cases brought forward, mostly in military courts lacking transparency, are wholly inadequate to address the pervasive impunity.[626] Myanmar's military courts are unable to handle large-scale human rights violations committed by the military, and civilian courts are not a viable alternative due to the lack of independence in the justice system, its inability to uphold fair trial standards, and its incapacity to address the scale and gravity of violations committed by high-ranking officials, especially those

[620] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record*, ICJ Doc. CR 2019/18 (10 December 2019), p. 61.
[621] HRC Report; Independent International Fact-Finding Mission on Myanmar, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/50 (9 August 2019).
[622] *The Rohingya, Justice and International Law,* p. 158.
[623] *The Constitution of the Union of Myanmar* (2008). Art. 343(b).
[624] *The Rohingya, Justice and International Law,* p. 159.
[625] IIFFM Report 2019, Section IV(G)(5).
[626] Ibidem.

involving international crimes.[627] Additionally, those who file complaints often face intimidation and retaliation. As such, the IIFFMM concluded that accountability at the domestic level in Myanmar is currently unattainable.[628]

The previous ICC Prosecutor, Fatou Bensouda, in her request for authorization to open an investigation under Article 15 of the Statute, reached a similar conclusion: the Myanmar Government is unwilling to end impunity for these violations, particularly those committed by security forces.[629] The Government's outright rejection of the IIFFMM's findings in 2018, and the fact that of the six individuals publicly named by the Report, two of the highest-ranking military officials still remain in their positions of command, further underscores its refusal to pursue accountability domestically.[630] This reluctance to pursue accountability was starkly illustrated by the release of seven Tatmadaw soldiers in November 2018.[631] These soldiers had been convicted and sentenced to ten years in prison for killing ten Rohingya civilians in Inn Din village, Maungdaw township, on 2nd September 2017. However, they were pardoned by the Senior General and released after serving less than a year in detention.[632] In contrast, two Reuters journalists, whose investigation into the incident had led to the soldiers' convictions, were themselves imprisoned for 18 months.[633]

On 30th July 2018, just before the IIFFMM released its first report, the Myanmar Government established the Independent Commission of Enquiry to investigate the events of 2017 in Rakhine state. As underlined in Paragraph 1.3.3, the ICOE consisted of two national and two international figures, none of whom appeared to have the necessary experience in complex human rights or criminal investigations. Additionally, statements made by Myanmar authorities and some of the selected commissioners suggested prejudice, undermining the commission's impartiality from the start. The ICOE's mandate limited its recommendations to enhancing peace, stability and law enforcement, rather than addressing accountability for human rights violations or breaches of international humanitarian law,[634] and the ICOE's chairperson explicitly stated that it was not designed to be an accountability mechanism for such violations.[635] Based on these facts, the IIFFMM concluded "on reasonable grounds" that the ICOE could not, and would not, provide a genuine pathway for accountability, even with some international involvement.[636]

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[627] *The Rohingya, Justice and International Law,* p. 159.
[628] IIFFM Report 2019, Section IV(G)(5).
[629] Office of the Prosecutor. *Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15 (Bangladesh/Myanmar)*, ICC-01/19 (4 July 2019), para. 235.
[630] *The Rohingya, Justice and International Law,* p. 159.
[631] IIFFM Report 2019, para. 232.
[632] Ibidem.
[633] Ibidem.
[634] Ibidem, para. 231.
[635] Ibidem.
[636] Ibidem, para. 233.

As discussed in Chapter 1, at the oral hearings before the ICJ in December 2019, Myanmar continued to defend its domestic criminal justice system. The ICOE's conclusion remained similar to Aung San Suu Kyi's defense.

Accepting the ICOE's conclusion as justifiable would imply that the ICC has no jurisdiction over the atrocities committed against the Rohingya. The war crimes in the context of internal armed conflict identified by the ICOE were perpetrated in Myanmar by Myanmar nationals, and since Myanmar is not a party to the Rome Statute and has not accepted the ICC's jurisdiction on an ad hoc basis under Article 12(3) of the Statute, the ICC would have no authority to address these crimes.

In a significant related development, from 10th – 20th March 2020, Myanmar's Parliament voted on 135 proposed amendments to the Constitution, which had been drafted by the then military regime.[637] The ruling National League for Democracy, led by ASSK, along with ethnic parties, submitted 114 of these amendments in an effort to limit or revoke the special powers and privileges granted to the military and its chief under the Constitution. These proposals sought to end the Commander-in-Chief's role as the supreme commander of the armed forces, as well as his authority to seize power during emergencies, including control over the legislature, executive and judiciary.[638] However, none of these amendments garnered the necessary three-fourths majority in Parliament for adoption.[639]

Myanmar's rebuttal in the ICJ, the ICOE's final report and the failed attempt to amend the Constitution to strip the military of its immunity must be objectively evaluated by the ICC in light of the criteria of inability or unwillingness as outlined in Articles 17(2) and (3) of the Rome Statute. After the coup d'état staged by the Tatmadaw on 1st February 2021, it is highly unlikely that the military will permit the prosecution of its leaders and key personnel for their role in the persecution of the Rohingya.

3.2 Modes of Liability

The Rome Statute recognizes two forms of individual criminal responsibility: direct and indirect (or superior). Direct individual criminal responsibility is addressed in Article 25, which establishes that the ICC has jurisdiction exclusively over "natural persons".[640] Consequently, governments, corporations and other entities that do not qualify as natural persons fall outside the ICC's jurisdiction.

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[637] Heugas, Annabelle. "Myanmar's Constitution Amendment Process in the Year 2020" (Konrad-Adenauer-Stiftung, 2 June 2020).
[638] Ibidem.
[639] Ibidem.
[640] *Rome Statute*, Art. 25.

According to Article 25(3): "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the [ICC]; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose".[641]

With respect to co-perpetration under Article 25(3)(a) of the Rome Statute, the ICC Appeals Chamber in the *Lubanga* case clarified that co-perpetrators are not required to personally or directly execute the crime. To establish that an accused committed a crime "jointly with another person" within the ICC's jurisdiction, it must be demonstrated that two or more individuals collaborated in the commission of the offense.[642] This necessitates an agreement among the perpetrators, which may be either explicit or implicit, prearranged or formed spontaneously.[643] It is enough for the shared plan to encompass a key element of criminality, as outlined in Article 30 of the Statute. This article specifies that the material elements of a crime under the ICC's jurisdiction must be committed with intent and knowledge. A person is considered to have intent where: "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".[644] By Article 30(3)

[641] Ibidem, Art. 25(3).
[642] International Criminal Court. *Prosecutor v. Lubanga*, Judgment, Case No. ICC-01/04-01/06 A 5 (1 December 2014), para. 464.
[643] *The Rohingya, Justice and International Law,* p. 164.
[644] *Rome Statute*, Art. 30.

knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".[645]

When multiple individuals are involved in committing a crime, determining whether an accused committed the crime - rather than merely contributing to its commission - cannot be based solely on their proximity to the act or whether they directly carried out the incriminated conduct.[646] Instead, it requires a normative evaluation of the accused's role within the specific context of the case. The most suitable approach for this assessment is to examine whether the accused exercised control over the crime through their essential contribution, which granted them the power to prevent its commission.[647] This control does not necessarily require their contribution to occur during the execution phase of the crime. The "control over the crime" doctrine differentiates individuals who are considered to have committed crimes from those who merely aided or contributed to crimes committed by others.[648]

The ICC Appeals Chamber emphasizes that the Rome Statute distinguishes between principal liability (Article 25(3)(a)) and accessorial liability (Articles 25(3)(b) to (d)), with principals generally considered more culpable, all else being equal.[649] When the necessary elements of different forms of principal liability under Article 25(3)(a) are established, the ICC must determine which mode of responsibility best captures the full extent of the accused's criminal liability.[650]

Regarding Article 25(3)(c) of the Rome Statute, the IIFFMM's Report - *The Economic Interests of the Myanmar Military* - submitted to the UN Human Rights Council in August 2019, called for criminal investigations into numerous Myanmar and foreign companies for allegedly aiding and abetting international crimes and crimes against humanity through financial support to the Myanmar military and government.[651] Specifically, at least 45 companies and organizations reportedly provided the Tatmadaw with financial donations totaling $6.15 million, solicited by senior Tatmadaw leadership to support the "clearance operations" launched in August 2017 against the Rohingya in northern Rakhine.[652]

The report further alleged that private companies with longstanding ties to the Tatmadaw were funding development projects in northern Rakhine to advance the Tatmadaw's aim of re-engineering

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[645] Ibidem, Art. 30(3).
[646] *The Rohingya, Justice and International Law,* p. 164.
[647] Ibidem.
[648] Ibidem.
[649] International Criminal Court. *Prosecutor v. Lubanga*, Judgment, Case No. ICC-01/04-01/06 A 5 (1 December 2014), para. 462.
[650] *The Rohingya, Justice and International Law,* p. 165.
[651] Independent International Fact-Finding Mission on Myanmar. *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.3 (16 September 2019), para. 180(c).
[652] Ibidem.

the region.[653] This re-engineering reportedly seeks to erase evidence of Rohingya belonging in Myanmar and prevent their return to reclaim their homeland and communities.[654] These projects, carried out under the Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine, were accused of consolidating the outcomes of war crimes, crimes against humanity and acts of genocide. Based on these findings, the Report identified private companies with officials who may have made a significant and direct contribution to these crimes.[655]

In the context of the Rohingya crisis, individuals, whether Myanmar or non-Myanmar nationals, who aid or abet crimes against the Rohingya that fall under the ICC's jurisdiction may be subject to prosecution by the Court. Determining who qualifies as an aider or abettor in this context depends on the specific facts of each case. The above-mentioned IIFFMM's August 2019 Report emphasized that criminal liability for aiding and abetting may arise when business officials undertake actions or omissions that assist, encourage or provide moral support for the commission of a crime.[656] This includes providing financial aid, goods, information or services, such as banking and communication infrastructure, which contribute to the perpetration of such crimes.[657]

In addition to these considerations, the IIFFMM's Report of 12 August 2018 examined the role of civilian government officials in the Rohingya crisis highlighting how Myanmar's civilian authorities had limited constitutional powers to oversee the Tatmadaw and showed no evidence of direct involvement in its security operations.[658] However, they failed to use their available authority to address the atrocities in Rakhine State.[659] State Counsellor Daw Aung San Suu Kyi did not act to prevent the crimes or protect civilians, instead spreading false narratives, denying the Tatmadaw's wrongdoing, blocking investigations and enabling the destruction of evidence.[660] The Report concluded that these actions and omissions contributed to the commission of atrocity crimes.[661]

Article 28 of the Rome Statute establishes the framework for indirect individual criminal responsibility for commanders and superiors. A military commander or an individual effectively acting in such a role can be held criminally responsible for crimes committed by forces under their effective command and control if specific conditions are met.[662] The first condition requires that the commander either knew or, based on the circumstances at the time, should have known that the forces

[653] Ibidem.
[654] Ibidem.
[655] Ibidem, para. 181.
[656] Ibidem, para. 43.
[657] Ibidem.
[658] HRC Report, para. 93
[659] Ibidem.
[660] Ibidem.
[661] Ibidem.
[662] *Rome Statute*, Art. 28.

were committing or about to commit such crimes.[663] The second condition entails that the commander failed to take all necessary and reasonable measures within their power to prevent the crimes, repress their commission, or report the matter to the competent authorities for investigation and prosecution.[664]

For non-military superior-subordinate relationships, the Statute imposes liability under slightly different criteria. In these cases, a superior is criminally responsible for crimes committed by subordinates under their effective authority and control if three conditions are fulfilled.[665] First, the superior must have known or consciously disregarded information clearly indicating that subordinates were committing or about to commit crimes. Second, the crimes must have occurred in activities falling under the effective responsibility and control of the superior. Third, the superior must have failed to take all necessary and reasonable measures within their power to prevent the crimes, suppress their commission or report the matter to competent authorities for investigation and prosecution.

To ensure proper notice, the accused must be clearly informed of the factual allegations underpinning the ICC Prosecutor's claim that they, as a commander, failed to take "all necessary and reasonable measures" within their power to prevent or repress the commission of crimes or to report the matter to the competent authorities for investigation and prosecution.[666]

Article 33 of the Rome Statute outlines the defense of superior orders. A person who commits a crime under the ICC's jurisdiction as a result of an order from a government or superior, whether military or civilian, will not be exempt from criminal responsibility unless three conditions are met: the person was legally obligated to obey the order, the person did not know the order was unlawful and the order was not manifestly unlawful.[667] However, orders to commit genocide or crimes against humanity are considered manifestly unlawful.[668]

3.3 The ICC's Legal Mechanisms

As underlined in Paragraph 3.1.1, the ICC has jurisdiction over a limited number of crimes. Following the occurrence of crimes, the legal process at the Court unfolds in several stages. The first step is the preliminary examination, during which the Office of the Prosecutor evaluates whether there is sufficient legal and factual basis to proceed with a prosecution. This includes assessing whether the

[663] Ibidem, Art. 28(1)(a).
[664] Ibidem, Art. 28(1)(b).
[665] Ibidem, Art. 28(2).
[666] International Criminal Court. *Prosecutor v. Jean-Pierre Bemba Gombo (Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute")*, Case No. ICC-01/05-01/08 A (8 June 2018), para. 11, 108.
[667] *Rome Statute*, Art. 33.
[668] Ibidem.

alleged crimes are of sufficient gravity to fall within the ICC's jurisdiction, whether national proceedings are underway and whether initiating an investigation would serve the interests of justice.[669] The role of the Prosecutor at the ICC is unique, as the legal criteria for selecting cases and situations are intentionally broad, granting the Prosecutor a significant amount of discretion. According to Article 42(1) of the Rome Statute, the Prosecutor is independent and is not subject to instructions from external actors,[670] making this figure someway similar to a gatekeeper of the integrity of the ICC.[671]

Under Article 19(3) of the Rome Statute, the Prosecutor has the option to seek a ruling on matters of jurisdiction or admissibility before proceeding with an investigation.[672] If the Prosecutor determines that there is a reasonable basis to initiate an investigation, they must submit a request for authorization to the Pre-Trial Chamber, as outlined in Article 15(3).[673] However, if the criteria for opening an investigation are not met, or if the situation or crimes fall outside the ICC's jurisdiction, the Prosecutor is prohibited from conducting an investigation.

Finally, the Rome Statute outlines three distinct procedural phases: pre-trial, trial, and appeal. Once the Office of the Prosecutor has gathered sufficient evidence, it submits a request to the Pre-Trial Chamber, which is responsible for confirming the suspect's identity and ensuring that the suspect understands the charges against them.[674]

According to Article 58 of the Rome Statute, at any time following the initiation of an investigation, the Pre-Trial Chamber, upon the Prosecutor's application, shall issue an arrest warrant if, after reviewing the application and the evidence or other information provided by the Prosecutor, it is convinced that: "(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances".[675]

A State Party to the Rome Statute that has received a request for provisional arrest or for arrest and surrender must promptly take steps to arrest the individual in question, in accordance with its national laws and the provisions under Part 9 of the Statute - which governs international cooperation

[669] Ibidem, Art. 53.
[670] Ibidem, Art. 42(1).
[671] Badagard, Lovisa, and Klamberg, Mark. "The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court" (2017), 48(3), *Georgetown Journal of International Law*.
[672] *Rome Statute*, Art. 19(3).
[673] Ibidem, Art. 15 (3).
[674] International Criminal Court, "How the Court Works" (2024), https://www.icc-cpi.int/about/how-the-court-works.
[675] *Rome Statute*, Art. 58(1).

and judicial assistance in the ICC's investigation and prosecution of crimes falling within its jurisdiction.[676]

Upon the surrender of an individual to the Court, or their voluntary appearance before the Court or pursuant to a summons, the Pre-Trial Chamber must ensure that the person has been informed of the crimes they are alleged to have committed, as well as their rights under the Rome Statute, including the right to apply for interim release pending trial.[677] A person subject to a warrant of arrest may request interim release. If the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) are met, the individual will remain in detention. If these conditions are not met, the Pre-Trial Chamber must release the person, with or without conditions.[678]

Within a reasonable time following the person's surrender or voluntary appearance before the ICC, the Pre-Trial Chamber is required to hold a hearing to confirm the charges that the ICC Prosecutor intends to pursue at trial. This hearing must be conducted in the presence of the Prosecutor, the person charged and their legal counsel.[679] The Pre-Trial Chamber may, upon the request of the Prosecutor or on its own initiative, hold a hearing to confirm the charges in the absence of the person charged under specific circumstances. This can occur if the person has waived their right to be present or if the person has fled or cannot be found, provided that all reasonable steps have been taken to secure their appearance before the Court and to inform them of the charges. In such cases, the person shall be represented by counsel if the Pre-Trial Chamber determines that it is in the interests of justice.[680] At the hearing, the Prosecutor is required to present sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. This evidence may include documentary or summary evidence, and the Prosecutor is not obligated to call witnesses who are expected to testify at the trial.[681] In the same way, during the proceeding the person accused has the right to object to the charges, challenge the evidence presented by the Prosecutor and present their own evidence.[682]

The Pre-Trial Chamber, based on the hearing, shall determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on this determination, the Pre-Trial Chamber shall: (a) confirm those charges for which it has determined there is sufficient evidence and commit the person to a Trial Chamber for trial on the confirmed charges; (b) decline to confirm those charges for which it has determined there

[676] Ibidem, Art. 59.
[677] Ibidem, Art. 60(1).
[678] Ibidem, Art. 60(2).
[679] Ibidem, Art. 61(1).
[680] Ibidem, Art. 61(2).
[681] Ibidem, Art. 61(5).
[682] Ibidem, Art. 61(6).

is insufficient evidence; (c) adjourn the hearing and request the Prosecutor to consider: (i) providing further evidence or conducting further investigation with respect to a particular charge, or (ii) amending a charge if the evidence submitted appears to establish a different crime within the jurisdiction of the Court.[683] If the Pre-Trial Chamber declines to confirm a charge, the Prosecutor is not precluded from subsequently requesting its confirmation if the request is supported by additional evidence.[684] After the charges have been confirmed and before the trial begins, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notifying the accused, amend the charges. If the Prosecutor seeks to add new charges or substitute more serious charges, a hearing must be held under this article to confirm those charges. Once the trial has commenced, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.[685] Any previously issued warrant shall no longer be valid for charges that have not been confirmed by the Pre-Trial Chamber or have been withdrawn by the Prosecutor.[686] Following the confirmation of charges, the ICC Presidency shall establish a Trial Chamber tasked with overseeing the subsequent proceedings. This Chamber may also perform any functions of the Pre-Trial Chamber that are applicable and relevant to those proceedings.[687]

Article 63 prescribes that "the accused shall be present during the trial".[688]

The presumption of innocence of the accused until proven guilty beyond a reasonable doubt by the Prosecutor before the ICC, along with the rights of the accused, are outlined in Articles 66 and 67 of the Statute, respectively.[689] Article 68 of the Statute mandates the ICC to implement appropriate measures to safeguard the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. In fulfilling this obligation, the ICC must consider all relevant factors, such as age, gender, health, and the nature of the crime - particularly, though not exclusively, in cases involving sexual or gender-based violence or violence against children. The ICC Prosecutor is specifically required to adopt such measures during the investigation and prosecution of these crimes.[690]

The ICC may impose one of the following penalties on an individual convicted of a crime under its jurisdiction: (a) imprisonment for a specified term, not exceeding a maximum of 30 years; or (b) life imprisonment, when warranted by the extreme gravity of the crime and the specific circumstances of the convicted individual. In addition to imprisonment, the ICC may also order: (a) a fine; and (b)

[683] Ibidem, Art. 61(7).
[684] Ibidem, Art. 61(8).
[685] Ibidem, Art. 61(9).
[686] Ibidem, Art. 61(10).
[687] Ibidem, Art. 61(11).
[688] Ibidem, Art. 63.
[689] Ibidem, Art. 66-67.
[690] Ibidem, Art. 68(1).

the forfeiture of proceeds, property and assets obtained directly or indirectly from the crime, provided this does not infringe upon the rights of bona fide third parties.[691]

With respect to reparations for victims, Article 75 of the Statute empowers the ICC to issue orders directly against a convicted individual, specifying appropriate reparations for victims, including restitution, compensation and rehabilitation.[692] When deemed appropriate, the ICC may direct that reparations be awarded through the Trust Fund established under Article 79 of the Statute by the Assembly of States Parties, benefiting victims of crimes within the ICC's jurisdiction and their families. Additionally, the ICC may order that funds and property obtained through fines or forfeiture be transferred to the Trust Fund, to be managed in accordance with the criteria set by the Assembly of States Parties.[693]

The decisions of the ICC are subject to appeal under specific conditions. The ICC Prosecutor may appeal on the grounds of procedural error, factual error, or legal error.[694] Similarly, the convicted person, or the Prosecutor acting on their behalf, may appeal on these grounds or on any other basis that affects the fairness or reliability of the proceedings or decision. Furthermore, both the Prosecutor and the convicted person may appeal a sentence if it is deemed disproportionate to the gravity of the crime.[695] Imprisonment sentences handed down by the ICC must be served in a State designated by the ICC from a list of States that have agreed to accept convicted individuals.[696] Such sentences are binding on all States Parties to the Rome Statute, which are prohibited from altering them in any way. Only the ICC has the authority to consider appeals or requests for sentence revision submitted by the convicted individual. [697] The enforcement of imprisonment is carried out under the supervision of the ICC and must adhere to widely accepted international treaty standards governing the treatment of prisoners.[698] The conditions of imprisonment are regulated by the domestic laws of the enforcing State, provided they align with the international standards and are neither more nor less favorable than those applied to individuals convicted of comparable offenses in that State.[699]

[691] Ibidem, Art. 77.
[692] Ibidem, Art. 75.
[693] Ibidem, Art. 79.
[694] Ibidem, Art. 81.
[695] Ibidem.
[696] Ibidem, Art. 103(1).
[697] Ibidem, Art. 105.
[698] Ibidem, Art. 106(1).
[699] Ibidem, Art. 106(2).

3.4 The Bangladesh - Myanmar Situation Before the ICC

On April 9th, 2018, the then Prosecutor of the ICC Fatou Bensouda submitted a request to the President of the Pre-Trial Division to determine whether the ICC could assert jurisdiction under Article 12(2)(a) of the Rome Statute concerning the alleged deportation of the Rohingya from Myanmar to Bangladesh (hereinafter "Request on Jurisdiction").[700] Consequently, the matter was assigned to Pre-Trial Chamber I.[701] In response to the Prosecutor's request, Pre-Trial Chamber I issued a decision on September 6th, 2018, clarifying that the ICC possessed jurisdiction over the alleged crime of deportation committed in Myanmar. The Chamber reasoned that, although the deportation began in the territory of a non-State Party to the Rome Statute, its transboundary nature meant that an essential element of the crime occurred in the territory of Bangladesh, a State Party to the Statute.[702] Furthermore, the Chamber asserted that if the Prosecutor met the necessary criteria under Article 12(2)(a) of the Statute,[703] the ICC could extend its proceedings to cover crimes other than deportation.[704]

The government of Myanmar, for its part, has openly criticized the ICC's Decision on Jurisdiction. It has invoked the international law of treaties to argue that Myanmar, as a non-State Party to the Rome Statute, is not bound by its provisions and that the ICC lacks jurisdiction over crimes allegedly committed on its territory.[705]

Following the Pre-Trial Chamber I's decision, the Prosecutor initiated a preliminary examination of the alleged violations committed in Myanmar.[706] Based on the evidence collected, a request for authorization to open an investigation into the Bangladesh-Myanmar situation was submitted to the Court on July 4th, 2019.[707] The Court granted the authorization in November of that year, specifically in relation to the crimes of deportation and persecution.[708] Notably, neither the Pre-Trial Chamber nor the Prosecutor addressed the potential inclusion of genocide within the ICC's jurisdiction over the Myanmar situation.

On November 27th, 2024, the ICC Prosecutor issued a statement announcing his Office's submission of an application for an arrest warrant in the Situation in Bangladesh-Myanmar and

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[700] *Request on Jurisdiction.*
[701] *Decision on Jurisdiction,* para. 2.
[702] Ibidem, para. 73.
[703] *Rome Statute*, Art. 12(2)(a).
[704] *Decision on Jurisdiction*, para. 74.
[705] Republic of the Union of Myanmar. Office of the President, *Press Release* (7 September 2018), http://www.president-office.gov.mm/en/?q=briefing-room/news/2018/09/07/id-8986.
[706] Office of the Prosecutor. *Situation in Bangladesh/Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15*, No. ICC-01/19-7 (4 July 2019), para. 3.
[707] Ibidem.
[708] *Authorisation of Investigation,* para. 92, 108, 110, 126.

indicated that additional applications would follow.[709] In the statement, the Prosecutor declared that the OTP had determined there were reasonable grounds to believe that Senior General and Acting President Min Aung Hlaing, Commander-in-Chief of the Myanmar Defence Services, holds criminal responsibility for the crimes against humanity of deportation and persecution of the Rohingya, committed in Myanmar and, in part, in Bangladesh.[710]

This case represents a pivotal moment for international criminal law, as it explores the boundaries of the ICC's jurisdiction over crimes committed partially on the territory of a non-State Party. The Court's handling of the Bangladesh-Myanmar situation has the potential to establish a significant precedent for future cross-border cases involving systemic human rights violations.

The next Paragraphs provide an analysis of the Prosecutor's Request on Jurisdiction, as well as the ICC's 2018 and 2019 Decisions, with the aim of examining the basis and extent of the Court's jurisdiction over the crimes committed in Myanmar. It will address the criteria for the Court's jurisdiction concerning the deportation of the Rohingya from Myanmar to Bangladesh, placing special emphasis on Article 12 of the Rome Statute and on the role of territoriality in affirming the ICC's jurisdiction.

3.4.1 The Path to the ICC

As underlined in the previous paragraphs, the ICC's involvement in the Myanmar situation is founded on the Prosecutor's independent exercise of its powers. According to Article 15, the Prosecutor needs to conduct a preliminary examination in cases where they believe that one or more statutory crimes may have been committed.[711] If the Prosecutor determines that there are reasonable grounds to proceed with an investigation, they must seek authorization from the assigned ICC Pre-Trial Chamber through a formal request supported by evidence. However, and this is particularly significant in the Bangladesh-Myanmar situation, if the crimes identified by the Prosecutor involve a non-State Party to the Rome Statute, the Pre-Trial Chamber may authorize the investigation only if the traditional jurisdictional bases - namely, active nationality or territoriality - are satisfied.[712]

For this reason, the Prosecutor opted to precede the Request for Investigation - and, indeed, the preliminary examination itself - with a request for the Court to determine whether it possessed jurisdiction over the alleged crime of deportation committed in the territories of Bangladesh and

[709] International Criminal Court. *Bangladesh/Myanmar*, https://www.icc-cpi.int/victims/bangladesh-myanmar.
[710] Office of the Prosecutor. *Statement of ICC Prosecutor Karim A.A. Khan KC: Application for an Arrest Warrant in the Situation in Bangladesh/Myanmar,* https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-application-arrest-warrant-situation-bangladesh.
[711] *Rome Statute*, Art. 15.
[712] Ibidem, Art. 15(4).

Myanmar. It is important to note that the Prosecutor's Request on Jurisdiction did not adhere to the procedural rules typically governing the submission of such requests.[713] This procedural deviation was explicitly criticized by the Government of Myanmar, which, in its August 2018 Statement, highlighted that under Article 19 of the Rome Statute a request for a jurisdictional ruling should follow, rather than precede, the initiation of an inquiry.[714] Article 19(3) provides that "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court".[715] According to the Government of Myanmar, the rule outlined in Article 19(3) allows the Prosecutor to evaluate whether the alleged crimes fall within the scope of the Rome Statute before submitting a jurisdictional request, serving as one of the different procedural safeguards designed to uphold the impartiality of subsequent proceedings.[716] The decision to submit the Request on Jurisdiction to the Pre-Trial Chamber without first conducting a preliminary examination is described as bypassing established procedural safeguards, effectively initiating criminal proceedings without first ensuring a proper legal basis.[717]

The Prosecutor explicitly addressed this issue in the Request on Jurisdiction, asserting that jurisdictional requests under Article 19(3) of the ICC Statute are not confined to a specific stage of proceedings. She argued that such requests can be made either in the context of a particular case - where individuals are already under investigation for alleged crimes - or during the earlier phase concerning a situation.[718] Furthermore, she maintained that these requests can be submitted to the Court even prior to the initiation of formal proceedings. While acknowledging that the 2018 Request on Jurisdiction marked the first instance of such a ruling being sought at this stage, the Prosecutor emphasized her discretion regarding the timing of such submissions.[719] The unique circumstances of the Bangladesh-Myanmar situation - characterized by the potential commission of a statutory crime spanning the territory of both a State Party and a non-State Party - prompted the Prosecutor to advance the 2018 Request prior to the initiation of a preliminary examination.[720]

Before delving into the content of the 2018 Request, it is necessary to address the legal basis invoked by the Prosecutor to justify its submission. The Request on Jurisdiction was grounded in

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[713] Vagias, Michail. "The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh: Certain Procedural Questions" (2018), *Leiden Journal of International Law*.
[714] Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor. *Press Release* (9 August 2018), para. 5, 9.
[715] *Rome Statute*, Art. 19(3).
[716] Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor. *Press Release* (9 August 2018), para. 6.
[717] Ibidem, para. 9.
[718] *Request on Jurisdiction*, para. 53; *Decision on Jurisdiction*, para. 26.
[719] *Request on Jurisdiction*, para. 55.
[720] Ibidem.

Article 19 of the Rome Statute, which, according to the Prosecutor, authorizes jurisdictional requests at any stage of criminal proceedings, including prior to their formal commencement. However, Pre-Trial Chamber I opted to rely on a different legal foundation, namely Article 119(1) of the Rome Statute, while characterizing the Prosecutor's interpretation of Article 19 as controversial.[721] Article 119(1) establishes that any dispute concerning the judicial functions of the Court falls within its own adjudicative competence, granting the ICC the authority to determine the scope and applicability of its jurisdiction in cases brought before it.[722] By invoking this provision, the Chamber underscored that questions of jurisdiction inherently fall within the Court's mandate to resolve legal ambiguities affecting its own authority.

In this context, regardless of the specific legal basis initially invoked by the Prosecutor for her Request on Jurisdiction, the Court reaffirmed its prerogative to determine whether it had jurisdiction over the Myanmar case by applying the well-established principle of *Kompetenz-Kompetenz.* This doctrine, widely recognized in both international and domestic legal systems, asserts that a judicial body has the inherent power to rule on the extent of its own jurisdiction.[723] The Chamber's reliance on *Kompetenz-Kompetenz* thus reinforced the ICC's ability to interpret and assert its jurisdictional reach, particularly in complex cases involving non-State Parties to the Rome Statute.

Recognizing the existence of a jurisdictional dispute,[724] the Chamber determined that Article 119 provided a valid legal basis for the Prosecutor's 2018 Request, effectively recharacterizing the grounds on which it had been presented. Alternatively, the Chamber suggested that Article 21(1)(b), which permits reliance on principles of international law, could also support the Request.[725]

Since Myanmar is not a party to the Statute, the initiation of proceedings through the Chamber's authorization of an investigation could only proceed if jurisdictional criteria based on either territoriality or active nationality were satisfied.[726] Given that the alleged crimes were perpetrated by nationals of Myanmar, the active nationality requirement could not be relied upon, leaving territoriality as the sole basis for the ICC jurisdiction.

The restrictive jurisdictional framework prompted the Prosecutor to limit the scope of her Request on Jurisdiction to the crime of deportation. Deportation under Article 7(1)(d) of the Rome Statute is inherently transboundary, requiring the movement of victims across an international border

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[721] *Decision on Jurisdiction*, para. 27.
[722] *Rome Statute*, Art. 119.
[723] International Criminal Court. *ICC Pre-Trial Chamber I Rules That the Court May Exercise Jurisdiction Over the Alleged Deportation of the Rohingya People From Myanmar to Bangladesh* (6 September 2018), https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-rules-court-may-exercise-jurisdiction-over-alleged-deportation.
[724] *Decision on Jurisdiction*, para. 28.
[725] Ibidem, para. 29.
[726] Curfman, Geoff. "ICC Jurisdiction and the Rohingya Crisis in Myanmar" *Just Security* (9 January 2018), https://www.justsecurity.org/50793/icc-jurisdiction.

to be completed.[727] The Prosecutor's 2018 Request was predicated upon the argument that the ICC possessed jurisdiction over the deportation of the Rohingya because a critical element of the crime - crossing an international border - occurred within the territory of Bangladesh, a State Party to the Rome Statute.[728] In her application, the Prosecutor sought confirmation from the Chamber as to whether the ICC had territorial jurisdiction in cases where deportation originates in the territory of a non-State Party and culminates in that of a State Party.[729]

The Prosecutor recognized that the deportation of the Rohingya to Bangladesh was a direct result of Myanmar's 2017 "clearance operations", emphasizing that these operations, marked by widespread and systematic attacks, were specifically designed to eradicate the Rohingya presence in Myanmar.[730] This recognition underscores the "knowledge of the attack", which is a defining element of crimes against humanity – with deportation being one of its constituents.[731]

A pivotal aspect of the Prosecutor's 2018 Request centered on the interpretation of "conduct" under Article 12(2)(a) of the Rome Statute, which sets forth the territorial grounds for the ICC's jurisdiction.[732] While the Rohingya fled to Bangladesh as a direct consequence of organized attacks, these attacks were physically carried out on Myanmar's territory. Thus, the Court's jurisdiction over the deportation hinged on whether "conduct" could be interpreted broadly, encompassing both the perpetrators' actions and the resulting consequences.[733] The Prosecutor argued that in Article 12(2)(a), the terms "conduct" and "crime" are used interchangeably, allowing the jurisdictional nexus to include both the material acts and their legal effects.[734] This interpretation led her to conclude that the ICC's jurisdiction extended to crimes where the perpetrators' actions on the territory of a non-State party produced criminally relevant consequences within a State party's borders.[735]

The transboundary nature of deportation was central to the Prosecutor's reasoning. The Prosecutor concluded that the ICC could exercise its judicial authority over the deportation of the Rohingya, as the "conduct" carried out by the Tatmadaw during the "clearance operations" resulted in its criminally significant consequence on the territory of Bangladesh.

Another issue addressed in the Request was whether all legal elements of a crime must occur within the territory of a State party for the ICC's jurisdiction to apply. The Prosecutor drew parallels

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[727] Werle, Gerhard, and Jessberger, Florian. *Principles of International Criminal Law*, 3rd edn (Oxford University Press, 2014), p. 358.
[728] *Request on Jurisdiction*, para. 2.
[729] Ibidem, para. 4.
[730] Ibidem, para. 10.
[731] *Rome Statute*, Art. 7(1).
[732] *Request on Jurisdiction*, para. 28.
[733] Geoff Curfman. "ICC Jurisdiction and the Rohingya Crisis in Myanmar" *Just Security* (online), 9 January 2018.
[734] *Request on Jurisdiction*, para. 46.
[735] Ibidem, para. 47.

to the jurisdictional practices of States, noting that under international criminal law national courts can prosecute crimes partially occurring within their territory.[736] She explained that States typically apply three jurisdictional principles: subjective territoriality, where jurisdiction arises if the crime begins within the State's territory and concludes elsewhere;[737] objective territoriality, where jurisdiction applies when a crime originates outside the State but is completed within its borders;[738] and the effects doctrine, which allows jurisdiction when the effects of a crime manifest within the State, even if the acts occur entirely abroad.[739] While the applicability of the effects doctrine to the ICC remains contested, the Prosecutor maintained that subjective and objective territoriality could validly underpin the Court's jurisdiction.[740]

The assertion that the ICC possesses jurisdiction over crimes that have only partially materialized within the territory of a State party carries significant implications for the crime of deportation. As demonstrated by the Prosecutor, the transnational nature of deportation allows it to occur either from the territory of a State party to that of a third State or from a third State to the territory of a State party. In the case of the Rohingya, the forced displacement originating in Myanmar and culminating in Bangladesh satisfied the objective territoriality standard. Restricting the ICC's jurisdiction solely to crimes fully committed within State party territories would create a jurisdictional vacuum, particularly for transboundary crimes like deportation.[741]

These arguments formed the basis of the Prosecutor's claim that the ICC possessed jurisdiction over the deportation of the Rohingya. The Pre-Trial Chamber I took these considerations into account when evaluating the Prosecutor's 2018 Request.

3.4.2 Pre-Trial Chamber I's Decision

In its decision, the ICC Pre-Trial Chamber I endorsed the Prosecutor's view regarding the legal question concerning the Court's jurisdiction over allegations that members of the Rohingya population were forcibly deported from Myanmar - a non-party to the Rome Statute that has not accepted the ICC's jurisdiction under Article 12(3) - to Bangladesh - a State Party to the Statute.

The Decision on Jurisdiction issued by Pre-Trial Chamber I addressed the specificities of the crime of deportation. As previously mentioned, the Prosecutor's Application relied on the premise that deportation could occur even if the coercive acts themselves lacked a transboundary character,

[736] Ibidem, para. 29.
[737] Ibidem, para. 32.
[738] Ibidem, para. 32.
[739] Ibidem, para. 30.
[740] Ibidem, para. 31.
[741] Ibidem, para. 49.

provided they were confined to a single State but ultimately resulted in the victims' forced migration to another State.[742] Notably, the Chamber characterized deportation as an "open-conduct crime",[743] indicating that it can encompass a range of human actions leading to involuntary migration, such as denial of fundamental rights, murder, torture, destruction of property and sexual violence.[744] To substantiate this view, the Chamber referred to the Court's Decision on the Confirmation of Charges in the *Ruto et al.* case, which explicitly acknowledged the "open-ended" nature of deportation.[745]

Although Pre-Trial Chamber I did not extensively analyze this aspect, it is significant that ICC Pre-Trial Chamber II further advanced the reasoning in a separate decision, emphasizing that the perpetrator's actions must have compelled the victims to leave the area where they were lawfully present.[746] Moreover, the crime's commission requires a causal link between the conduct and the displacement of the victims to another State.[747] Viewed through this lens, the acts perpetrated by the Tatmadaw clearly constitute the "coercive acts" proscribed under Article 7(1)(d) of the Rome Statute, as they caused the Rohingya's forced exodus from Myanmar to Bangladesh.[748]

The Pre-Trial Chamber I also relied on the interpretation of deportation articulated in *Ruto et al.* to affirm the ICC's jurisdiction when only one element of the crime, or a part thereof, is committed on the territory of a State party to the Rome Statute.[749] This principle was initially established by the Permanent Court of International Justice (PCIJ) in the 1927 *Lotus* case, which the Chamber explicitly referenced. The case concerned a collision on the high seas between the French steamer Lotus and the Turkish vessel S.S. Boz Kourt, resulting in the deaths of eight Turkish sailors. The French government contested Turkey's jurisdiction over the incident, arguing that the acts occurred outside its territorial waters. However, the PCIJ upheld Turkey's jurisdiction, it observed that; "[t]he territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty".[750] This reasoning reinforces the notion that the Court's jurisdiction may extend beyond the confines of strict territorial sovereignty when at least one element of a crime occurs within the territory of a State Party.

The Chamber also drew upon the penal codes of Myanmar and Bangladesh, which recognize jurisdiction over criminal conduct occurring partially or entirely outside their territories.[751] This

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[742] Ibidem, para. 28.
[743] *Decision on Jurisdiction*, para. 61.
[744] Ibidem,
[745] International Criminal Court. *The Prosecutor v Ruto et al.*, Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, 4 February 2012, para. 244.
[746] Ibidem.
[747] Ibidem, para. 245.
[748] Geoff Curfman. "ICC Jurisdiction and the Rohingya Crisis in Myanmar" *Just Security* (online), 9 January 2018.
[749] *Decision on Jurisdiction*, para. 64.
[750] Ibidem, para. 66.
[751] Ibidem, para. 67-68.

reference supported the Chamber's broader affirmation that under international criminal law, States' national courts may prosecute crimes that are only partially committed within their territories.[752] Pre-Trial Chamber I concluded that, since the ICC exercises jurisdiction delegated by its member States, the scope of its jurisdiction must align with that of those States.[753] This rationale is the same one proposed by the Prosecutor in her 2018 Request on Jurisdiction.

The Chamber further noted the cross-border nature of deportation, emphasizing that this characteristic is not limited by requirements regarding the crime's origin or destination. Such restrictions would have constrained the ICC's jurisdiction on territorial grounds. By contrast, the absence of such limitations permits the Court to exercise jurisdiction even when only a single element or part of the crime occurred within a State party's territory.[754] Consequently, the Chamber asserted the Court's jurisdiction over the deportation of the Rohingya from Myanmar to Bangladesh, consistent with the arguments advanced in the 2018 Request.[755] Additionally, Pre-Trial Chamber I left open the possibility for the Prosecutor to invoke the Court's jurisdiction over other statutory crimes, provided that at least one element or part of the crime occurred within a State party's territory. This perspective has significant implications for extending the Court's jurisdiction to address allegations of genocide against the Rohingya.

Following the Court's Decision on Jurisdiction, the Prosecutor submitted a Request for Investigation concerning the crimes of deportation, persecution and inhuman acts. Notably, the 2019 Request did not include the crime of genocide. This omission is unfortunate, as a determination by the Court regarding an investigation into genocide could provide clarity on whether the conditions for exercising jurisdiction over this crime are met in the Myanmar-Bangladesh context. Subsequently, on November 14th, 2019, Pre-Trial Chamber III issued the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh-Republic of the Union of Myanmar, granting authorization for the Prosecutor's investigation.

3.4.3 Pre-Trial Chamber III's Authorization of an Investigation

Pre-Trial Chamber III authorized the investigation into the crimes specified in the Prosecutor's Request for Jurisdiction, adhering to the procedure outlined in Article 15 of the Rome Statute. As previously seen, under this provision, when statutory crimes are suspected to have been committed,

[752] Ibidem, para. 66.
[753] Ibidem, para. 70.
[754] Ibidem, para. 71.
[755] Ibidem, para. 72.

the Prosecutor must seek authorization from the assigned Pre-Trial Chamber. The Chamber may only approve the investigation if it determines that there is a "reasonable basis to proceed" and that the case "falls within the jurisdiction of the Court".[756] In the Myanmar situation, Pre-Trial Chamber III concluded that both conditions were satisfied.

In determining jurisdiction, Pre-Trial Chamber III adopted the interpretation that the term "conduct" is interchangeable with "crime", thereby extending the notion to include the consequences of the criminal act.[757] For deportation, this meant that the act's consequences - specifically, the victims' removal from the State's territory - fell within the scope of the conduct. The Chamber held that such removal could occur directly through the perpetrator's actions or indirectly through coercive acts.[758] Moreover, it reaffirmed the principle from the Decision on Jurisdiction, whereby the ICC may exercise jurisdiction over crimes that are partially committed on the territory of a State Party.[759] The Chamber reasoned that since customary international law allows States to institute proceedings for conduct partially occurring within their territories, the ICC should similarly have jurisdiction over crimes with partial territorial connections to a State Party, enjoying the same level of territorial jurisdiction as the single Parties.[760] Applying this principle to the deportation of the Rohingya, the Chamber determined that their forced migration into Bangladesh, a State Party, established the territorial nexus required for the Court to assert jurisdiction.[761]

Pre-Trial Chamber III then evaluated the second condition under Article 15(4): whether there was a "reasonable basis to proceed with an investigation". This standard aligns with Article 53(1), which requires the Prosecutor to determine if the available information provides a reasonable basis to believe that a crime within the Court's jurisdiction has been or is being committed.[762] Although the Rome Statute does not define the precise meaning of "reasonable basis", it has been interpreted as the lowest evidentiary threshold, given the preliminary nature of investigations.[763]

The criteria for establishing a "reasonable basis" were extensively examined in the 2010 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, issued by the Pre-Trial Chamber II of the ICC.[764] In this decision,

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[756] *Rome Statute*, Art. 15(4).
[757] *Authorisation of Investigation*, para. 50.
[758] Ibidem, para. 51-52.
[759] Ibidem, para. 61.
[760] Ibidem, para. 60.
[761] Ibidem, para. 62.
[762] *Rome Statute*, Art. 53(1).
[763] Stigen, Jo. *The Relationship Between the International Criminal Court and National Jurisdictions* (Cambridge University Press, 2008), p. 96.
[764] International Criminal Court. *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Case No. ICC-01/09-19-Corr, 31 March 2010, para. 27.

Pre-Trial Chamber II clarified that, given that the authorization of an investigation occurs during the preliminary examination stage, the "reasonable basis" standard represents the lowest evidentiary threshold.[765] This lower standard is attributed to the inherently incomplete nature of the evidence collected by the Prosecutor during this early phase of proceedings.[766] The underlying purpose of this standard was identified as a safeguard to prevent the initiation of frivolous or politically motivated investigations that could undermine the Court's integrity.[767] Based on these considerations, Pre-Trial Chamber II concluded that, when assessing the existence of reasonable grounds, the Chamber must determine whether the alleged commission of a crime under Article 5 of the Rome Statute is founded on a "sensible or reasonable justification".[768]

In the context of Myanmar, this standard required Pre-Trial Chamber III to evaluate whether the alleged crime of deportation met the plausibility threshold. This assessment entailed determining whether the constitutive elements of this specific crime against humanity were *prima facie* present concerning the Rohingya population.

Applying this standard, Pre-Trial Chamber III first assessed whether crimes against humanity could credibly have been perpetrated against the Rohingya. Referring to Article 7 of the Rome Statute, which defines crimes against humanity as criminal acts forming part of a "widespread and systematic attack" directed at a civilian population in furtherance of a State policy, the Chamber determined that the Prosecutor's supporting materials substantiated the claim that these elements were met. The evidence indicated that the Rohingya had been progressively stripped of their citizenship and subjected to severe human rights violations over decades.[769] The Chamber identified the 2016 and 2017 "clearance operations" as both an intensification of prior abuses and primarily attributable to the Tatmadaw, Myanmar's military,[770] which effectively dominates the government.[771] According to Pre-Trial Chamber III, the evidence corroborated allegations that these forces had committed acts such as murder, torture, rape, sexual assault, mutilation, arbitrary imprisonment and other severe deprivations of physical liberty targeting the Rohingya.[772] These acts exhibited consistent patterns and were directed specifically at Rohingya-majority villages or individuals of Rohingya ethnicity.[773] Collectively, these findings led Pre-Trial Chamber III to conclude that there was a reasonable basis

[765] Ibidem.
[766] Ibidem.
[767] Ibidem, para. 32.
[768] Ibidem, para. 35.
[769] *Authorisation of Investigation*, para. 67.
[770] Ibidem, para. 69, 75, 77.
[771] Ibidem, para. 64.
[772] Ibidem, para. 77.
[773] Ibidem, para. 80-81.

to believe that widespread and systematic violence had been perpetrated as part of a State policy targeting the Rohingya.[774]

Subsequently, the Chamber turned its attention to the crime of deportation, evaluating whether the Prosecutor's allegations regarding its commission were also "reasonable". The legal criteria for deportation, as established under international law, include the forcible displacement of persons lawfully present within a State across its borders, absent grounds recognized as lawful.[775] The Chamber underscored that it is the Prosecutor's burden to demonstrate the absence of lawful justifications for such displacement.[776] It further noted that international humanitarian law generally prohibits the deportation of a State's nationals or the collective expulsion of non-nationals, except under specific conditions related to ensuring the population's safety or imperative military necessity.[777] However, the displacement of the Rohingya, resulting directly from coercive acts of violence, could not be justified under these conditions.[778] This interpretation was supported by the findings of the 2018 Report by the Independent International Fact-Finding Mission, which stated that no imperative military or security reasons existed for the displacements.[779]

The Chamber also clarified that the lawful presence of the victims should be assessed under international, rather than national, law and should be distinguished from the concept of residence.[780] Although the Pre-Trial Chamber III did not apply this requirement specifically to the Rohingya, its acknowledgment of the minority's long-standing presence in Myanmar's Rakhine State implicitly validated their lawful presence under international law.[781]

Based on the evidence presented, the Pre-Trial Chamber III concluded that the coercive actions of Myanmar's security forces during the 2016 and 2017 operations resulted in the forced displacement of over 700,000 Rohingya to Bangladesh.[782] This causal link satisfied the reasonable basis standard under Article 15(4) of the Rome Statute, thereby justifying the Prosecutor's conclusion that the crime of deportation had occurred.[783] Consequently, the Chamber authorized "the commencement of the investigation in relation to *any crime* within the jurisdiction of the Court committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State making a declaration under article 12(3) of the Statute, if the alleged crime is sufficiently linked to the situation as described

[774] Ibidem, para. 92.
[775] *Rome Statute*, Art. 7(2)(d).
[776] *Authorisation of Investigation*, para. 98.
[777] Ibidem.
[778] Ibidem.
[779] IIFFM Report 2018, para. 282.
[780] *Authorisation of Investigation*, para. 99.
[781] Ibidem, para. 13, 66.
[782] Ibidem, para. 105.
[783] Ibidem, para. 108.

in this decision",[784] allowing the initiation of the investigation without making it contingent on the transboundary nature of the crimes under scrutiny. The Chamber added that "the Prosecutor is not restricted to the incidents identified in the Request and the crimes set out in the present decision but may, on the basis of the evidence gathered during her investigation, extend her investigation to other crimes against humanity or other Article 5 crimes, as long as they remain within the parameters of the authorized investigation".[785] This suggests that the OTP is authorized to investigate also acts of violence purportedly carried out in Myanmar by the ARSA.[786]

However, even if the ICC's jurisdiction theoretically encompasses nationals of non-State Parties, doubts have been raised regarding whether suspects would willingly submit themselves to the ICC in light of this decision and the potential risk of conviction.[787] The challenges associated with investigating and prosecuting senior government officials from non-State Parties are exemplified by the case of Sudanese President Omar Al-Bashir. Despite the issuance of an ICC arrest warrant, Al-Bashir remained at large for over a decade and was not surrendered to the Court, even after his removal from power in April 2019.[788]

The decisions of the Pre-Trial Chambers collectively endorsed the Prosecutor's assessment of the ICC's jurisdiction and the existence of a reasonable basis for investigating the Bangladesh-Myanmar situation. The Chambers upheld the argument that jurisdiction could be asserted based on the overlap between the concepts of "conduct" and "crime", requiring only that a legal element or part of a crime occur within the territory of a State Party. The evidentiary material supported the conclusion that the deportation of the Rohingya stemmed from unlawful acts prohibited under international law.

The Chambers' recognition of the crime of deportation has significant implications for the ICC's future involvement in cases involving crimes only partially committed within States Parties.[789] Although the Chambers briefly referred to this possibility in the context of the Prosecutor's 2018 and 2019 Requests, they did not provide further elaboration. This leaves unresolved questions regarding the applicability of the partial commission standard to other crimes under Article 5, including the alleged genocide in Myanmar.

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[784] Ibidem, para. 126.
[785] Ibidem.
[786] *The Rohingya, Justice and International Law,* p. 156.
[787] Ibidem, p. 212.
[788] *The Rohingya crisis and the International Criminal Court*, p. 45.
[789] Vagias, Michail. "The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh: Certain Procedural Questions" (2018) *Leiden Journal of International Law*, p. 982.

3.5 Possible Effects of the ICC Proceedings

The dynamics between the ICC and Myanmar underwent a shift following the 2021 coup, with the deposed government displaying a greater inclination to cooperate compared to its stance prior to being overthrown. This change in approach may be attributed to two primary motives.[790] First, the ousted regime may seek to affirm its democratic legitimacy in opposition to the post-coup junta.[791] Second, it could aim to foster a sense of justice and accountability, both domestically and internationally, by advocating for the ICC to hold the junta responsible for its actions.[792]

On July 17th, 2021, Acting President Duwa Lashi La of Myanmar's National Unity Government (NUG) submitted a declaration to the ICC Registrar under Article 12(3) of the Rome Statute, formally accepting the Court's jurisdiction over international crimes committed on Myanmar's territory since July 1st, 2002.[793] Despite this significant gesture, the ICC and the Office of the Prosecutor have not taken substantive steps in response. Some experts in international law and international criminal law argue that the ICC should have recognized the NUG's declaration of jurisdiction and acted promptly, as it did in Ukraine, by dispatching investigators to Myanmar to initiate an inquiry.[794] However, the prevailing perspective suggests that the ICC has refrained from making a determination on the NUG's unilateral move due to the junta's *de facto* control over Myanmar's State apparatus.[795]

The practical challenges for the ICC to carry out a site visit are apparent, even if the Court were to recognize the ousted Myanmar government instead of the ruling junta. The fundamental issue lies in the inherent difficulty of conducting an investigation in the territory of a non-State Party without its consent. While Bangladesh, as a State Party, would likely cooperate with the ICC's efforts, the lack of consent and cooperation from Myanmar presents significant obstacles. This impasse would necessitate reliance on alternative investigative methods, particularly interviewing witnesses located in Bangladesh and collecting digital evidence from social media platforms.[796] Platforms like Facebook, which the Report of the Independent International Fact-Finding Mission on Myanmar identified as a significant tool for disseminating hate speech, could serve as critical sources of evidence for the ICC's investigation.[797]

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[790] *The Rohingya crisis and the International Criminal Court*, p. 50.
[791] Ibidem.
[792] Ibidem.
[793] Min, Aung Myo. "The Minister of Human Rights for the National Unity Government of Myanmar" (Twitter, 2021) https://twitter.com/aung_myo_minn/status/1428680811574972416; Legal Action Worldwide. "Press Release: More Than 500 Rohingya Request ICC Prosecutor Accept NUG Declaration" (2021) https://www.legalactionworldwide.org/accounta.
[794] Dugard, John, et al. "The ICC Must Engage with Myanmar's Democratic Government and Hold the Junta to Account" *The Diplomat* (2022), https://thediplomat.com/2022/08/the-icc-must-engage-with-myanmars-democratic-government-and-hold-the-junta-to-account/.
[795] *The Rohingya crisis and the International Criminal Court*, p. 51.
[796] Ibidem.
[797] HRC Report, para. 74.

It is crucial to emphasize that the ICC's investigative mandate regarding crimes committed against the Rohingya in Myanmar is inherently limited. The Pre-Trial Chamber has only authorized investigations into crimes where at least one element can be definitively linked to Bangladesh.[798] As a result, even with full cooperation from Bangladesh, the evidence available within its territory provides only a partial view of the crimes under investigation. This constraint highlights a significant challenge: much of the evidence essential to prosecuting the ruling junta in Myanmar remains under the control of the junta itself,[799] including critical documentation and other materials directly related to the deportation of the Rohingya. In instances where evidence is scarce or inaccessible, the Office of the Prosecutor is compelled to rely on alternative sources. These include Reports from the United Nations, documentation by non-governmental organizations, and testimonies and findings gathered by activists and UN personnel operating in the region. Such sources are indispensable in advancing the investigation despite the obstacles posed by limited direct access to evidence within Myanmar.

It has been proposed that achieving effective accountability for the situation in Myanmar could require escalating beyond a *proprio motu* investigation by the ICC Prosecutor to a referral by the UN Security Council.[800] Despite the ICC Pre-Trial Chamber III's authorization for the Prosecutor to investigate alleged crimes within the Court's jurisdiction related to Bangladesh/Myanmar,[801] the Special Rapporteur recommended that the Security Council formally refer the situation to the ICC.[802] Although global attention shifted toward Ukraine in 2022, international attitudes toward Myanmar began to evolve positively by the year's end. On December 21st, the UN Security Council issued its first resolution addressing the Myanmar crisis since the February 2021 coup. Drafted by the United Kingdom, the resolution condemned the junta, called for an end to violence and demanded the release of arbitrarily detained prisoners, including Win Myint and Aung San Suu Kyi.[803]

Some permanent Security Council members have expressed tentative support for referring Myanmar's situation to the ICC. For instance, since December 2022, the U.S. government has hinted at this possibility,[804] while the UK government has argued that a referral to the ICC currently lacks

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[798] *Authorisation of Investigation*, para. 124.
[799] Williams, Paul, et al. "The Rohingya Genocide" (2020), 52(1–2), *Case Western Reserve Journal of International Law,* p. 566.
[800] *The Rohingya crisis and the International Criminal Court*, p. 54.
[801] *Authorisation of Investigation*.
[802] United Nations Human Rights Council. *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Thomas H. Andrews*, UN Doc. A/HRC/49/76 (2022), p. 18, para. 94.
[803] United Nations Security Council. *Resolution 2669*, UN Doc. S/RES/2669 (2022); United Nations Meeting Coverage. "Security Council Demands Immediate End to Violence in Myanmar, Urges Restraint, Release of Arbitrarily Detained Prisoners, Adopting Resolution 2669" (2022), https://press.un.org/en/2022/sc15159.doc.htm.
[804] U.S. Mission to the United Nations. "Remarks by Ambassador Chris Lu, U.S. Representative of the United States of America to the United Nations for U.N. Management and Reform, at a Georgetown University Event on Burma" (2022), https://usun.usmission.gov/remarks-by-ambassador-chris-lu-at-a-georgetown-university-event-on-burma/.

consensus, warning against a veto that could embolden the junta.[805] Unlike the situation in Ukraine, where permanent members of the UN Security Council have direct interests, Myanmar may offer a less contentious context for achieving unanimity.[806] The political authority of the UN Security Council could significantly bolster ICC investigations or prosecutions, as under both the UN Charter and the Rome Statute a referral through a Security Council resolution would obligate relevant States Parties to cooperate with the ICC.[807]

The cornerstone of success in international criminal justice for ongoing conflicts lies in the timely collection and preservation of evidence by the international community.[808] However, gathering evidence during an active conflict presents significant challenges, as comprehensive and systematic evidence collection often becomes feasible only after the conflict has subsided. Therefore, it is imperative for the international community to collaborate in safeguarding evidence, showcasing the ICC's ability to operate effectively even in cases involving non-State Parties.[809]

Regarding this matter, the most recent and significant development of the case concerns the November 27th, 2024, application to Pre-Trial Chamber I of the ICC for a warrant arrest by the Office of the Prosecutor. Prosecutor Karim A. A. Khan stated that since November 14th, 2019, the OTP has been conducting a detailed investigation into crimes allegedly committed during the violent episodes of 2016 and 2017 in Myanmar's Rakhine State, which triggered the forced displacement of the Rohingya population into Bangladesh.[810] Following a comprehensive and impartial inquiry, the OTP concluded that there are reasonable grounds to believe that Senior General Min Aung Hlaing, Commander-in-Chief of Myanmar's Defence Services and Acting President, bears criminal responsibility for crimes against humanity, including deportation and persecution. These crimes are alleged to have been carried out by Myanmar's armed forces - the Tatmadaw - in coordination with the national police, the border guard police and certain non-Rohingya civilian groups, between August 25th and December 31st, 2017, in both Myanmar and parts of Bangladesh.[811]

This filing represents a pivotal development as it constitutes the first request for an arrest warrant targeting a high-ranking Myanmar government official. The case relies on a diverse body of

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[805] Norman, Jesse. "Answer to the Question for Foreign, Commonwealth and Development Office by Rushanara Ali: Myanmar: International Criminal Court" (2022), https://questions-statements.parliament.uk/written-questions/detail/2022-09-05/47539.
[806] *The Rohingya crisis and the International Criminal Court*, p. 55.
[807] Ibidem.
[808] Meron, Theodor. *Standing Up for Justice: The Challenges of Trying Atrocity Crimes* (Oxford University Press, Oxford 2021), p. 92.
[809] *The Rohingya crisis and the International Criminal Court*, p. 55.
[810] International Criminal Court. *Statement of ICC Prosecutor Karim A. A. Khan KC: Application for an Arrest Warrant in the Situation in Bangladesh/Myanmar* (27 November 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-application-arrest-warrant-situation-bangladesh.
[811] Ibidem.

evidence, including witness testimonies - some from insider witnesses - documentary records, and authenticated scientific, photographic, and video materials.[812]

The judges of the ICC will now assess whether the application satisfies the legal criteria for issuing an arrest warrant. If approved, the OTP plans to collaborate with the Registrar of the Court to facilitate the arrest and transfer of the accused.[813] However, the success of prosecuting individuals from Myanmar under the ICC's jurisdiction hinges on the cooperation of States, particularly those party to the Rome Statute. Ensuring the arrest and surrender of suspects remains a significant challenge, one that must be addressed to achieve meaningful accountability.

The analysis of the Bangladesh-Myanmar situation before the ICC highlights the complexities and challenges of pursuing international justice in cases involving non-State Parties to the Rome Statute. In fact, the Court's innovative reliance on the transboundary nature of the crime of deportation to assert jurisdiction marks a significant development in international criminal law, setting a precedent for addressing cross-border crimes that might otherwise fall into a legal void.

This case also raises broader questions about the future of international criminal justice. As the ICC continues to address situations involving both State and non-State actors, the Bangladesh-Myanmar case serves as a testing ground for the Court's capacity to adapt to evolving realities of conflict and displacement. The Court's willingness to interpret its jurisdiction creatively, while maintaining its legal integrity, sets a promising example for addressing emerging challenges such as transnational crimes, cyber warfare and climate-induced displacement.

Ultimately, the Bangladesh-Myanmar case emphasizes the essential role of the ICC as a cornerstone of global justice, underscoring the urgent need for systemic reforms to enhance the Court's enforcement mechanisms and build broader international consensus around its jurisdiction. It becomes clear that the fight against impunity demands more than just robust legal frameworks; it requires unwavering political commitment and collective international action.

3.6 Universal Jurisdiction and the Case of Argentina

While the primary focus of this chapter has been on the proceedings before the International Criminal Court regarding individual criminal responsibility for crimes committed in Myanmar, it is important to acknowledge other avenues for accountability that complement the ICC's work. One such avenue is the exercise of universal jurisdiction. Universal jurisdiction is founded on the principle that certain crimes are so egregious and of such global concern that they affect humanity as a whole, constituting harms against the international community. This principle gives all States the authority to hold

[812] Ibidem.
[813] Ibidem.

perpetrators accountable, regardless of where the crimes occurred or the nationalities of the victims or suspects. It enables the investigation and prosecution of atrocious offenses such as war crimes, crimes against humanity, torture, genocide and enforced disappearances, irrespective of borders.[814] While the primary responsibility to address such crimes lies with the State where they were committed, universal jurisdiction serves as a vital mechanism in the international criminal justice system when those States are unwilling or unable to act. This principle allows other States to step in and ensure accountability for these grave violations.

The application of universal jurisdiction differs among States, generally falling into two categories: "pure" universal jurisdiction and "conditional" jurisdiction.[815] Countries like Germany adopt a "pure" universal jurisdiction model, allowing the investigation and prosecution of international crimes without requiring a specific connection to Germany. However, prosecutors retain discretion over whether to pursue cases with no direct link to the country. Other States, such as France, require a "connecting link", such as the suspect's presence in the country or the nationality of the victim or perpetrator, before initiating investigations.[816]

Argentinian law embraces "pure" universal jurisdiction, as its Constitution explicitly allows trials for crimes against international law committed outside its borders. Citing Article 118: "The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against public international law, the trial shall be held at such place as Congress may determine by a special law".[817] Additionally, Article 5 of Law 26,200/06 grants federal courts jurisdiction over crimes outlined in the Rome Statute of the ICC, among others.[818]

The case brought by the Burmese Rohingya Organization UK is not Argentina's first application of universal jurisdiction. Argentina's historical commitment to justice stems from its own experience with gross human rights violations during the late 1970s and early 1980s under the military dictatorship known as the "Dirty War".[819] In the past few years, Argentina has pursued cases involving crimes committed during Francisco Franco's regime in Spain, the persecution of the Falun Gong movement in China, and, most notably, a case concerning genocide and crimes against humanity targeting Uyghurs in China.

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[814] Global Justice Center – BROUK. *The Universal Jurisdiction Case Against Argentina* (September 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/09/Sept2023_ArgentinaMyanmarUJ_QA.pdf.
[815] Ibidem.
[816] Ibidem.
[817] *Constitution of the Argentine Nation*, Section 118, http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf.
[818] *Corte Penal Internacional*, http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/123921/norma.htm.
[819] Global Justice Center – BROUK. *The Universal Jurisdiction Case Against Argentina* (September 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/09/Sept2023_ArgentinaMyanmarUJ_QA.pdf.

The concept of jurisdiction refers to the authority of a nation-State to regulate the actions of individuals or entities through its domestic legal framework.[820] This authority can be categorized into three types: jurisdiction to prescribe, which is the power to legislate or establish laws and regulations; jurisdiction to enforce, which involves implementing and enforcing those laws; and adjudicatory jurisdiction, which is the authority of national courts to interpret and apply domestic laws.[821] Jurisdiction is fundamentally territorial, meaning a State typically exercises authority over incidents occurring within its territory or originating there but having effects elsewhere. This also includes jurisdiction over airspace, territorial waters and crimes committed on ships or aircraft registered in that State.[822]

States can further exercise jurisdiction under specific principles. The active personality principle allows a State to assert jurisdiction over offenders who are its nationals, while the passive personality principle enables jurisdiction over offenders when the victims are nationals of that State. Under the protective principle, a State may claim jurisdiction over offenses committed abroad if they threaten its security or interfere with government functions.[823]

The most contentious basis for jurisdiction is universal jurisdiction, where, as previously mentioned, a State asserts authority over crimes that lack any territorial, national or victim-based connection to it. Historically, universal jurisdiction was widely accepted for piracy, but its application to other crimes remains debated unless supported by treaty obligations.[824] However, the rationale for universal jurisdiction is rooted in the gravity of certain crimes - such as war crimes, genocide and crimes against humanity - which are considered so egregious that they concern all humanity despite the presence of a nexus with the concerned State.

This idea is reinforced by the ICTY Trial Chamber in *Furundžija*, which affirmed that universal jurisdiction over international crimes is justified due to their universal condemnation and the imperative to ensure accountability, even when there is no direct link to the prosecuting State.[825]

On November 13th, 2019, the Burmese Rohingya Organization UK, along with two Argentine human rights organizations - the Grandmothers of the Plaza de Mayo (Abuelas de Plaza de Mayo) and the Foundation for Peace and Justice (Fundación Servicio Paz y Justicia) - filed a legal complaint

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[820] *The Rohingya, Justice and International Law*, p. 216.
[821] Ibidem.
[822] Ibidem.
[823] Shaw, Malcolm. *International Law* (8th edn, Cambridge University Press 2017), pp. 488–500.
[824] International Court of Justice. *Separate Opinion of President Guillaume in Arrest Warrant of 11 April 2000 (DR Congo v. Belgium)* [2002] ICJ Rep 3, pp. 36–45.
[825] International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v. Furundžija*, Case IT-95-17/1-T, ICTY Trial Chamber, Judgment, 10 December 1998, para. 156, quoting the Supreme Court of Israel in *Attorney-General of the Government of Israel v. Adolf Eichmann* (1968) 36 ILR 277, 298: "it is the universal character of the crimes in question ... which vests in every State the authority to try and punish those who participated in their commission".

in a federal court in Buenos Aires, Argentina. The complaint sought to prosecute Myanmar's senior military and political leaders, including Commander-in-Chief Senior General Min Aung Hlaing and Aung San Suu Kyi, for acts described as genocide or an "existential threat" against the Rohingya Muslim minority.[826] The case was supported by Tomás Ojea Quintana, an Argentine national and former UN Human Rights Council Special Rapporteur on the human rights situation in Myanmar (2008-2014), who had witnessed the alleged suffering of the Rohingya community firsthand.

On December 9th, 2019, an Argentine court dismissed the case, citing concerns that it would overlap with the investigation already initiated by the International Criminal Court.[827] However, on 26th November 2021 the Federal Court of Appeals overturned the first-instance decision, ordering the continuation and further deepening of the investigation.[828] The court agreed to hear the case and requested additional information from the ICC to avoid duplicating other ongoing efforts to achieve justice for the Rohingya.[829] Following this, an investigative judge in Argentina's Federal Criminal Court initiated proceedings, later delegating investigative responsibilities to the Federal Prosecutor's Office.[830]

Building on testimony and statements from direct victims, the Prosecutor examined not only the notorious clearance operations of 2017 but also the years of systemic discrimination and persecution that set the stage for the violence. A significant focus was placed on the role of hate speech, particularly that disseminated on Facebook, in inciting the atrocities. Posts from the platform revealed a calculated and chilling effort to marginalize and dehumanize the Rohingya population in the months leading up to August 2017.[831]

The case has been further supported by analytical Reports from the Independent Investigative Mechanism for Myanmar (IIMM), a United Nations body established to collect and preserve evidence of human rights violations in Myanmar, playing a critical role in supporting this effort. Although the IIMM is not a prosecutorial entity, its case files are designed to assist legal proceedings at national, regional or international levels. In April 2022, the head of the IIMM and its team visited Argentina to explore ways of supporting the judicial investigation, with a focus on sharing relevant evidence.[832]

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[826] BROUK. "Argentinean Courts Urged to Prosecute Senior Myanmar Military and Government Officials for the Rohingya Genocide" (13 November 2019), https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/.
[827] Opinio Juris. "Universal Jurisdiction, the International Criminal Court and the Rohingya Genocide" (23 October 2020), http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/.
[828] Global Justice Center – BROUK. "The Universal Jurisdiction Case Against Argentina" (September 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/09/Sept2023_ArgentinaMyanmarUJ_QA.pdf.
[829] Ibidem.
[830] Ibidem.
[831] Opinio Juris. "Argentinian Arrest Warrants for Crimes Against the Rohingya: The Power of Small States" (16 July 2024), http://opiniojuris.org/2024/07/16/argentinian-arrest-warrants-for-crimes-against-the-rohingya-the-power-of-small-states/.
[832] Ibidem.

Since then, the IIMM has maintained regular communication with Argentina's Federal Prosecutor's Office, highlighting the importance of international cooperation in combating impunity for the crimes committed against the Rohingya people.[833]

On June 28th, 2024, Argentine Prosecutor Guillermo F. Marijuán requested a Federal Court to issue arrest warrants for 25 officials from Myanmar's government and military, including Min Aung Hlaing and Aung San Suu Kyi. Based on substantial evidence of crimes against humanity and genocide committed against the Rohingya between 2012 and 2018, the Prosecutor called for the issuance of Interpol red notices and sought the international arrest of those responsible.[834]

To address concerns about duplicating efforts, the Argentinian judiciary has maintained diplomatic communication with the ICC, ensuring that its universal jurisdiction case complements rather than overlaps with the ICC's investigation into crimes in Myanmar. The scope of the Argentinian case is notably broader, encompassing a wide range of crimes committed against the Rohingya within Myanmar. This contrasts with the ICC's efforts, which are restricted to crimes that occurred partially in Bangladeshi territory. Without a Security Council referral, the ICC cannot investigate many atrocities perpetrated by the Myanmar military in Rakhine State, such as murder, enforced disappearances, sexual violence and genocide. Additionally, the Argentinian case does not conflict with The Gambia's proceedings before the ICJ, as the ICJ focuses on State responsibility for genocide, while Argentina is investigating the individual criminal accountability of Myanmar's senior military and civilian leaders, as well as direct perpetrators.

Two additional universal jurisdiction cases are currently addressing crimes committed in Myanmar. The first, initiated in March 2022 by the Myanmar Accountability Project and filed with the Prosecutor's office in Turkey, seeks to hold Myanmar's military leadership responsible for the systematic use of torture.[835] This case focuses on victims who were subjected to torture at the Yay Kyi Ai military interrogation center in Yangon's Mingaladon Township. The second case, brought in January 2023 by Fortify Rights and 16 complainants to Germany's Federal Public Prosecutor General, targets senior military officials for atrocity crimes, including genocide, war crimes and crimes against humanity.[836] It is supported by extensive evidence - including interviews comprising over 1,000 survivors - and addresses crimes committed during the Rohingya "clearance operations" of 2016-2017 and atrocities following the February 2021 military coup.

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[833] Ibidem.
[834] Global Justice Center – BROUK. "The Universal Jurisdiction Case Against Argentina" (September 2023), https://www.globaljusticecenter.net/wp-content/uploads/2023/09/Sept2023_ArgentinaMyanmarUJ_QA.pdf.
[835] Ibidem.
[836] Ibidem.

Although the path from requesting an arrest warrant to a Head of State appearing in an Argentinian courtroom involves numerous steps, the issuance of red notices targeting Myanmar's top government and military officials is significant. Such notices will not only restrict these individuals' ability to live, travel and manage their wealth without consequences but also influence other States' perceptions of Myanmar, potentially diminishing its status as a trusted or acceptable partner.

Grounded in the principle of universal jurisdiction, this case stands as one of the most significant efforts to uphold the international community's shared commitment to ensuring that grave human rights violations do not remain unpunished. Although the outcome of the case remains uncertain, it highlights the crucial role of States in complementing the work of the International Criminal Court, particularly given the ICC's limited resources and the sheer volume of alleged perpetrators it must address. This case serves as a reminder of the collective responsibility to fill gaps in the global justice system and ensure accountability for the most heinous crimes.

Concluding Remarks

This thesis has undertaken a comprehensive examination of the legal, political and humanitarian dimensions of the Rohingya crisis, exploring the historical antecedents of their persecution, and the mechanisms available for holding States and individuals accountable for the serious violations committed against the Rohingya population. The findings of this research highlight both the progress made in establishing legal accountability frameworks and the persistent challenges that hinder the effective enforcement of international law. This concluding section summarizes the key insights derived from each chapter, providing a broader reflection on their implications for the future of international justice and accountability.

At the time of writing, the Rohingya crisis remains unresolved. Over 900,000 Rohingya refugees currently residing in Bangladesh remain at high risk of facing a severe health crisis, further exacerbating their already precarious living conditions due to prolonged displacement, inadequate healthcare access and deteriorating humanitarian aid support.[837] The possibility of their repatriation to Myanmar is severely hindered by the persistent violence and discrimination faced by the remaining members of the minority who still live in the country. Despite this grim reality, it is essential to consider these challenges in light of the international legal and political developments examined throughout this thesis.

The first chapter provided an in-depth analysis of the historical and socio-political factors underpinning the systematic persecution of the Rohingya population in Myanmar. It detailed the discriminatory policies that have entrenched their statelessness, with particular emphasis on the impact of the 1982 Citizenship Law, which effectively excluded the Rohingya from legal recognition and rendered them vulnerable to institutionalized discrimination. The chapter also examined the political landscape of Myanmar, marked by Buddhist nationalist ideologies and military dominance, which have played a significant role in the marginalization of the Rohingya minority.

Furthermore, the section examined the historical roots of the Rohingya's marginalization, emphasizing the role of colonial legacies, ethnic tensions and Myanmar's nation-building process in shaping exclusionary policies. The large-scale displacement triggered by the military-led "clearance operations" in 2016 and 2017 was examined in the context of international responses, including findings by the United Nations Fact-Finding Mission that these acts bore the hallmarks of genocide.

[837] UNICEF, *Humanitarian Action for Children: Bangladesh,* 2025, https://www.unicef.org/media/165596/file/2025-HAC-Bangladesh.pdf.pdf.

By establishing a historical and political foundation, this chapter underscored the systemic nature of the violence and the Rohingya's prolonged struggle for recognition and rights.

The second chapter shifted focus from historical and political considerations to the realm of legal accountability at the State level, specifically through the *The Gambia v. Myanmar* case before the International Court of Justice. This case, initiated under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, represents a seminal moment in the legal pursuit of State responsibility for gross human rights violations. Its key legal concept is the doctrine of *erga omnes* obligations, which establishes that the prohibition of genocide is an obligation owed to the international community as a whole.

Considering this, the recognition of The Gambia's standing as a non-injured State in bringing this case before the ICJ sets a critical precedent, affirming that any State Party to the Genocide Convention can seek legal recourse to enforce compliance with its provisions. The chapter also provided a detailed analysis of the provisional measures issued by the ICJ in January 2020, which mandated Myanmar to prevent further acts of genocide against the Rohingya, preserve evidence and submit periodic compliance reports.

Despite its significant contributions, The Gambia's case also underscores the limitations inherent in the ICJ's jurisdiction. While the Court's rulings are binding, their enforcement relies heavily on the political will of the States involved and the broader international community. Nonetheless, the case is poised to set critical legal precedents, including clarifying the threshold for proving genocidal intent and outlining the scope of State obligations under the Genocide Convention. As of today, the ICJ has not yet issued a final ruling on Myanmar's responsibility for genocide, but the ongoing proceedings and interim measures continue to shape the discourse on State accountability for mass atrocities.

The third chapter analyzed the International Criminal Court's investigation into the Bangladesh-Myanmar situation, shifting the focus from State responsibility to individual accountability. A major obstacle for the ICC was Myanmar's non-membership in the Rome Statute, which would often preclude the Court's jurisdiction. However, the ICC demonstrated its innovative capacity to broadly interpret the scope of its jurisdiction by assigning relevance to the cross-border element of forced deportation into Bangladesh - a State Party to the Rome Statute. This legal argument allowed the ICC to assert jurisdiction over crimes that began in Myanmar but were completed in Bangladesh, setting an important precedent for future cases involving non-State Parties.

The investigation targets high-ranking military and political leaders in Myanmar, underscoring the fundamental tenet that all individuals, regardless of their position or status, are accountable under the law. However, the Court's efforts face significant hurdles, including Myanmar's refusal to

cooperate and the lack of enforcement mechanisms for arrest warrants. These challenges highlight the structural limitations of the ICC when addressing crimes committed by uncooperative States.

Additionally, this chapter examined the principle of universal jurisdiction, with a particular focus on Argentina's case against Myanmar's leadership. Unlike international courts, which face jurisdictional constraints, universal jurisdiction allows national courts to prosecute individuals for international crimes, regardless of where the crimes occurred or the nationality of the perpetrators. Argentina's case represents an important development in global accountability efforts, demonstrating how domestic courts can complement international justice mechanisms when traditional avenues, such as the ICC, face jurisdictional challenges. The paragraph explored the legal basis for Argentina's case, the difficulties of securing evidence and the broader diplomatic implications of prosecuting foreign officials in domestic courts.

The legal proceedings in Argentina reflect a growing trend in transnational accountability, where national courts step in to fill the gaps left by international institutions. This approach not only reinforces the universal applicability of international criminal law but also serves as a deterrent against impunity, thereby strengthening the global framework for prosecuting serious international crimes.

The Rohingya crisis serves as a pivotal test case for assessing the effectiveness of contemporary international justice mechanisms. As of today, the proceedings at the ICJ, ICC and in Argentina remain ongoing, and their outcomes will have far-reaching implications for the development of international law. A ruling by the ICJ affirming Myanmar's State responsibility for genocide could reinforce the principle that States must uphold their obligations under the Genocide Convention, emphasizing the *erga omnes* nature of these duties. Such a decision would highlight the collective responsibility of all States to prevent and punish acts of genocide, regardless of where they occur. With regard to the ICJ's Provisional Measures Order, it has confirmed the existence of an imminent threat to the Rohingya's right to existence, as safeguarded under the Genocide Convention. While this does not ensure that the Court will ultimately hold Myanmar accountable for genocide - particularly given the challenges of proving specific intent with unequivocal evidence - it does not completely preclude such a finding. The recent decision by the Maldives and other States to intervene in the case in support of The Gambia may contribute to strengthening the existing body of evidence. However, this effort remains significantly hindered by the repeated restrictions imposed by the Burmese authorities on investigative processes. It will be up to the ICJ to assess whether the evidentiary material compiled by the IIFFM, which forms the basis of The Gambia's application, is adequate to establish Myanmar's genocidal intent. Furthermore, the Court may determine that Myanmar bears responsibility for failing to prevent and punish acts of genocide based on the same body of evidence.

Regardless of the final ruling, the fact that a State not directly affected by the alleged violations has initiated proceedings before the ICJ reflects an increasing awareness of the necessity to uphold human rights on a global scale.

Similarly, successful prosecutions at the ICC would demonstrate that individual accountability transcends borders and positions of power, while Argentina's case could serve as a model for other States to invoke universal jurisdiction as a mean of addressing impunity. All these efforts collectively signify a shift towards a more integrated and multi-faceted approach to international justice. The ICC's involvement in the Bangladesh/Myanmar situation may also serve as a deterrent against the further commission of such acts in the future, particularly in light of the parallel proceedings taking place before the Argentinian court concerning crimes committed entirely within Myanmar's territory. Regardless of the eventual outcome of the proceedings before the ICC, it is crucial to highlight that the Pre-Trial Chambers' interpretation of the term "conduct" as found in Article 12 - extending its meaning to include the consequences of an individual's actions - could have a groundbreaking impact. This interpretation has the potential to significantly expand the ICC's jurisdiction, especially in cases involving third States, thereby addressing one of the key challenges that have historically hindered the Court's ability to initiate proceedings.

Ultimately, the Rohingya's plight represents both a stark reminder of the consequences of systemic failure and an opportunity to strengthen the mechanisms that uphold accountability and the protection of human dignity. The interplay between the ICJ, ICC and domestic courts underscores the necessity of a cohesive international justice system capable of addressing the complexities of modern conflicts. By learning from the successes and limitations of the legal proceedings examined in this thesis, the international community can take meaningful steps toward ensuring justice for the Rohingya and preventing similar atrocities in the future. These cases, while imperfect, hold the potential to redefine the boundaries of accountability and to reaffirm the commitment of the global legal order to protecting the most vulnerable.

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