



FACULTY OF LAW
Lund University

Tommy Nieminen

One situation for two Courts

A thesis about the legal proceedings regarding the Rohingya crisis

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Christoffer Wong

Semester of Graduation: Period 1, Spring semester 2020

Contents

SUMMARY	1
PREFACE	5
ABBREVIATIONS	6
1 INTRODUCTION	7
1.1 Background	7
1.2 Purpose and Research Questions	8
1.3 Delimitations	9
1.4 Methodology and Material	9
1.5 Definitions	11
1.5.1 The Rohingya and the Rakhine State	11
1.5.2 Burma or Myanmar?	11
1.6 Previous Research	12
1.7 Structure	13
2 THE ROHINGYA CRISIS	15
2.1 A Brief History of Human Rights Abuses in Myanmar	15
2.2 Reactions on the “ethnic cleansing” of Rohingya in Myanmar	17
3 THE INTERNATIONAL CRIMINAL COURT	21
3.1 How the ICC operates	21
3.1.1 The Legal Process of the ICC	22
3.1.2 The ICC’s Jurisdiction	23
3.2 The Rohingya Case at the ICC	26
3.2.1 The Path to the ICC	26
3.2.2 Pre-Trial Chamber I’s decision	27
3.2.3 Effects of the ICC proceedings	29
4 THE INTERNATIONAL COURT OF JUSTICE	35
4.1 How the ICJ operates	35
4.1.1 The Legal Process of the ICJ	36
4.1.2 The ICJ’s Jurisdiction	37
4.1.3 Provisvional Measures	38
4.2 The Rohingya Case at the ICJ	39

4.2.1	The path to the ICJ	40
4.2.2	The ICJ's decision	41
4.2.3	Effects of the ICJ proceedings	43
5	ANALYSIS	47
5.1	The significance of bringing the Rohingya crisis to both the ICC and ICJ	47
5.2	The role of politics in international law	52
6	CONCLUSION	57
	SUPPLEMENT A – REGIONAL MAP	61
	BIBLIOGRAPHY	62
	TABLE OF CASES	70

Summary

In August 2017, a deadly crackdown by Myanmar's army on Rohingya Muslims sent hundreds of thousands fleeing across the border into Bangladesh. The situation in Myanmar has escalated over the last few years. Mass displacements of refugees, sustained allegations of crimes against humanity, and a large-scale intervention has propelled the conflict to centre stage of international human rights.

The situation in Myanmar has now reached the highest judicial levels in international law, the ICC and the ICJ. The subject of this thesis concerns the ICC and the ICJ's legal proceedings regarding the Rohingya crisis in Myanmar. By examining these legal proceedings, the thesis aims to explain what the legal proceedings actually means for the Rohingya and the international community in general. It also aims to give a better understanding on what role politics play in the legal proceedings.

By examining the ICC and its legal proceedings regarding the situation in Myanmar one can conclude that the ICC has brought hope for justice to the Rohingya, but the court will likely face several obstacles. By recognising a cross-border element of certain crimes, the ICC managed to exercise jurisdiction over crimes committed in Myanmar, even though Myanmar is not a party to the Rome Statute. Because of the wide interpretation of the Rome Statute, the decision is controversial. Myanmar has rejected the decision, and the ICC will likely have problems in investigating a situation without the cooperation of the country.

By examining the ICJ and its legal proceedings, one can conclude that the order on provisional measures is likely to have limited effect. The provisional measures do not bring any new obligations to Myanmar, except for preserving all evidence alleged to the alleged genocide and to submit reports on all measures that have been taken. Myanmar is denying all allegations of genocide and it can therefore be questioned which measures Myanmar will take. Regarding the future of the case, it has been shown that the evidentiary requirements on the crime of genocide is set quite high, and it will be difficult to prove in a court of law.

The legal proceedings also fail in being independent from political views. It can be questioned if the ICC's interpretation of its jurisdiction is reflecting the will and interests of the rules in the Rome Statute and if the ICC instead relies on theories of natural justice. It is also highly remarkable how much

influence the UNSC have in the legal proceedings. The UNSC not referring the situation to the ICC has resulted in ICC not being able to exercise jurisdiction over the crime of genocide. Additionally, the ICJ will not be able to legally enforce any of its future decisions without the cooperation of the UNSC.

Sammanfattning

I augusti 2017 utförde Myanmar:s armé våldsamma tillslag mot den muslimska Rohingya-minoriteten. Tillslagen resulterade i att flera hundratusen Rohingya-muslimer flydde över landsgränsen till Bangladesh. Massförskjutningar av flyktingar, fortsatta anklagelser om brott mot mänskligheten och ett ökat engagemang från internationella aktörer har satt konflikten i centrum för frågor om mänskliga rättigheter.

Situationen i Myanmar har nu nått internationella brottmålsdomstolen och internationella domstolen, de högsta organen inom folkrätten. De juridiska processerna i de internationella domstolarna utgör huvudområdet för den här uppsatsen. Genom att undersöka de juridiska processerna syftar uppsatsen till att förstå vad dessa egentligen betyder för Rohingya-muslimerna samt för det internationella samfundet. Uppsatsen avser också att ge en ökad förståelse för vilken funktion politik har i de juridiska processerna.

Genom att undersöka internationella brottmålsdomstolen och dess juridiska processer angående situationen i Myanmar går det att konstatera att dessa har inneburit hopp om rättvisa för Rohingya-befolkningen, men att domstolen också står inför flera hinder. I sitt beslut om jurisdiktion ansåg internationella brottmålsdomstolen att flera brott har ett gränsöverskridande inslag och bedömde därför att den hade jurisdiktion över brott som begåtts i Myanmar, trots att Myanmar inte har ratificerat Romstadgan. Beslutet är att anse som kontroversiellt då domstolens tolkning av Romstadgan var anmärkningsvärt bred. Myanmar har avvisat beslutet och utan Myanmar:s samarbete kommer internationella domstolen stöta på ett flertal problem i sin utredning.

Genom att undersöka internationella domstolen och dess juridiska processer, går det att konstatera att domstolens beslut om provisoriska åtgärder förmodligen kommer ha begränsad effekt. Beslutet om provisoriska åtgärder innebär egentligen inga nya skyldigheter för Myanmar, mer än att bibehålla bevis om folkmord samt att rapportera om vilka åtgärder man vidtagit mot folkmord. Med hänsyn till att Myanmar redan förnekar att folkmord har förekommit kan det ifrågasättas vilka åtgärder Myanmar egentligen kommer att vidta. Angående den framtida processen av målet har det konstaterats att beviskraven för folkmord är höga och att det kommer bli problematiskt att bevisa att ett eventuellt folkmord har förekommit.

De juridiska processerna misslyckas dessutom med att hålla sig självständiga från politiska uppfattningar. Det kan ifrågasättas om internationella brottmålsdomstolens tolkning av sin jurisdiktion verkligen reflekterar avsikten och de ursprungliga intressena i Romstadgan och om domstolen istället förlitar sig på naturrättsliga värderingar. Det är också anmärkningsvärt hur mycket inflytande FN:s säkerhetsråd har över de juridiska processerna. Faktumet att säkerhetsrådet inte hänvisade situationen i Myanmar till internationella brottmålsdomstolen innebär att denna inte kan utöva jurisdiktion över brottet folkmord. Dessutom kommer internationella domstolen inte att kunna juridiskt genomdriva sitt beslut utan assistans från säkerhetsrådet.

Preface

As the writing of this thesis draws to an end, I would like to extend my gratitude for all the support I've been given.

I would like to thank my supervisor Christoffer Wong, for his encouragement and guidance throughout the different stages of the writing process.

I would also like to thank Victoria Taylor-Philip, for her thoughts and valuable support.

Lastly, I would like to thank my family for all their support. This journey would not have been possible without your inspiration and encouragement.

Lund, 26 May 2020

Tommy Nieminen

Abbreviations

ASEAN	Association of Southeast Asian Nations
ICC	International Criminal Court
ICJ	International Court of Justice
ICOE	Independent Commission of Enquiry
IIFFM	Independent International Fact-Finding Mission on Myanmar
NGO	Non-Governmental Organisation
OIC	The Organisation of Islamic Cooperation
OTP	Office of the Prosecutor
OHCHR	Office of the United Nations High Commissioner for Human Rights
UN	United Nations
UNGA	General Assembly of the United Nations
UNSC	United Nations Security Council

1 Introduction

1.1 Background

The Rohingya living in Myanmar's Rakhine State have been the target of wide-spread state-sponsored violence since at least 1978.¹ In August 2017, a deadly crackdown by Myanmar's army on Rohingya Muslims triggered by far the largest and fastest refugee inflow to Bangladesh. Since then, over 700 000 Rohingya, including more than 400 000 children, have fled into its northern neighbour state. During this time, entire villages were burned to the ground, families were separated and killed, and women and girls were raped.² Because of the scale of violence and massive movement of refugees across the border, Myanmar came under intense international pressure and observation.³

On 6 September 2018, the Pre-Trial Chamber I of the ICC decided that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh.⁴ On November 2019, Pre-Trial Chamber III of the ICC authorised the Prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction.⁵ The ICC decision was controversial since Myanmar is not a State Party to the Rome Statute. The Pre-Trial Chamber circumvented this by recognising that the cross-border nature of the crime against humanity of deportation occurred on the territory of the State Party Bangladesh.⁶

In November 2019, Gambia filed a contentious case against Myanmar, claiming that Myanmar had failed to comply with its international obligations under the UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁷ On 23 January 2020, the

¹ PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State*, September 2018, at 5.

² OCHA, *Rohingya Refugee Crisis*, 2019, available at: <https://www.unocha.org/rohingya-refugee-crisis>, (last visited 2020-05-25).

³ Kipgen, Nehginpao, Myanmar's Perspective on the Rohingya Crisis, *International Journal on World Peace*, Vol. 37, Issue 1, pp. 43-70, at 43.

⁴ ICC, Pre-Trial Chamber I, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18-37, 6 September 2018.

⁵ ICC, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27, 14 November 2019.

⁶ ICC, Pre-Trial Chamber I, 6 September 2018, at 42-43.

⁷ ICJ, *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, 11 November 2019, and, UNGA, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

ICJ released its decision on provisional measures, ordering Myanmar to prevent further human rights violations against the Rohingya population.⁸ The government of Myanmar has rejected the ICJ ruling, claiming the situation is not a case of genocide.⁹

The persecutions of the Rohingya in Myanmar and Bangladesh illustrate perhaps one of the greatest challenges facing modern international law, the problem of human rights violations. Several international bodies and non-governmental organisations (NGOs) have been established with the main goal of stopping human rights violations and preventing future crimes. The rulings of the ICC and the ICJ have offered hope for the Rohingya. However, it is worth noting that the road to justice will be long and full of obstacles. It also raises the question of whether these proceedings will be enough to bring accountability and justice for the Rohingya people.

1.2 Purpose and Research Questions

The proceedings at the ICC and the ICJ have been controversial for many reasons. The fact that the ICC has exercised jurisdiction over crimes committed by a non-State Party, and that the ICJ has ordered provisional measures over a situation that Myanmar has described as an “internal armed conflict”, is just the tip of the ice-berg.¹⁰ The intervention by the two courts has also sent an implicit message to the UN Security Council (UNSC) which has refused to impose sanctions or take punitive action against Myanmar. So far, China has vetoed all UNSC resolutions that condemn Myanmar’s actions against the Rohingya and call for a greater accountability.

The situation is undoubtedly complex and the chief purpose of this thesis is to analyse the current legal proceedings regarding the Rohingya crisis. The situation in Myanmar has now reached the highest judicial level in international law. This thesis aims to explain what this actually means for the Rohingya and the international community in general. Studying these cases raises several questions: What does the current legal proceedings mean for the Rohingya? What happens if Myanmar refuses to cooperate with the international courts? What powers do international courts have to prevent human rights abuses? The author hopes that analysing the cases and

⁸ ICJ, Order, *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)*, 23 January 2020.

⁹ BBC, *Myanmar Rohingya: Government Rejects ICJ Ruling*, 23 January 2020, <https://www.bbc.com/news/world-asia-51229796>, (last visited 2020-05-25).

¹⁰ Aljazeera, *Transcript: Aung San Suu Kyi’s speech at the ICJ in full*, 12 December 2019, available at: <https://www.aljazeera.com/news/2019/12/transcript-aung-san-suu-kyi-speech-icj-full-191212085257384.html> (last visited 2020-05-25).

the rules of the courts will provide new perspectives and insights on what possibilities and obstacles international law provides for justice for victims of the gravest crimes of concern to the international community.

In order to satisfy the stated purpose, the following research questions have been constructed and are meant to be answered throughout the thesis.

1. What effects can be expected from the current ICC and ICJ proceedings regarding the Rohingya crisis?
2. What significance and impact does the fact that the Rohingya crisis is being observed by both the ICC and the ICJ have?
3. What do these cases say about the obstacles and possibilities that politics bring into international law?

1.3 Delimitations

Some delimitations have been made in order to provide the focus for the thesis. Firstly, the thesis is limited to the ICC and ICJ proceedings. In November 2018, a group of Rohingya and Latin American human rights organisations filed a criminal case in Argentina against Myanmar's top military leaders for crimes committed in Rakhine State. This is an example of a case that might be interesting from a legal perspective, but which will not be featured in the thesis. Secondly, the functions and powers of the ICC and the ICJ are extensive. To provide focus for the purpose of this thesis the main focus will be to describe and analyse the functions and rules that are relevant for the current proceedings. For example, descriptions of the ICJ's possibilities to mediate advisory opinions have been omitted due to space concerns. Thirdly, although this thesis includes a brief history of the Rohingya crisis, this thesis is solely focusing on the situations that are being examined by the courts and the effects of those decisions. Some references to how the courts or states have acted in the past will be made, but these are made to describe what can be expected from the current circumstances. Lastly, it is important to clarify that the discussion regarding politics and international law is seen from the perspective of the cases in this thesis. While there are more areas where these components interact together, this thesis will focus on what the wills and interests of Myanmar mean for the cases at the courts.

1.4 Methodology and Material

The thesis uses a legal dogmatic method as a foundation to establish the law as it exists. The sources of international law are used to understand the

current proceedings and the actual powers of the international courts. The sources include Conventions as well as judgements from the international dispute mechanisms.¹¹ A credible legal analysis requires devotion to the highest degree towards the legal material. The investigation and interpretation of legal material will therefore be of essential importance in this thesis.

The traditional lawyer may question the use of a legal dogmatic method to analyse effects and the relationship between politics and international law. It is therefore important to point out that the legal dogmatic method is only the foundation of this thesis. To approach the more analytical part, periodic articles as well as international documents and reports will be of importance. It is by studying the courts and the situation in Myanmar from different perspectives that one can get a greater understanding of the relationship between the two. Simply understanding the rules and the decisions of the courts would only be enough if international law worked as a light switch, and the fundamental idea of this thesis is based on the assumption that this is not the case. It is fair to say that it is optimistic to believe that one can change the world only through the manipulation of symbols. However, this does not mean that international law is merely a process of argumentation without effects.¹² In other words, legal rules and arguments are designed to have a practical effect, but this thesis aims to understand if they do. Therefore, other sources than the traditional legal ones will be of importance. The method of this thesis has a close relationship to sociology of law, since it studies the law's effect on the society, the society's effects on the law and the relationship between the two. In fact, sociology of law is known for using research questions about how law affects social conditions, which this thesis partly does.¹³

The material regarding politics in this thesis will be based on the acts of states and international bodies. It should, for instance, be clear to the reader that the UNSC does not always write exactly why it is going in a certain direction, but through analysing the acts of the UNSC and its members as well as articles by scholars one should be able to get a better understanding of the political wills behind the decisions.

¹¹ Sandgren, Claes, Är rättsdogmatiken dogmatisk?, *Tidskrift for Rettsvitenskap*, 04/05, 2005, pp. 648-656, at 649.

¹² Scobbie, Iain, *Rhetoric, Persuasion, and Interpretation in International Law*, Interpretation in International law, First edition., Oxford University Press, Oxford, United Kingdom, 2015, at 64.

¹³ Mathiesen, Thomas, *Rätten i samhället: En introduktion till rättssociologin*, Studentlitteratur, Lund, 2005, at 14, 23-31.

1.5 Definitions

1.5.1 The Rohingya and the Rakhine State

The term Rohingyas is used to refer to the Rohingya Muslims of Rakhine State. The Rakhine State is located in the western part of Myanmar and will in this thesis be referred to as *Rakhine*.¹⁴ The Rohingya are an ethnic group, the majority of whom are Muslim, who have lived for centuries in the majority Buddhist Myanmar.

For decades, the Burmese military and State have been consciously and systematically violating the fundamental human rights of the Rohingya population in Myanmar. This includes denying of citizenship and not being recognised as an ethnic group. Because of this, most Rohingyas are effectively stateless and unable to vote, study, work, travel, marry or practise their religion.¹⁵ Based on these facts the government has even refused to use the very name “Rohingya”.¹⁶

As the situation in Myanmar is commonly referred to as the “Rohingya crisis” and since the acts of Myanmar has not given any valid reason not to use the term, the group of the Rohingya Muslims will be referred to as Rohingya.

1.5.2 Burma or Myanmar?

In 1989, the military government of Burma decided that their country, heretofore referred to as Burma, was henceforth to be referred to as Union of Myanmar. The short form is Myanmar. Even though the words Burma and Myanmar come from the same root, the name change is still contested.¹⁷ The reason for the disagreement regarding the official name of the state is that some groups do not recognise the legitimacy of the military government or its authority to change the name. Since 2008, there have been democratic reforms in Burma/Myanmar that supports the name change. For example, the Constitutional Referendum in 2008 included a new change in the official

¹⁴ For full map of Myanmar and the Rakhine State, see Supplement A.

¹⁵ The Guardian, *Myanmar's Aung San Suu Kyi faces first legal action over Rohingya crisis*, 14 November 2019, available at: <https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis>, (last visited 2020-05-25).

¹⁶ The Washington post, *Myanmar is now erasing the Rohingya's very name*, 16 June 2018, available at: https://www.washingtonpost.com/opinions/myanmar-is-now-erasing-the-rohingyas-very-name/2018/06/16/e3f66986-6f40-11e8-bf86-a2351b5ece99_story.html, (last visited 2020-05-25).

¹⁷ Dittmer, Lowell, *Burma vs. Myanmar: What's in a Name?*, *Asian Survey*, 48(6), 2008, pp. 885-888, at 885.

name to Republic of the Union of Myanmar.¹⁸ Nevertheless, some states and groups continue to use the name Burma. For instance, the website of the U.S Department of State observes the name change but also states that the United States government continues to use the name Burma. No explanation for this is given.¹⁹

Simply put, the name Myanmar is used by many countries while other countries continue to use Burma. The name Myanmar is used by the UN and since this thesis circuits around the ICJ and the ICC, which are courts founded by the UN, it is suitable for the thesis to use this name.²⁰ In conclusion, this thesis will refer to the country as Myanmar.

1.6 Previous Research

There have been several contributions on the subject of the Rohingya crisis. Many scholars and organisations have studied the situation in Myanmar from a human rights perspective. Morten Pedersen's articles about the roots of the Rohingya crisis and Human Rights Watch's texts on the events in Myanmar are just two of many examples of the studies of the Rohingya crisis.²¹ The Rohingya crisis has also been observed and analysed from a legal perspective. Some articles focus solely on the proceedings in the ICC, like Douglas Guilfoyle discussing what role ICC should play in the Rohingya crisis.²² Other articles focus on the Rohingya crisis in relation to the ICJ, like Lee Deppermann's article which discusses if the ICJ's influence regarding human rights should be increased.²³

It should be noted that the most recent decisions from the ICC and ICJ came quite recently, and it is therefore fair to assume that research about these decisions are most likely being developed at the time. Also, almost all

¹⁸ Hostage, John, Updating Place Names in the Name Authority File to Reflect Political Realities: The Cases of Crimea, Taiwan, and Myanmar, *Cataloging & Classification Quarterly*, Vol. 57, Issue 6, pp.407-422, at 419-420.

¹⁹ U.S Department of State, *U.S. Relations With Burma*, 21 January 2020, available at: <https://www.state.gov/u-s-relations-with-burma/>, (last visited 2020-05-25).

²⁰ UN, *Member States*, 2020, available at: <https://www.un.org/en/member-states/index.html>, (last visited: 2020-05-25).

²¹ Pedersen, Morten, The Roots of the Rohingya Refugee Crisis, *Human Rights Defender*, Vol. 27, Issue 2, October 2018, pp. 16-20, and HRW, *Myanmar – Events of 2019, 2020*, available at: <https://www.hrw.org/world-report/2020/country-chapters/myanmar-burma>, (last visited 2020-05-25).

²² Guilfoyle, Douglas, The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar, *Australian Journal of International Affairs*, Vol. 73, Issue 1, February 2019, pp. 2-8.

²³ Deppermann, Lee J. F., Increasing the ICJ's influence as a Court of Human Rights: The Muslim Rohingya as a Case Study, *Chicago Journal of International Law*, Vol. 14, Issue 1, 2013, pp.291-316.

articles that are analysing the crisis from a legal perspective are focusing on one of the courts. However, a few blogs on international law, such as the Blog of the European Journal of International Law, EJIL:Talk!, has discussed the simultaneous proceedings on various occasions.²⁴ Ongoing discussions about the different proceedings can also be found at universities. For example, Harvard Law School's Human Rights Program recently hosted an expert panel to discuss the ICJ's case on genocide in Myanmar.²⁵

To conclude, one could say that the situation in Myanmar has attracted widespread international attention and the situation has been discussed from different perspectives, including bringing the situation to the international courts as well as the actions of the international courts. But since the situation and the proceedings are still ongoing, one can undoubtedly expect more research on the subject in the near future.

1.7 Structure

Following the introduction, the second chapter of the thesis will provide a description of the Rohingya crisis in Myanmar. First, there will be a short historical background to the conflict followed with an overview of the reactions on the ongoing crisis in Myanmar from international bodies, states and NGOs.

The third chapter of the thesis will feature a presentation of the current proceedings at the ICC. The chapter will include a summary on the ICC as an international body and a description of the powers of the court that are relevant to understand the proceedings in the case regarding the Rohingya crisis. After this, there will be an outline of the actual proceedings, followed by a discussion on the actual and possible effects of the court's proceedings, tackling the first research question.

The fourth chapter will follow a similar structure to the third chapter, but with the focus on the ICJ instead of the ICC. This chapter also addresses the first research question by discussing the actual and possible effects of the proceedings.

²⁴ EJIL:Talk!, *The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya*, 21 November 2019, available at: <https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-rohingya/>, (last visited 2020-05-25).

²⁵ Harvard Law School, *HLS Human Rights Program | The International Court of Justice Case on Genocide in Myanmar*, Youtube, 27 February 2020, available at, <https://www.youtube.com/watch?v=gYJB-ZxRkK8&t=2s>, (last visited 2020-05-25).

The fifth chapter will focus on the second and the third research questions. First, there will be a discussion based on the previous chapters, analysing the significance of bringing the Rohingya crisis to both the ICC and the ICJ. Then there will be a separate discussion regarding the role of politics in international law, analysed from the perspective of the legal proceedings regarding the Rohingya crisis.

After answering the research questions, the final part of the thesis will consist of summarising the results achieved.

2 The Rohingya Crisis

2.1 A Brief History of Human Rights Abuses in Myanmar

This chapter introduces the complexity of Myanmar's Rohingya conflict. The conflict has escalated over the last few years. Mass displacements of refugees, sustained allegations of crimes against humanity, and a large-scale intervention has propelled the conflict to centre stage of international human rights.²⁶

Ever since a military regime came to power in Myanmar in the 1960s people throughout the country have been subject to mass detentions, arbitrary violence and oppressive governance. The Rohingya in Rakhine have been the target of state-sponsored violence since at least 1978.²⁷ The situation continued to worsen into the 1990s. After a series of democratic protests in 1988, a military regime seized control of political power in Myanmar. Besides gaining more control over Myanmar's government, the military resorted to widespread use of forced labour, religious persecutions of Muslims, and the forcible relocation of civilians.²⁸

The campaign of violence is a result of extensive belief amongst the government of Myanmar, the state media, and a large part of the population that the Rohingya as illegal migrants pose a threat to national security. The government does not consider the Rohingya to be among the country's 135 official ethnic groups, which means that the Rohingya are unqualified for citizenship or associated rights.²⁹

In recent years, Myanmar has begun taking steps toward a more democratic state. For example, Myanmar has freed several political prisoners and started loosening restrictions on the state-controlled economy.³⁰ In 1991, the now State Counsellor of Myanmar, Aung San Suu Kyi, was even awarded the Nobel Peace Prize for her non-violent struggle for democracy and human rights.³¹ But even with these improvements, reports still surface

²⁶ Ware, Anthony & Laoutides, Costas, Myanmar's 'Rohingya' Conflict, *Complexities, Misconceptions, and Context*, [E-Resource], Oxford University Press, 2018, at 1-2.

²⁷ Ibid. at 14.

²⁸ PILPG, 2018, at 5.

²⁹ Ware & Laoutides, 2018, at 23.

³⁰ PILPG, 2018, at 3.

³¹ The Nobel Prize, *The Nobel Peace Prize 1991*, 14 October 1991, available at: <https://www.nobelprize.org/prizes/peace/1991/press-release/>. (last visited 2020-05-25).

showing that serious human rights violations continue in Myanmar.³²

A gang rape of a Rakhine woman by a group of three Rohingya in 2012 was followed by reprisal attacks and along with this there was an increase in military-perpetrated violence against the Rohingya.³³ The reprisal attacks incited the Rohingya residents of Maungdaw town in Rakhine to riot, destroying property and killing residents.³⁴ The governments responded to the riots by declaring a state of emergency in Rakhine, which gave the military authority to intervene in the situation.³⁵ This led to several human rights abuses being committed against the Rohingya, including unlawful use of force, torture, the destruction of property and internal displacement.³⁶ In 2016, the violence between the Rohingya and the government escalated again when wide spread internal displacement of the Rohingya was responded to with attacks from Rohingya militant groups.³⁷ It has been estimated that between 25 August 2016 and 24 September 2016, at least 21.5 per cent of the recently displaced population experienced violence.³⁸

Since August 2017, more than 740.000 Muslim refugees have fled Myanmar for Bangladesh.³⁹ Most arrived in the first three months of the crisis. The majority of those reaching Bangladesh are women and children, and more than 40 per cent are estimated to be under the age of twelve.⁴⁰ Labelled as “undocumented Myanmar nationals”, the Rohingya have no legal status in Bangladesh.⁴¹ The refusal of the authorities to register Rohingya at birth or other civil documentation makes it difficult for the Rohingya to fully assess the scale of humanitarian needs. Without legal status, they are unable to pursue education and formal employment opportunities and remain vulnerable to exploitation and serious protection risks.⁴²

³² See for example, HRW, *World Report 2019*, ISBN-13:978-1-60980-884-6, 2019, at 413-420.

³³ HRW, *"The Government Could Have Stopped This" Sectarian Violence and Ensuing Abuses in Burma's Arakan State*, ISBN: 1-56432-922-4, 1 August 2012, at 18.

³⁴ HRW, 2012, at 18.

³⁵ HRW, 2012, at 19.

³⁶ Wheeler, Caleb H, Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation, *Journal of International Criminal Justice*, Vol. 17, Issue 3, July 2019, pp.609-631, at 2.

³⁷ *Ibid.*, at. 3.

³⁸ Medecins Sans Frontieres, *"No One Was Left": Death and Violence Against the Rohingya in Rakhine State*, March 2018, at 11.

³⁹ UNHCR, *Rohingya Emergency*, 2019, available at: <https://www.unhcr.org/rohingya-emergency.html>, (last visited 2020-05-25).

⁴⁰ *Ibid.*

⁴¹ ECHO, Fact Sheet, *The Rohingya Crisis*, August 2018, at 2.

⁴² Ibrahim, Azeem, *The Rohingyas: inside Myanmar's hidden genocide*, Hurst & Company, London, 2016, at 51.

The UN High Commissioner for Human Rights, Zeid Ra'ad al Hussein, has called the Rohingya crisis “a textbook example of ethnic cleansing” and also included Rakhine State alongside Syria, Yemen and Congo as “the most prolific slaughterhouses of humans in recent times”.⁴³

2.2 Reactions on the “ethnic cleansing” of Rohingya in Myanmar

Since the creation of the UN, countless committees, commissions, courts, economic groups and NGOs have been established with the goal of stopping current human rights violations and preventing future crimes.⁴⁴ This chapter will present a few of the reactions to the Rohingya crisis by a few important international actors.

In September 2017, UN Secretary General Antonio Guterres called on the Myanmar authorities to stop military operations in Rakhine, allow humanitarian access to affected communities, and ensure the safe return of refugees.⁴⁵ Despite this call from the UN chief for an international response to the crisis, the UNSC remained divided. During the UNSC’s first open meeting on Myanmar in eight years, China and Russia supported Myanmar’s government while the U.S., Britain and France demanded an end to ethnic cleansing of the Rohingya. The Russian ambassador to the UN warned that excessive pressure could only further exacerbate the crisis.⁴⁶ China’s ambassador to the UN stressed the need for the international community to be patient with the Myanmar government and pointed out that there is no quick fix to the complex conflict in Rakhine.⁴⁷ In November 2017 the UNSC called on the Myanmar government to end the “excessive use of military force and communal violence” and also expressed concerns over limited access to humanitarian aid to affected areas in Rakhine and

⁴³OHCHR, *Human Rights Council 36th session – Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights*, 11 September 2017, and OHCHR, *37th session of the Human Rights Council – Opening statement by UN High Commissioner for Human Rights*, 26 February 2018.

⁴⁴ For an overview of the history of UN human rights involvement, and the most central UN treaties and mechanisms that deal with human rights, see: OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30/Rev.1, August 2012.

⁴⁵ UN, *Remarks at open debate of the Security Council on Myanmar*, 28 September 2017, available at: <https://www.un.org/sg/en/content/sg/speeches/2017-09-28/sgs-myanmar-remarks-security-council>, (last visited 2020-05-25).

⁴⁶ UNSC, *8060th meeting*, S/PV.8060, 28 September 2017.

⁴⁷ UN News, *UN Security Council Calls on Myanmar to End Excessive Military Force in Rakhine State*, 6 November 2017, available at: <https://news.un.org/en/story/2017/11/570082-un-security-council-calls-myanmar-end-excessive-military-force-rakhine-state>, (last visited 2020-05-25).

demanded that the government ensure safe access to the UN and other humanitarian actors to deliver assistance to these areas.⁴⁸ In April 2018, the Myanmar government agreed to allow a visit by a delegation of Security Council members after initially resisting a request. In May 2018, senior diplomats from the 15-member Security Council visited refugee camps in Bangladesh. The Council members met with humanitarian agencies, civil society groups, parliamentarians, and military and government officials.⁴⁹ So far, the UNSC has failed to pass a resolution condemning the military's atrocities committed against the Rohingya as China and Russia support the Myanmar government's position on the communal violence in Rakhine.⁵⁰

Part of the international community's efforts in responding to the crisis in Myanmar is to pursue accountability for human rights violations committed by the armed forces of Myanmar. In March 2017, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established a Fact-Finding Mission to establish the fact and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar. The mission was called the Independent International Fact-Finding Mission (IIFFM) and its mandate ended in September 2019.⁵¹ The mission's initial findings were reported to the OHCHR in March 2018 which confirmed overwhelming evidence of atrocities committed against the Rohingya as "inadequate and [this] is of grave concern". In September 2018, the IIFFM released its 444-page report, which found the military to have committed atrocities against the Rohingyas with "genocidal intent".⁵² In the report, the civilian government was singled out for its failure to hold its armed forces accountable for their crimes against the Rohingya.⁵³ In August 2019, the IIFFM released another report identifying the economic interests of the Myanmar military. Since it found how Myanmar's economic activities contributed to continuing atrocities against civilians, the IIFFM has recommended states, foreign corporations and investors, as well as private individuals, stop supporting the economic activities of the Myanmar

⁴⁸ UNSC, *Security Council Press Statement on Security Council Visit to Bangladesh, Myanmar*, SC/13331, 9 May 2018.

⁴⁹ Morada, Noel M., *Continuing Violence and Atrocities in Rakhine since 2017: Beyond the Outrage, Failures of the International Community*, *Global Responsibility to Protect*, Vol. 12 Issue 1, 2020, pp.64-85, at 76.

⁵⁰ *Ibid.*

⁵¹ OHCHR, *Independent International Fact-Finding Mission on Myanmar*, 2017, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>, (last visited 2020-05-25).

⁵² UNGA, *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64, 10-28 September 2018, at 16.

⁵³ *Ibid.*, at. 1, 63-68.

military.⁵⁴ The IFFM have also called upon members of the UN to impose economic sanctions against the Myanmar military and companies linked to the military.⁵⁵

At the regional level, the Association of Southeast Asian Nations (ASEAN) has remained divided in dealing with the crisis in Rakhine. A distinctive principle of the Charter of the ASEAN is the non-interference in the domestic affairs of ASEAN member states.⁵⁶ During the 30th ASEAN Summit, held in April 2017, Myanmar's handling of the Rohingya was not condemned or even mentioned.⁵⁷ However, some of the member states have been more vocal about the crisis. For example, Malaysia was vocal in condemning Myanmar's treatment of the Rohingya. The country has emphasised that the plight of the Rohingya Muslims is a regional concern and has called for ASEAN to coordinate humanitarian aid and to investigate alleged atrocities committed against them.⁵⁸ The reaction of some member states and discussions held within the ASEAN on the Rohingya crisis since the ASEAN Summit 2017 indicate that the some changes have taken place. For example, there has been open dialogues about the Rohingya crisis among the members. Nonetheless it seems like ASEAN has not changed its long-sustained style of decision making and even though ASEAN has continued holding dialogues among members there is still no consensus on how to handle the situation. The ASEAN's stance has been summarised as all talk and not a lot of action.⁵⁹

Several human rights organisations and researchers have warned about the serious threat of genocide, ethnic cleansing, and crimes against humanity, calling for immediate intervention by the international community.⁶⁰ Organisations such as Human Rights Watch and Amnesty International have been especially vocal in calling on the UNSC to refer the situation in Myanmar to the ICC.⁶¹

Based on the above, it is fair to say that the reactions have been divided. The situation in Myanmar has attracted widespread international attention. While

⁵⁴ Nishikawa, Yukiko, The Reality of Protecting the Rohingya: An Inherent Limitation of the Responsibility to Protect, *Asian Security*, Vol. 16, Issue 1, January-April 2020, pp. 90-106, at 96-97.

⁵⁵ Ibid.

⁵⁶ ASEAN, Charter of the Association of Southeast Asian Nations, 15 December 2008.

⁵⁷ Nishikawa, Yukiko, January-April 2020, at 96-97.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ See for example, Fortify Rights, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?*, October 2015.

⁶¹ HRW, 2018 and Amnesty, 2019.

many actors have condemned the situation, several actors have been reluctant to take a formal action stance towards the situation.

3 The International Criminal Court

To understand the Rohingya case before the ICC, it is important to clarify the Court's legal nature as an institution. In this chapter, the legal nature of the Rohingya case will be considered in three steps. First, there will be an introduction to how the ICC operates. Then there will be a discussion on the jurisdiction of the Court. Lastly, the ICC proceedings concerning the Rohingya will be examined.

3.1 How the ICC operates

The ICC is a permanent, international tribunal located in The Hague in the Netherlands. The status of the ICC as a subject of international law is spelled out in article 4(1) of the Rome Statute, which determines that the Court shall have international legal personality. The ICC was established by the Rome Statute in 1998, which makes the Court a relative newcomer in the UN human rights system. The Statute was adopted at a diplomatic conference in Rome, Italy on 17 July 1998, and entered into force on 1 July 2002.⁶² To date, 123 countries are State Parties to the Rome Statute of the ICC, having both ratified and signed the original law.⁶³ By signing and ratifying the Rome Statute, these State Parties agreed to support the Court, accept the ICC's jurisdiction, and work to incorporate the rules stipulated in the Rome Statute into their own judicial systems.⁶⁴ The ICC aims to “participate in a global fight to end impunity”, but also to hold those responsible for committing the most serious crimes of concern to the international community through international criminal justice, and to prevent these crimes from happening again.⁶⁵

The ICC is composed of four primary organs. *The Presidency* (1), which conducts external relations with state, coordinates judicial matters and oversees the Registry's administrative work. *Judicial Divisions* (2), which conducts judicial proceedings, Pre-Trial, Trial and Appeals. *The Office of*

⁶² UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998.

⁶³ A full list of the State Parties to the Rome Statute can be found at: ICC, *The State Parties to the Rome Statute*, 2020, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, (last visited 2020-05-25).

⁶⁴ ICC, *How the Court works*, 2019, available at: <https://www.icc-cpi.int/about/how-the-court-works>, (last visited 2020-05-24).

⁶⁵ ICC, *About*, 2020, available at: <https://www.icc-cpi.int/about>, (last visited 2020-05-25).

the Prosecutor (OTP) (3), which conducts preliminary examinations, investigations and prosecutions. *The Registry* (4), which conducts non-judicial activities, such as interpretation, outreach, support to victims, and more.⁶⁶

The ICC is intended to complement national criminal systems, not to replace them. The Court prosecutes cases only when States are “unwilling or unable” to do so genuinely.⁶⁷ In theory, the ICC appears to provide a valid alternative to domestic systems, but there are still several weaknesses that has prevented the ICC from significantly altering the international human rights legal framework. For example, the ICC can only punish individuals, and has no jurisdiction over states.⁶⁸ Additionally, there is still a lot of states that that has not signed the Rome Statute. The fact that the permanent members of UNSC, such as the U.S and China, are not parties to the Rome Statute weakens the international legitimacy and efficiency. It has also been argued that the Court’s procedures are long, which may reduce the retributive effects and disincentives associated with prosecuting international crimes.⁶⁹

3.1.1 The Legal Process of the ICC

The ICC has jurisdiction over a limited number of crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression.⁷⁰ After crimes occur, the legal process of the ICC can be divided in different steps. First, there is the preliminary examination where the OTP must determine whether there is sufficient basis for a prosecution, considering if there is legal or factual evidence of crimes of sufficient gravity falling within the ICC’s jurisdiction, whether there are national proceedings and whether opening an investigation would serve the interests of justice.⁷¹ The Prosecutor of the ICC has a rather unique role in the proceedings before the Court. The legal criteria for choosing among the numerous situations and cases provided in the Rome Statute are relatively open as to allow the Prosecutor a considerable degree of discretion. Article 42(1) of the Statute states that the Prosecutor is independent, which includes not seeking nor acting on instructions from outside actors. Some scholars argue that the wide discretionary of powers can lead to “politicisation” of the Court’s powers or even a risk of abuse. This makes the Prosecutor

⁶⁶ ICC, *How the Court works*, 2019.

⁶⁷ *Ibid.*

⁶⁸ Article 1 of the Rome Statute.

⁶⁹ Deppermann, 2014, at 7-8.

⁷⁰ Article 5 of the Rome Statute.

⁷¹ Article 53 of the Rome Statute.

something of a gatekeeper of the ICC.⁷² According to Article 19(3) of the Rome Statute the Prosecutor may seek ruling regarding question of jurisdiction or admissibility before initiating an investigation. If the Prosecutor concludes that there is reasonable basis to proceed with an investigation, the Prosecutor shall submit a request for authorisation of an investigation to the Pre-Trial Chamber, according to Article 15(3) of the Rome Statute. If the requirements are not met for initiating an investigation, or if the situation or crimes are not under the ICC's jurisdiction, the ICC's Prosecutor cannot investigate.

Lastly, the Rome Statute marks three distinct procedural phases: pre-trial, trial and appeal. When the OTP has sufficient evidence, it submits a request to the Pre-Trial Chamber which confirm suspect's identity and ensure suspect understand the charges. After hearing the Prosecution, the Defence and the Legal representative of victims, the Pre-Trial Chamber decide if there is enough evidence for the case to go to trial. At the trial stage the Prosecution must prove beyond reasonable doubt the guilt of the accused. The judges can sentence a person to up to 30 years of imprisonment, and under exceptional circumstances, a life sentence. Both the Prosecutor and the Defence have the right to appeal a Trial Chamber's decision on the verdict and the sentence. The Appeals Chamber decides whether to uphold the appealed decision, amend it, or reverse it. This is the final judgment, unless the Appeals Chamber orders a re-trial before the Trial Chamber.⁷³

3.1.2 The ICC's Jurisdiction

As stressed under para 4 of the preamble of the Statute, the subject matter for jurisdiction of the ICC is limited to "the most serious crimes of concern to the international community". Article 5 of the Statute comprises the same phrase and an additional operative part listing the specific crimes considered "atrocities crimes", namely war crimes, crimes against humanity, genocide and the crime of aggression. Additionally, it is important to remember that the Court may only exercise jurisdiction over the crimes if they were committed on or after 1 July 2002 when the Rome Statute entered into force.

The Rome Statute was originally intended to have universal jurisdiction over non-State Parties. Throughout the drafting of the Rome Statute states such as Germany argued for the ICC to be granted universal jurisdiction.

⁷² See for example, Badagard, Lovisa & Klamberg, Mark, The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court, *Georgetown Journal of International Law*, Vol 48., Issue 3, 2017, pp. 639-734.

⁷³ ICC, *How the Court works*, 2019.

For example, the German Justice Minister Schmidt-Jorzig held a speech on 16 June 1998 before the conference plenary, in which he stressed Germany's support for universal jurisdiction.⁷⁴ Yet, the five permanent members of the UNSC remained reluctant to give up full jurisdiction over the core international crimes.⁷⁵ As a result, it was decided that the Court was not granted universal jurisdiction. Even after the Rome Statute was passed and the ICC was founded, the topic continued to be debated.⁷⁶ Under the *pacta tertiis nec nocent nec prosunt*⁷⁷ rule of customary international law, also enshrined in the Vienna Convention on the Law of Treaties, treaties such as the Rome Statute do not bind or give legal rights to non-parties.⁷⁸ Instead, the Rome Statute relies on a system that requires a valid act of delegation from a state to the ICC as a precondition to the ICC's exercise of jurisdiction. This means that the ICC has potential worldwide jurisdiction based on the fact that the Rome Statute is open for all states in the world join.⁷⁹

Before the Prosecutor can investigate on her own motion, he or she must conduct a preliminary examination considering such matters as sufficient evidence, interests of justice, but maybe most importantly, the Court's jurisdiction. Article 12 of the Rome Statute contains the preconditions for the ICC's exercise of jurisdiction. Article 12(1) states that:

A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.⁸⁰

Article 12(2) clarifies the term State Party and reads:

A State Party is a country that has both signed and ratified the Rome Statute, meaning it has accepted the jurisdiction and legal obligations of the ICC.⁸¹

The articles can be read as requiring statehood as well as being a Party to the Rome Statute for the presence of jurisdiction. According to 125(3) of the

⁷⁴ German Delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Statement of the German Federal Minister of Justice*, 16 June 1998.

⁷⁵ Hale, Kip & Rankin, Melinda, Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people, *Australian Journal of International Affairs*, Vol. 73, Issue 1, February 2019, at 22.

⁷⁶ *Ibid.*

⁷⁷ Latin: a treaty binds the parties and only the parties; it does not create obligations for a third state.

⁷⁸ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, articles 36-38.

⁷⁹ Article 125(3) of the Rome Statute.

⁸⁰ Article 12(1) of the Rome Statute.

⁸¹ Article 12(2) of the Rome Statute.

Rome Statute, the statute is open to accessions by all States. To complete a preliminary examination of jurisdiction, the Prosecutor must show that there are reasonable grounds to believe that crimes within the jurisdiction of the Court were committed either on the territory of a state party or by a national of a state party. So called “territorial jurisdiction” or “*Ratione Loci*” is based on article 12(2)(a) of the Rome Statute which provides that the ICC may exercise jurisdiction over a crime if the “State on the territory of which the conduct in question occurred” is a party to the Statute or has accepted the Court’s jurisdiction by declaration.⁸² Simply put, this means that the ICC the Court may exercise territorial jurisdiction over a crime that has been committed within the territory of a State Party. The second principle of jurisdiction is based on article 12(2)(b) of the Rome statute, which stipulates that the Court has jurisdiction in situations where a person accused of a crime is a national of a State Party to the Rome Statute, so called “personal jurisdiction” or “*Ratione Personae*”.

As an exception to the preconditions described in Article 12 of the Rome Statute, the ICC may exercise its jurisdiction following the referral of a situation from the UNSC pursuant to the article 13(b) of the Statute. In this case, the jurisdiction of the ICC is established if the UNSC acts under Chapter VII of the Charter of the United Nations and refers a situation to the Prosecutor. It is widely accepted that the UNSC may enforce legal obligations on member states to the UN in accordance with Article 25 of the UN Charter, which reads:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.⁸³

Consequently, if a State is not a Party to the Rome Statute but a member of the UN, then pursuant to Article 25 of the UN Charter it is obligated to carry out decisions of the UNSC and therefore comply with a referral to the ICC Prosecutor pursuant to Article 13(b) of the Rome Statute.⁸⁴ This can be understood as a sort of exception from the fact that the ICC does not have universal jurisdiction. Although, Article 27 of the UN Charter notes that decisions of the Security Council shall be made by an affirmative vote of nine members including the concurring votes of the permanent members. Accordingly, a negative vote from any of the members in the Security Council will block the adoption of a draft resolution.

⁸² Schabas, William A., *The International Criminal Court: a commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, at 29.

⁸³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁸⁴ Schabas, 2010, at 188-189.

3.2 The Rohingya Case at the ICC

This part addresses possible and actual effects of the ICC's recent decision acknowledging that the court may exercise jurisdiction over the Rohingya crisis. Firstly, the comment addresses the ICC's authorisation of an investigation, secondly it will problematise the possible effects for the Rohingya and the international community in general.

3.2.1 The Path to the ICC

The situation described in chapter 2 is the situation against which the ICC Office of the Prosecutor submitted its request under Article 19(3) of the Rome Statute to the ICC for a ruling on its jurisdiction over crimes connected to the mass movement of the Rohingya from Myanmar to Bangladesh on 9 April 2018.⁸⁵ Specifically, the Prosecutor argued that the Rohingya eviction from Myanmar amounts to deportation as a crime against humanity under Article 7(1)(d) of the Rome Statute.⁸⁶ The Prosecutor argued that the ICC has territorial jurisdiction because part of the offence was committed on the territory of Bangladesh.⁸⁷ She noted that one of the essential elements of deportation is the crossing of an international border.⁸⁸ She also argued that that an interpretation of Article 12(2)(a) extending the Court's jurisdiction to commission in part is consistent with general international law and the text, context, purpose and object of the treaty.⁸⁹

This request was breaking new ground in two ways. Firstly, this is the first time the ICC has been requested to make a finding specifically on the meaning of the Article 12(2)(a) of the Rome Statute and the scope of the Court's territorial jurisdiction. Since a positive ruling from the Court on this question would increase the likelihood of prosecution for nationals of non-State Parties, this decision holds significant value for the future. In other words, the decision from the Pre-Trial Chamber I had to address sensitive issues concerning the application of the Rome Statute over non-State Parties nationals for crimes committed on a State Party territory. Secondly, this was the first time that the Prosecutor used her power under Article 19(3) of the Rome Statute to request a ruling from the Court on a question of jurisdiction. An affirmative decision on this would create procedural

⁸⁵ ICC, President of the Pre-Trial Division, *Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute*, ICCRoC46(3)-01/18-1, 9 April 2018.

⁸⁶ *Ibid.*, at 3.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 11.

opportunities for the Prosecutor since it would come with an authority to request a jurisdictional ruling at any stage.

Both Bangladesh and Myanmar were given the opportunity to respond to the Prosecutor's request.⁹⁰ Bangladesh did so confidentially on 11 June 2018.⁹¹ Myanmar refused to respond and engage formally with the ICC. Myanmar instead issued public statements objecting to the proceedings and arguing against the Court's jurisdiction.⁹²

3.2.2 Pre-Trial Chamber I's decision

The Prosecutor's request posed a difficult question for the Court because the ICC, like many other courts, has limited jurisdiction. As mentioned in chapter 3.1.2, the ICC's jurisdiction is limited to addressing genocide, the crime of aggression, war crimes, and crimes against humanity.⁹³ In this particular case, the Prosecutor alleged the Myanmar government was responsible for forcible deportation, which is specifically identified as a crime against humanity under Article 7 of the Rome Statute.⁹⁴

On 6 September 2018, the Pre-Trial Chamber I of the ICC reached a decision.⁹⁵ In its decision, the Pre-Trial Chamber found that it has jurisdiction over the crime against humanity of deportation as it relates to the Government of Myanmar's treatment of the Rohingya ethnic group.⁹⁶ The Court faced challenges in determining whether it could assert jurisdiction over the Rohingya situation. The greatest challenge laid in satisfying one of the preconditions necessary to exercise jurisdiction, either territorial jurisdiction, personal jurisdiction or jurisdiction through a UNSC referral.

As mentioned in Chapter 2.2, human rights organisations, such as Human Rights Watch and Amnesty International, have called on the UNSC to refer the situation in Myanmar to the ICC.⁹⁷ In May 2018, senior diplomats from the 15-member Security Council visited refugee camps in Bangladesh. The Council members met with humanitarian agencies, civil society groups, parliamentarians, and military and government officials. Yet, it appears unlikely that a case would be referred to the ICC by the UNSC. That occurs

⁹⁰ ICC, Pre-Trial Chamber I, 6 September 2018, at 3, 6.

⁹¹ *Ibid.*, at 4.

⁹² Government of the Republic of the Union of Myanmar, Ministry of the Office of State Counsellor, *Press Release*, 9 August 2018.

⁹³ Article 5 of the Rome Statute.

⁹⁴ Article 7(1)(d) of the Rome Statute.

⁹⁵ ICC, Pre-Trial Chamber I, 6 September 2018.

⁹⁶ *Ibid.*, at 42.

⁹⁷ HRW, 2018 and Amnesty, 2019.

only rarely as the US, Russia and China are not members of the ICC, and can use their veto powers to prevent a referral.⁹⁸ In this particular case there is reason to believe that China would veto any such resolutions, given its strong stance on non-intervention and extensive economic and political relations with Myanmar.⁹⁹ Moreover, a State Party national had not committed the crime, since Myanmar is not a State Party to the Rome Statute. Therefore, the only option for the ICC to justify its jurisdiction was to find that the crime of deportation occurred inside a State Party's territory. The Judges finally stated that even though Myanmar is not a State Party to the Rome Statute, the ICC had jurisdiction over crimes partially committed of a State party, such as, in this situation, Bangladesh.¹⁰⁰

The decision is remarkable for several reasons. Firstly, it addressed and rejected Myanmar's argument in its public statement that the Court lacks jurisdiction over non-State Parties. The Court engaged in a discussion of the Court's "objective international personality", which gives it the ability to interact with and impact even non-state Parties under certain circumstances.¹⁰¹ Secondly, the decision permits the Court to exercise jurisdiction over members of the government of Myanmar for actions they performed within the territory of Myanmar. Myanmar is not a state party to the Rome Statute and therefore not directly subject to the Court's jurisdiction. The Pre-Trial Chamber I circumvented this problem by recognising that the element of crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States.¹⁰² In other words, the Court clarified that under Article 12(2)(a) of the Rome Statute, in the case of deportation, only one element of the crime needs to occur inside a State Party's territory.¹⁰³ It should however be noted that the Rome Statute does not expressly state that premise.¹⁰⁴

Seemingly, the Court was anticipating that its decision would spark controversy by noting similar expansive territorial jurisdiction approaches

⁹⁸ Reuters, *ICC prosecutor seeks Bangladesh and Myanmar investigation*, June 26 2019, <https://www.reuters.com/article/us-war-crimes-myanmar/icc-prosecutor-seeks-bangladesh-and-myanmar-investigation-idUSKCN1TR187>, (last visited 2020-05-24)

⁹⁹ Medium, *Myanmar's Referral to the International Criminal Court: Five Things You Should Know*, 10 September 2018, available at: <https://medium.com/chatham-house/myanmars-referral-to-the-international-criminal-court-five-things-you-should-know-2cb5ea7d21b>, (last visited 2020-05-25)

¹⁰⁰ ICC, Pre-Trial Chamber I, 6 September 2018, at 42-45.

¹⁰¹ *Ibid.*, at 18-29.

¹⁰² *Ibid.*, s. 35-41

¹⁰³ *Ibid.*, at 41

¹⁰⁴ Article 12(2)(a) of the Rome Statute.

have been widely accepted by many international and national systems.¹⁰⁵ The Court also identified other treaties Myanmar is a party to that follow a jurisdictional approach to the one the ICC accepted in this case. In doing so, the Court concluded that its decision complied to international legal norms.¹⁰⁶ The Pre-Trial Chamber also concluded that the ICC has jurisdiction over other crimes against humanity under the Rome Statute and customary international law other than deportation, as long as they have a cross-border element.¹⁰⁷

3.2.3 Effects of the ICC proceedings

3.2.3.1 ICC authorises investigation

On 4 July 2019, the Prosecutor requested the Pre-Trial Chamber III to authorise the commencement of an investigation into the Situation in Bangladesh/Myanmar in the period since 9 October 2016 and continuing.¹⁰⁸ On 14 November 2019, Pre-Trial Chamber III of the ICC authorised the Prosecutor to proceed with an investigation for alleged crimes within the ICC's jurisdiction. The Chamber agreed with the Prosecutor that there were no substantial reasons to believe that an investigation into the situation would not be in the interest of justice.¹⁰⁹ As a result, the decision of the Court authorised the commencement of the investigation in relation to any crime, including any future crime as long as it is within the jurisdiction of the Court, requiring that it is allegedly committed at least in part of the territory of Bangladesh (or on any other State Party), it is sufficiently linked to the situation described in the decisions, and it was allegedly committed on or after the date of entry into force of the Rome Statute for Bangladesh (or other relevant State Party).¹¹⁰

Still, the investigation will likely encounter many challenges, the foremost being a lack of cooperation from the Myanmar government. In November 2019, the Myanmar government spokesman Zaw Htay said that "(t)he investigation over Myanmar by the ICC is not in accordance with

¹⁰⁵ ICC, Pre-Trial Chamber I, 6 September 2018, at 36-38.

¹⁰⁶ *Ibid.*, at 39.

¹⁰⁷ *Ibid.*, 42-44.

¹⁰⁸ ICC, Pre-Trial Chamber III, *Request for authorisation of an investigation pursuant to article 15*, ICC-01/19-7, 4 July 2019.

¹⁰⁹ ICC, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27, 14 November 2019, at 52.

¹¹⁰ *Ibid.*, at 52-55.

international law”.¹¹¹ He also added that Myanmar’s own committees would investigate any abuses and ensure accountability if needed.¹¹² Since Myanmar is not a party to the Rome Statute, the Court does not have jurisdiction over crimes committed solely within Myanmar’s territory, unless it was authorised and referred by the UNSC. The Pre-Trial Chamber indicated that the Court should have jurisdiction where at least one element of an ICC crime is committed on the territory of Bangladesh. In other words, the investigation will not cover all allegations of violence in Myanmar, as they must have partly occurred in Bangladesh to fall within the ICC’s jurisdiction.

3.2.3.2 Discussion on possible effects of the ICC proceedings

The ICC’s decision that it may exercise jurisdiction over alleged deportations of Rohingya people from Myanmar to Bangladesh could be seen as controversial, simply because of the already stated fact that Myanmar is not a State Party to the Rome Statute. The ICC Pre-Trial Chamber recognising that the cross-border nature of the deportation included the territory of Bangladesh, who are a State Party to the Rome Statute, is, arguably, a wide interpretation of the Rome Statute.

The ICC’s decision to open an investigation into Myanmar’s crimes is potentially the most effective effort taken to secure justice and accountability for the Rohingya people. There are several reasons why the ICC’s decision on jurisdiction over the alleged deportations of Rohingya people was and is encouraging. Many of the effects are normative. The decisions send a strong message to the orchestrators of atrocities that their actions are being observed and it shows that one of the few legal resources available to the Rohingya is willing to investigate the crisis. The decision also demonstrates a willingness to adhere to the law over politics and apply criminal law as a standard. The ICC proceedings regarding the Rohingya could be an opportunity to increase accountability for human rights abuses that would otherwise go unpunished. But while it is natural for the law to evolve through interpretation, it is necessary that the decisions of the ICC are founded on a firm legal footing. The rule of law applies not only within national polities but also between them, and legal decisions built on faulty premises could lead to heightened expectations of the victims of crimes and make the Court vulnerable to criticism. It should however be noted that the Pre-Trial Chamber acknowledged that the Court is a “legal-judicial-

¹¹¹ Aljazeera, *Myanmar rejects ICC probe into alleged crimes against Rohingya*, 15 November 2019, available at: <https://www.aljazeera.com/news/2019/11/myanmar-rejects-icc-probe-alleged-crimes-rohingya-191115180754984.html>, (last visited 2020-05-25).

¹¹² Ibid.

institutional entity”.¹¹³ This should be read as that the Court is not simply a court, but also an actor that makes decisions of consequence. Some scholars argue that the Court’s mandate has expanded at every turn.¹¹⁴ In a way, the Court is and will continue to be a living institution which may develop its own jurisprudence over time, since the law evolves through interpretation.

The legitimacy of legal institutions is always contingent on acceptance by state parties. Consequently, even if the decision is met with enthusiasm, even among ICC’s own membership, some might see it as unwise of the Court to continue to seek expansion of its own jurisdiction. The decision does, in fact, show a willingness to test and reaffirm the court’s jurisdiction reach. In terms of effects, this decision is therefore a way for the ICC to show that it is not afraid of expanding its interpretation, and in that way expand its power as an international court. Some might find that this could be a justified and promising extension of the system of criminal law, while others might find this unacceptable. Consequently, one of the effects of this decision will most likely create a division on opinions towards the ICC and international criminal law in general.

One practical remark that should be made is on the consequences of the fact that the Court could not exercise personal jurisdiction and that there was no referral from the UNSC. The interpretation of territorial jurisdiction means that the Prosecutor can only investigate crimes with a cross-border element. Notably, genocide is a crime that does not have a cross-border element. So even if the exercise of jurisdiction was broadly interpreted by the Court, the alleged crime of genocide will most likely not be a part of the Prosecutor’s investigation. Even though other crimes might be added, the Court will not directly charge individuals for crimes only committed within Rakhine, let alone elsewhere in Myanmar.

It should be observed that even though the decision may have normative value and is a first step towards justice to the Rohingya, there are still practical problems for the future handling of the case and investigation. It has been observed that the ICC has had limited success in prosecuting cases without the active support of the territorial State where crimes were committed or commenced. In fact, in no case has the ICC secured defendants from non-Party territories or conducted successful trials without the cooperation of the territorial state. For example, the ICC has no defendants in custody in respect of two UNSC referrals, the situations in

¹¹³ ICC, Pre-Trial Chamber I, 6 September 2018, at 29.

¹¹⁴ See for example, Heller, Kevin J, Radical Complementarity, *Journal of International Criminal Justice*, Vol. 14, Issue 3, July 2016, pp. 637–665.

Libya and Uganda.¹¹⁵ And as mentioned above, Myanmar has not shown much of interest in participating or in helping in these ICC proceedings. Therefore, history suggests that whoever controls physical access to evidence, witnesses and defendants controls the whole investigation. It is a game hostile non-State Parties have little incentive to play unless the broader international community is ready to sway them to do so.¹¹⁶ Considering that Myanmar has refused to engage formally with the ICC, one may even be concerned that this investigation will be a backlash for the Rohingya situation since it might align the Myanmar's government and armed forces. As far as the ICC situation is concerned, it will likely take the Prosecutor significant time to complete their investigations and build cases against individual perpetrators of the crimes in question. If the lack of cooperation continues for the ICC in terms of its ability to connect effectively with victims and populations affected by the crimes, it means that the ICC will need to step up outreach efforts for the Rohingya.

Since the Rohingya case is still ongoing, it cannot be guaranteed that similar situations can be treated in the same way. For that reason, a degree of caution might be advised before victims of similar situations who would understand the decision as that they too will have an opportunity to experience justice. Some might applaud the Pre-Trial Chamber I for suggesting a creative approach for delivering some partial form of accountability for the crimes committed against the Rohingya, but the Court also needs to be wary of offering false hope to victims.

One cannot draw any exhaustive conclusions from the Pre-Trial Chamber's decision, but there is still reason to speculate what general effects the decision could have. Even though the Pre-Trial Chamber I's decision might not seem ground-breaking in comparison to many other cases, the effects could still be far reaching. The ruling could have consequences on the prosecution of current and future occurrences of human rights violations. In March 2019, the Guernica Centre for International Justice submitted a communication to the Prosecutor's office requesting that it begin a preliminary investigation into the deportation by the Syrian government of some Syrian nationals into Jordan. The Guernica Centre's argues that enough parallels exist between the situation in Myanmar and Syria.¹¹⁷ The Syrian conflict resembles the Rohingya crisis. Jordan is a State Party to the

¹¹⁵ Guilfoyle, February 2019, at 5-7.

¹¹⁶ Ibid.

¹¹⁷ Guernica Centre for International Justice, *Press Statement: GCIJ Files Article 15 Communication with ICC Prosecutor on Syria*, 4 March 2019, available at: <https://www.guernicagroup.org/post/press-statement-gcij-files-article-15-communication-with-icc-prosecutor-on-syria> (last visited 2020-05-25).

Statute, but the aggressor, Syria is not.¹¹⁸ In this case, one of the crimes alleged is deportation, which is expressly stated in Article 7(1)(d) of the Rome Statute.¹¹⁹ And at least one element of the crime(s) is committed within a State Party's (Jordan) territory. Applying the ICC's trans-border element analysis, it is not unlikely that ICC may be able to exert jurisdiction over Syria's war crime of deportation. Therefore, due to the similarities, the Syrian conflict may now fall under the ICC's jurisdiction.

Another example would be the Israeli-Palestine conflict. In April 2015, Palestine became a State party to the Rome Statute, and are in a similar situation to the Rohingya case since Israel has not ratified the Statute.¹²⁰ Despite being threatened by both Israel and the United State not to make a formal request to the ICC, Palestine referred Israel's crimes to the ICC in 2018.¹²¹ Israel responded Palestine's request by arguing the ICC's lack of jurisdiction over the situation for two reasons: (1) Palestine is not a recognised state, and (2) Israel has not accepted the Court's jurisdiction.¹²² While these objections might be complicated, one should still notice that through the decisions regarding the Rohingya crisis, the Court may have new precedent to open a formal investigation into Israel's war crimes in the disputed area of Gaza. The Israeli-Palestine conflict shares similar factual circumstances with the Rohingya crisis that were essential in justifying the decision. Like Myanmar, Israel is a non-State Party, but some crimes that occur inside the Gaza territory, which is recognised as part of the Palestinian National Authority, may also fall under the jurisdiction of the ICC provided the crime has some trans-border element or effect. On 20 December 2019, ICC Prosecutor, Fatou Bensouda, announced that her office has determined that there is reasonable basis to proceed with an investigation into alleged Rome Statute crimes committed in the situation in Palestine.¹²³

In a way, the proceedings in the Rohingya may be a start of something bigger. But while this may seem like a call for greater accountability, one needs to remember the obstacles that the ICC may face in the Rohingya case. Regardless if the ICC does succeed in its investigation on Bangladesh

¹¹⁸ ICC, *The State Parties to the Rome Statute*, 2020,

¹¹⁹ UNHCR, *Syria Emergency*, 19 April 2018, available at: <https://www.unhcr.org/syria-emergency.html>, (last visited 2020-05-25)

¹²⁰ ICC, *The States Parties to the Rome Statute*, 2020.

¹²¹ The State of Palestine, *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, PAL-180515-Ref, 15 May 2018.

¹²² State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction over the so-called "Situation in Palestine*, 20 December 2019.

¹²³ ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction*, 20 December 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>, (last visited 2020-05-25).

and Myanmar, the same obstacles will likely occur in the case of Syria and Israel. There is reason to believe that the ICC reaffirming its jurisdictional reach may not give the effect that some might be hoping for.

4 The International Court of Justice

This chapter is similar to the previous one, but it will examine the ICJ and its proceedings on Myanmar. First there will be an introduction on ICJ and the competence and jurisdiction of the ICJ. Then there will be a discussion of the Rohingya case before the ICJ and the possible effects of these proceedings.

4.1 How the ICJ operates

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established in June 1945 by article XIV of the Charter of the United Nations (the UN Charter) and began work in April 1946. The Court is seated in the Peace Palace in The Hague, Netherlands and is composed by 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council.¹²⁴

The ICJ's constitution and operation are regulated, first by the UN Charter itself (Chapter IV, articles 92-96), secondly by its Statute (to which article 92 in the UN Charter refers), and thirdly by the Rules of Court, made by the Court itself under a power conferred by article 30 of the Statute. The Rohingya case before the ICJ is not a criminal case against individual alleged perpetrators and it does not involve the ICC, which is a separate body. It is a "state-to-state" litigation between UN member states governed by legal provisions in the UN Charter and the ICJ Statute. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies.¹²⁵ The Court may entertain two types of cases: (1) legal disputes between states submitted to it by them (contentious cases)¹²⁶ and (2) requests for advisory opinions on legal questions referred to it by United Nation General Assembly (UNGA) or the Security Council and specialised agencies (advisory proceedings).

¹²⁴ ICJ, *The Court*, 2020, available at: <https://www.icj-cij.org/en/court>, (last visited 2020-05-25).

¹²⁵ United Nations, Statute of the International Court of Justice, 18 April 1946, Article 36.

¹²⁶ *Ibid.*

It should be noted that commentators have observed that the ICJ is not the ideal forum for human rights cases.¹²⁷ Most of the Court's prominent and useful cases have dealt with territorial disputes or other similar questions that have little to do with human rights law. Since it can be questioned if ICJ is a specialised human rights institution in terms of mandate, jurisdiction or procedures, it also raises the question if the ICJ's role is limited in the human rights arena. It should however be noted that the ICJ has played a central role in human rights, through ruling and advisory opinions.¹²⁸ One could also conclude that, since the vast majority of the world's nations are part of the UN system, the rulings of the ICJ have a normative value since they are largely observed by its members.

4.1.1 The Legal Process of the ICJ

Chapter 3 in the Statute of the ICJ establishes procedures for the conduct of a case before the Court. The provisions of the Statute are supplemented by the Rules of the Court.¹²⁹ The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction.¹³⁰ State parties to a dispute may commence a case after notifying it to the Registrar of the Court. Agents will then be appointed by the parties to represent them before the Court.¹³¹

In the initial proceedings of a case, the ICJ may without prejudice to the decision as to its jurisdiction in the case, where necessary, indicate interim measures for the protection of the rights of one of the parties.¹³² Following the submission of the application and after the President has met and consulted with the parties there is room for preliminary objections and the right of intervention of a third party.¹³³ Then the proceedings before the ICJ takes place in two phases, the written and oral proceedings. After the oral proceeding the ICJ delivers its judgment at a public sitting. The rulings of the ICJ are final and cannot be appealed. Article 59 of the Statute states that the decision of the Court has no binding force except between the parties and in respect of that particular case. A judgement is also binding upon the parties in accordance with Article 2 and 94(1) of the UN Charter. Sometimes, the judgement of the ICJ is purely declaratory of the rights of

¹²⁷ See, for example, Schwebel, Stephen M., Human Rights in the World Court, *Vanderbilt Journal of Transnational Law*, Vol. 24, Issue 5, 1991, pp. 945-970, at 945-946.

¹²⁸ For example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 9 July 2004, ICJ reports (2004).

¹²⁹ ICJ, Rules of the Court, 1 July 1978.

¹³⁰ For more on jurisdiction, see Chapter 4.1.2.

¹³¹ UNCTAD, *Dispute Settlement – The International Criminal Court*, Misc.232/Add.20, 24 June 2003, at 17.

¹³² Article 41 of the Statute of the International Court of Justice.

¹³³ Article 62 and 79 of the Statute of the International Court of Justice.

the parties and there is nothing further to be done. Actual duties from a judgement are more complicated to enforce. For example, in the *Corfu Channel* case¹³⁴ it was 45 years before Albania, the losing party, paid the indemnities ordered by the ICJ's judgement to be paid to the United Kingdom.¹³⁵

There is no provision in the Statute for what might be termed enforcement of a judgement. Although, in the case of failure by a party to comply with the obligations from in the decision, the other parties can, in accordance with Article 94(2) of the UN Charter, have recourse to the UNSC for the enforcement of the decision. However, very little use has been made of this faculty.¹³⁶

The procedure described above is the typical procedure. However, the course of the proceedings may be modified by incidental proceedings. An example of an incidental proceeding relevant for this particular case is provisional measures. These will be described below in Chapter 4.1.3.

4.1.2 The ICJ's Jurisdiction

The ICJ possesses two types of jurisdiction: (1) legal disputes between states submitted to it by them (contentious cases), and (2) requests for advisory opinions on legal questions referred to it by UN organs and specialised agencies (advisory proceedings). In this chapter, the main focus will be on contentious cases, since this is the jurisdiction relevant for the ongoing Rohingya situation.

Only states which are members of the UN, have become parties to the Statute of the Court or have accepted ICJ's jurisdiction under certain condition, are parties to contentious cases.¹³⁷ By signing the Charter, a member state of the UN undertakes to comply with the decision of the Court in any case to which it is a party.¹³⁸ Consequently, the basis for jurisdiction is the consent of the State parties to a dispute. Consent can be expressed in different ways. The consent may be very immediate, as when to parties conclude an agreement to establish a one-off arbitral tribunal to decide a particular dispute. It may also be wider in scope, as when two States conclude a general treaty for the settlement of future dispute, or when a multilateral

¹³⁴ ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Merits, I.C.J Reports, 9 April 1949, p. 22.

¹³⁵ Thirlway, Hugh, *The International Court of Justice*, 1. ed., Oxford University Press, Oxford, 2016, at 138.

¹³⁶ *Ibid.*, at 239.

¹³⁷ Article 34(1) of the Statute of the ICJ.

¹³⁸ Thirlway, Hugh, 2016, at 35.

convention includes a clause providing for the judicial settlement of any dispute between parties.¹³⁹

4.1.3 Provisional Measures

Provisional measures serve as the equivalent of injunctions or even temporary restraining orders against a country. They are usually requested when one state believes that there is an ongoing legal violation from which it will continue to suffer harm while the Court considers underlying claims.¹⁴⁰

Article 41 of the Statute of the Court confers on the Court the power to indicate measures, the procedure for which is regulated by the Rules of Court. Article 74(1) of the Rules of the Court requires that requests of provisional measures are conducted as a matter of urgency and therefore have priority over all other cases. The starting point is normally a written request by the party that considers that measures are necessary.¹⁴¹ Article 41 of the Statute of the Court makes clear that the purpose of the decision on provisional measures is solely to preserve the respective rights of the parties pending any judgement which might be given on the merits. The article reads:

The Court shall have the power to indicate whether it considers that the circumstances so require which provisional measures of protection of the rights of each party should be taken to preserve the respective rights of either party.¹⁴²

Article 41 of the Statute of the Court confers a power of the ICJ, to be exercised “if it considers that circumstances so require”. This means that provisional measures may only be authorised by the ICJ under specific circumstances. These are related to the ICJ’s jurisdiction over the party and the issue. As set out in one of the ICJ’s treatments of the subject, *Belgium v. Senegal*, there are three requirements which must be satisfied:

1. it must appear, *prima facie*, that the provisions relied upon by the Applicant afford a basis on which the jurisdiction of the Court could be founded;

¹³⁹ Thirlway, Hugh, 2016, at 35-36.

¹⁴⁰ *Ibid.*, at 149.

¹⁴¹ Article 73 of the Rules of the Court.

¹⁴² Article 41 of the Statute of the Court

2. the provisional measures must be designed to protect rights which might subsequently be adjudged to belong to one of the parties; and
3. the measures ordered must be necessary to protect those rights.¹⁴³

In theory, determinations made at the provisional measures stage have no bearing on the ultimate decision reached on those issues later. The standard of proof for granting provisional measures is that of a *prima facie* showing, considerably less than that required for final judgment. Regarding provisional measures, it should be noted that article 75(2) of the Rules of the Court gives the ICJ power to indicate measures that are, in whole or in part, other than those requested.

As mentioned above, the Statute of the Court provides that the ICJ may indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. However, the Statute is silent on the consequences if such measures are not complied with.¹⁴⁴ In the *LaGrand* case¹⁴⁵, the ICJ held that provisional measures are legally binding because if they were not binding, it would defeat the purpose of Article 41 of the ICJ Statute. As also mentioned above, a state which considers that the other party has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may bring the matter before the Security Council, which is empowered to recommend or decide upon measures to be taken to give effect to the judgment. However, it should be noted that the Security Council can be called on by a party to act on non-compliance, this is in relation to a “judgement” of the ICJ rather than an interim ruling.

4.2 The Rohingya Case at the ICJ

This part addresses possible and actual effects of the ICJ’s recent decision on ordering provisional measures but also on the future treatment of the case. Firstly, the section addresses Gambia bringing the situation to the ICJ, secondly it will discuss the actual decision, and lastly it will problematise the possible effects for the Rohingya and the international community in general.

¹⁴³ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order, 28 May 2009.

¹⁴⁴ Thirlway, Hugh, 2016, at 149-150.

¹⁴⁵ ICJ, *LaGrand case (Germany v. USA)*, Judgment, 2 June 2001.

4.2.1 The path to the ICJ

Both Gambia and Myanmar have ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which places an obligation on states to prevent and punish genocide. Article IX of the Genocide Convention explicitly provides that any dispute between states that are parties to the Convention should be resolved by the ICJ. Since both Gambia and Myanmar are parties to the Genocide Convention, they have both agreed to the jurisdictional clause, which means that any dispute they have about the Genocide Convention should be resolved by the ICJ. Fifteen states have lodged reservations relating to Article IX, but Myanmar has not. It has instead made reservations to Articles VI and VIII of the Genocide Convention, neither of which are obstacles to pursuing an ICJ case.¹⁴⁶ The reservations made by Myanmar reads:

- (1) With reference to article VI, the Union of Burma makes the reservation that nothing contained in the said Article shall be construed as depriving the Courts and Tribunals of the Union of jurisdiction or as giving foreign Courts and tribunals jurisdiction over any cases of genocide or any of the other acts enumerated in article III committed within the Union territory.
- (2) With reference to article VIII, the Union of Burma makes the reservation that the said article shall not apply to the Union

On 11 November 2019, The African nation Gambia, which is located more than 11 500 kilometres from Myanmar, filed a case at the ICJ claiming that a conflict exists between Gambia and Myanmar.¹⁴⁷ Gambia filed the case with backing of the 57 members of the Organisation of Islamic Cooperation (OIC).¹⁴⁸ Gambia argued that the conflict was built on the interpretation and application of the Genocide Convention based on how Myanmar was treating the Rohingya population. Gambia claimed that Myanmar's treatment of the Rohingya population rose to the level of genocidal acts and therefore requested that the ICJ declare that Myanmar had violated the provisions of the Genocide Convention.¹⁴⁹ Since the request was rather extensive and may take several years to adjudicate, Gambia also requested the ICJ rule on provisional measures, under Article 41 of the ICJ Statute, designed to protect the Rohingya while these legal questions are being considered.¹⁵⁰

¹⁴⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, 23 January 2020, at 6.

¹⁴⁷ ICJ, *Application Instituting Proceedings and Request for Provisional Measures (The Gambia v. Myanmar)*, 11 November 2019.

¹⁴⁸ *Ibid.*, at 8.

¹⁴⁹ *Ibid.*, at 2.

¹⁵⁰ *Ibid.*, at 38-31.

Gambia's rather unlikely intervention came about through a series of circumstances. The most important, however, being OIC looking for a way to stand up for the Rohingyas and therefore sponsored Gambia out of its 57 members to lead the case. Reed Brody, legal counsel for Human Rights Watch said that Gambia was seen as the right country to do it, since it was important that it was a democratic country with relatively clean hands.¹⁵¹

Suu Kyi, who chose to act as the "agent", said Gambia had presented an "incomplete and misleading" case.¹⁵² She said that there may have been some human rights violations and deviations from the international norms of justice and the rule of law, however, she did not consider these violations as amounting to genocide.¹⁵³ A few days before the ICJ's decision, a group established by Myanmar's government called the Independent Commission of Enquiry (ICOE) issued an executive summary on the situation in Myanmar.¹⁵⁴ The executive summary released on 21 January 2020, acknowledged that Members of Myanmar's security forces committed war crimes and serious human rights violations against the Rohingya. Yet, the ICOE found no evidence of genocidal intent and did not address crimes against humanity.¹⁵⁵

4.2.2 The ICJ's decision

On 23 January 2020, The ICJ issued its decision on the request for provisional measures in the case of *Gambia v. Myanmar*.¹⁵⁶ The Court did not yet determined whether the violence in Myanmar constitutes genocidal intent by Myanmar's authorities, instead this was an order specifically addressing the urgent request by Gambia for provisional measures. The ICJ determined that Gambia had been sufficient in showing that the ICJ had the authority to adjudicate the dispute. The Court therefore determined that it had "prima facie" jurisdiction to justify issuing an order for provisional

¹⁵¹ Equal Times, *Gambia's genocide case against Myanmar shows that smaller countries can also help balance the scales of international justice*, 27 March 2020, available at: <https://www.equaltimes.org/gambia-s-genocide-case-against>, (last visited 2020-05-25).

¹⁵² ICJ, *Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim record 2019/19, 11 December 2019, at 12-13.

¹⁵³ Bloomberg, *Aung San Suu Kyi Says Genocide Trial Against Myanmar Neglects Key Facts*, 18 December 2019, available at: <https://www.bloomberg.com/news/articles/2019-12-18/suu-kyi-says-genocide-trial-against-myanmar-neglects-key-facts>, (last visited 2020-05-25).

¹⁵⁴ The Republic of the Union of Myanmar, President Office, *Executive Summary Of Independent Commission of Enquiry-ICOE' Final Report*, 21 January 2020.

¹⁵⁵ *Ibid.*, at 9 & 12.

¹⁵⁶ ICJ, Order, 23 January 2020.

measures.¹⁵⁷ After referencing and reviewing the arguments from both states, the report of the Independent Fact Finding Mission Myanmar and the IFFM report to the OHCHR, the ICJ found that it was justified in issuing provisional measures.¹⁵⁸ Further, the court extensively relied on the reports of the IFFM, sanctioned by the UN Human Rights Council, to arrive at its own conclusions. The ICJ categorically took note of the reports observations that there are reasonable grounds to conclude the commission of genocide against the Rohingya.¹⁵⁹

Myanmar's legal team argued that because of the country's reservations on the Genocide Convention, the ICJ has no jurisdiction over this case. But the court dismissed this claim and ascertained that it has prima facie jurisdiction over the case.¹⁶⁰ The Court, relying on the *Belgium v. Senegal* case, found that Gambia had standing to bring a claim against Myanmar under the Genocide Convention even though it was not itself directly affected by Myanmar's actions. In the words of the court: "It follows that any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*¹⁶¹, and to bring that failure to an end".¹⁶²

In its application, Gambia asked for five provisional measures, and an additional sixth at the hearings. The Court accepted all but two of the provisional measures that Gambia requested. The Court prefaced its decision referring to Article 75(2) of the Statute of the ICJ which enables the court to make orders other than those requested. The ICJ found that the two requested provisional measures, regarding not aggravating the dispute, and granting access to UN investigative mechanisms, were not granted. The ICJ found that Gambia's request for a specific measure requiring Myanmar to provide access to UN investigators saying: "does not consider that its indication is necessary in the circumstances of the case". Regarding the other provisional measure not granted, the Court decided not to indicate the general, innocuous non-aggravation measure, saying that it was unnecessary due to the specific measures that it did indicate.¹⁶³

¹⁵⁷ *Ibid.*, at 11-12.

¹⁵⁸ *Ibid.*, at 17-18.

¹⁵⁹ ICJ, Order, 23 January 2020, at 17-18, 21.

¹⁶⁰ *Ibid.*, at 37-38.

¹⁶¹ In the *Belgium v. Senegal* case "*obligations erga omnes partes*" was defined as obligations in the compliance of which the states have an "interest", which, in the case is a "common interest". See, ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium Senegal)*, Judgement, 20 July 2012, at 31.

¹⁶² ICJ, Order, 23 January 2020, at 13.

¹⁶³ *Ibid.*, at 19.

The two first two measures ordered Myanmar not to violate its obligations under the Genocide Convention. Simply put, Myanmar must neither commit genocide nor allow genocide to be committed in its territory. The third order was for Myanmar to take “effective measures” to preserve all evidence related to the alleged genocide. Lastly, the ICJ ordered that Myanmar update the court on the measures that Myanmar has taken to comply with the ICJ’s orders. The ICJ also concluded that the Rohingya in Myanmar appear to constitute a “protected group” within the meaning of Article II of the Genocide Convention, meaning that the Rohingya appears as a group that should be protected by the Genocide Convention.¹⁶⁴ Three judges, in addition to supporting the provisional measures, wrote separate opinions to expound on different points. For example, a Chinese judge wrote that she had “serious reservations with regard to the plausibility of the present case under the Genocide convention”, meaning that she had serious concerns that the evidence does not support a finding of the specific intent necessary for genocide.¹⁶⁵

Myanmar’s Ministry of foreign affairs issued a short statement after the ICJ decision was announced. The statement declared that there was no genocide in Rakhine, argued that the ICJ’s order was not a decision on merits and referred to the report issued by ICOE.¹⁶⁶

4.2.3 Effects of the ICJ proceedings

As stressed regarding the ICC decision, the international attention on the Rohingya crisis has been a reason of hope for the Rohingya worldwide and a clear message that systematic human rights violations should not go unnoticed. This is, of course, also have an effect of the ICJ ruling. The decision marks a breakthrough in the multidimension attempt to establish accountability for the crimes inflicted by Myanmar. The decision from the ICJ that Myanmar should take all measures available to prevent acts of genocide against the persecuted Rohingya minority is, like the ICC decision, truly ground-breaking. It shows how small states can play an important role in upholding international law and holding other states accountable. The effects of the fact that Gambia was able to bring this case to the ICJ is clear, it will create more room for states that are not directly affected by a conflict to be more inclined to engage in conflicts at the legal stage. It should however be noted this is an initial decision of the ICJ, the central case could

¹⁶⁴ ICJ, Order, 23 January 2020, at 16.

¹⁶⁵ ICJ, *Separate opinion of Vice-President Xue*, 23 January 2020, at 1.

¹⁶⁶ BBC, 23 January 2020.

still take years to conclude. The case will continue at the ICJ, the phases could include preliminary objections, admissibility and jurisdiction arguments and eventually addressing the merits of the case.

The provisional measures raise some interesting questions regarding their actual effect on the crisis. The first two provisional measures states that Myanmar shall take all measures within its power to prevent the commission of all acts within the scope of the definition of genocide and to ensure that all relevant parts not to commit genocide or in any way attempt genocide. Simply put, Myanmar must not commit nor allow genocide to be committed within its territory. The question regarding these measures is whether it does bring any new obligations to Myanmar. The state is already part of the Genocide Convention and according to the convention the country is already not allowed to do any of these things. The orders might come with some international gravity, but if Myanmar already believes they are innocent to the crime there is really no reason for them to do anything differently. After all, Myanmar's domestic investigative task force ICOE concluded in its final report that they did not find any evidence of genocidal intent by the country's security forces. The third provisional measure, to take effective measures to preserve all evidence alleged to genocide, is important, but also rather confusing. It is, without a doubt, unlikely that Myanmar would have any interest in preserving any evidence that the state is guilty of a potential genocide. And even if Myanmar were to preserve evidence, the evidence might not necessarily prove genocide. Again, the report presented by ICOE has already reached the conclusion that there is no genocidal intent by the security forces. The fourth provisional measure states that Myanmar must submit a report to the Court on all measures taken to give effect to the order. When, and of course if, Myanmar does this, they may argue that the steps taken essentially meets its obligations towards the Genocide Convention. Hypothetically, Myanmar can even fulfil this requirement even if the measures are ineffective in the actual crisis.

It should be noted that research shows that only one of eleven states which the ICJ has ordered provisional measures against during the time period 1951-2002 have complied with those provisional measures.¹⁶⁷ Additionally, one of the attorneys representing Gambia in the case has pointed out that in the Bosnia Genocide case in the ICJ, the Court issued provisional measures twice in 1993, including to "take all measures within its power to prevent commission of genocide".¹⁶⁸ Yet, just two years later the massacre at

¹⁶⁷ Schulte, Constanze. (red.), *Compliance with decisions of the International Court of Justice*, Oxford University Press, Oxford, 2004.

¹⁶⁸ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Order, 8 April 1993, at 25.

Srebrenica happened.¹⁶⁹ Consequently, only time will tell whether the provisional measures now issued will prevent future genocide in Myanmar or even effect the Rohingya crisis in general.

This raises the interesting question regarding the decision on provisional measures, whether or not the ICJ successfully can enforce a provisional measures order. Unlike domestic courts, the international courts have no police forces at their disposal. The ICJ's provisional measures orders are legally binding on the parties, under article 94 of the UN Charter, all member countries must abide by ICJ decisions in cases to which they are a party. In event of non-compliance, the UNSC may "decide upon measures to be taken to give effect of the judgement". Under Article 41(2) of the ICJ Statute, the provisional measures orders are automatically sent to the UNSC. This could increase the pressure on the Security Council to take concrete actions in Myanmar, for example through a binding resolution. Although, as already noted, this is unlikely because of China's support for Myanmar's leadership and its veto power. Simply put, even if the decision is unanimous and binding, the ICJ cannot enforce its ruling.

One could still point out the decisions normative value and the fact that leaders, institutions and organisations might put more pressure on Myanmar's handling of the Rohingya crisis. Nonetheless, history shows that Myanmar has not been to receptive of international pressure. During the 1990s and 2000s Myanmar was subject to one of the world's harshest international sanctions regimes, which did not end in the former military government customising.¹⁷⁰ Simply put, since Myanmar has shown itself resistant to international criticism there could be a risk that the state will fail to comply. Although, these facts should, of course, not be taken as a guarantee that the reaction will be the same in this particular case.

The actual outcome of the merits stage is still to be determined. Yet, the Rohingya case appears remarkably similar to the 1993 genocide case of Bosnia & Herzegovina vs Serbia and Montenegro case, where Serbia and Montenegro were accused of perpetrating genocide against the Bosnian Muslims. In this case Serbia argued that the crimes were done without "genocidal intent", not unlike the argumentation by ICJ. The ICJ found that Serbia was neither directly responsible for the genocide, nor that it was

¹⁶⁹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgement, 26 February 2007, at 87.

¹⁷⁰ Pedersen, Morten B., *Promoting human rights in Burma: a critique of Western sanctions policy*, Rowman & Littlefield, Lanham, Md., 2008, at 63-67.

complicit in it.¹⁷¹ In other words, the evidentiary requirements in the case of genocide are set quite high. This raises the question of whether Gambia will be able to provide clear and convincing evidence that genocide was committed against the Rohingya and whether alleged crimes had “genocidal intent”. It is not unlikely that the Myanmar case could reach a similar conclusion to the Bosnia genocide case.

In a way, the ICJ’s decision still might reaffirm faith in the global justice system. If the ICJ did not take actions towards Myanmar it could make the system of international law appear spineless. Instead, it shows a glimmer of hope for the Rohingya. For now, the actual effect depends on whether Myanmar chooses to follow the ICJ’s provisional measures. If Myanmar chooses to do so, the ruling will most likely have a very positive impact on the situation in Myanmar. Regardless of whether the ICJ ultimately finds that genocide has occurred in Myanmar, the situation for the Rohingya would improve and the possibility for individuals to be held accountable for their crimes in Myanmar would increase. However, considering what has been described in this chapter, one should remain sceptical.

¹⁷¹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* – Overview of the case, available at: <https://www.icj-cij.org/en/case/91>, (last visited 2020-05-25).

5 Analysis

5.1 The significance of bringing the Rohingya crisis to both the ICC and ICJ

The fact that the situation in Myanmar is now being considered by the ICC and the ICJ has undoubtedly offered hope for justice for the Rohingya. This chapter aims to describe the significance and the impact of the fact that the situation is now observed by not only the ICC but also the ICJ. It discusses the normative impact of the situation being handled at the highest judicial levels, but also if the courts can make a difference where diplomacy and sanctions have failed.

Bringing the Rohingya situation to the ICC and the ICJ can be important for several reasons. Firstly, the proceedings provide a chance for the international community to witness the persistent violation of human of fundamental human rights of the Rohingyas. Adjudicating this case at the highest international judicial levels makes it difficult for Myanmar to deny that any human rights violations has taken place. Even if the government-established Myanmar inquiry, ICEO, found that the acts in Rakhine had no genocidal intent, it did acknowledge that there were war crimes and that members of Myanmar's security forces committed serious human rights violations against the Rohingya. Adding the fact that Myanmar refuses to engage with the ICC primary on the argument that ICC lacks jurisdiction and not by denying the deportations shows the international community that atrocities are happening in Myanmar and it may bring more attention to the crisis in general. A large part of the international community has already engaged in this situation. However, the ICC investigating the situation combined with ICJ's interim ruling may provide a hook for key international actors, such as the UNGA, to maintain pressure on Myanmar.

The current developments in both courts are also highly significant for their symbolic force. Whether the cases at ICC and ICJ will result in accountability for perpetrators and redress for victims are not yet clear. But the proceedings send a strong message that human rights violations will not be ignored. The decisions demonstrate a willingness to adhere law over politics and apply international law as a standard. The proceedings by the court recognises calls by victims and international actors to address the allegations of atrocities against the Rohingya. Even though the UNSC may

be unwilling to act, the ICC and the ICJ are responding. This is a powerful reminder that Myanmar or states in similar situations should not fully rely on powerful allies to escape their responsibilities. What this willingness from the courts actually means will be further discussed in Chapter 5.2. However, to make real progress in resolving humanitarian crises, the international community must take formal action. It could be argued that to address humanitarian crises, the disparaging views on the ICC and the ICJ needs to be put aside and there must be a recognition that the courts might not be the problem but rather the ineffective assistance of the international community. But while relying the international community to shape the international justice movement, these decisions may create more incitement for international actors to act towards atrocities.

Bringing the Rohingya situation to the ICJ in addition to the ICC also gives impact on a more practical note. While the ICC as a court appear to provide a valid alternative to domestic and regional systems, several limitations of its competence may prevent it from significantly altering the international human rights legal framework. In this sense, The ICJ comes with several normative advantages. Initially, the ICJ has a broader international participation. A vast majority of the world's nations are part of the UN system, and this does bring a large number of nations into discussions about human rights violations. The ICJ being one of the principal organs of the UN brings wider attention to their proceedings and those proceedings might therefore come with a larger impact at the international community.

The ICC also lacks the ability to bring suits against states. While ICC can only establish individual responsibility of those committed crimes, the ICJ can establish Myanmar's state responsibility. This is important since the government in Myanmar can, at least in theory, offer political changes in Myanmar which cannot be made simply by the prosecution of an individual. At the same time, it can be argued that it is not the government of Myanmar that is the main threat for the Rohingya, but the military leaders. Therefore, the proceedings at the ICC will also be of great importance for the situation on the ground in Myanmar. Bringing the situation to both ICC and ICJ can help ensure that no stone will be left unturned in the effort of stopping the human rights violations towards the Rohingya. Additionally, while the remit of the cases before the ICC and the ICJ are fundamentally different there are bound to be overlaps in the assessment of evidential material and issues.

Considering the jurisdictional approach from the ICC, it will not be able to investigate the crime of genocide. Consequently, ICJ's is the only hope for an international judicial condemnation of the situation as genocide. Bearing in mind how the ICJ handled the prima facie analysis in its order on

provisional measures, it appears rather unlikely that the ICJ will dismiss the genocide case towards Myanmar at the jurisdictional stage. Since Myanmar is a Party to the Genocide Convention it has, at least in theory, the obligation at a state level to comply with the decisions of the ICJ. As mentioned in Chapter 4.2.3, the evidentiary requirements in the case of genocide was set quite high in the Bosnia case. Simply put, the crime of genocide is difficult to prove in a court of law. Despite the UN reports and the media coverage of the Rohingya crisis, Gambia's legal team still has a long road ahead to hold Myanmar guilty of the crime of genocide. However, bringing the situation to the ICJ is still the only way that Myanmar will have to answer to these allegations. Ultimately, the path chosen is long and complex. But because something is difficult does not mean that it should not be undertaken, and this case indeed must be pursued to its conclusion.

While the ICJ's jurisdiction only covers the crime of genocide, the Myanmar government and military have been accused of a vast body of war crimes and crimes against humanity. These will, to some extent, be pursued at the ICC. The ICC Prosecutor has indicated that the investigation will cover forcibly deportation as well as other inhumane acts. She also indicated this may include prosecution on ethnic and religious grounds associated with those crimes.¹⁷² Some might argue that in a perfect world, both the government and individuals should be tried on all the alleged crimes. However, what this discussion shows, is that bringing this situation to one of the courts would have limited the examination on the crimes and those responsible for the crimes considerably. Given the ICC's more victim-oriented proceedings, there will be room for the victims and their legal representative to participate in the proceedings. This, combined with the genocide proceedings Myanmar most likely will be facing before the ICJ, could be an effective road to address the alleged crimes against the Rohingya.

The last normative advantage of bringing the situation to the ICJ, is the ICJ's ability to employ provisional measures. This is, more or less, the only action taken by any of the courts that in some way orders Myanmar to stop the violence. If the Courts order are followed, the ruling would have a very positive impact on the ground in Myanmar. Regardless of whether the ICJ ultimately finds that genocide actually occurred in Myanmar, the everyday life of the Rohingya would be improved. If the order on provisional measures are taken seriously by Myanmar, it will either contribute to a

¹⁷² ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh*, 18 September 2018, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>, (last visited 2020-05-25).

reduction of violence targeted towards the Rohingya or preserve evidence for later accountability.

However, even though the provisional measures are binding on Myanmar, the order is unlikely to be significant. According to reports, two women Rohingya women were killed by Myanmar's armed forces just two days after the ICJ decision.¹⁷³ Additionally, according to a press release from the government of Myanmar the provisional measures are unnecessary, since there has been no genocide in Myanmar.¹⁷⁴ However, the order is one of the few decisions that are taken at the moment, that actually does something to affect the current situation. The verdict on merit may take several years, so hopefully, provisional measures may help to cease the persistent abuses. It should also be noted that even if the order does not make any difference for the government of Myanmar, Bangladesh, who have been cooperative with the ICC, may be more inclined to do what they can to prevent the alleged genocide in Myanmar.

Apart from seeking the immediate imposition of provisional measures, there are two main consequences of bringing the situation to the ICJ in addition to the ICC. First, the ICJ can establish Myanmar's state responsibility, whereas the ICC can only establish individual responsibility. Second, given the limited jurisdiction of the ICC, the ICJ appears to be the international community's only hope for an international judicial qualification of the Rohingya crisis as genocide.

Although, is important to remember that the ICC and the ICJ face several common obstacles. Without the co-operation of the government of Myanmar in providing evidence, serving warrants on alleged perpetrators and granting access to investigators and court officials, all these proceedings face serious problems. The ICC's decisions and the ICJ order are significant decisions under international law and they should play a critical role in questions of accountability and in protecting a group under serious threat. However, both the ICC and the ICJ have structural limitations, the ICC cannot investigate crimes primarily committed only on Myanmar's territory without a referral from the UNSC, and the ICJ does not have the mandate to enforce its future judgements without the support of the UNSC. China has threatened a veto in the UNSC to prevent statements, resolutions, or meetings on the situation in Myanmar, which undoubtedly is a huge

¹⁷³ Reuters, *Two Rohingya women killed in Myanmar shelling*, 25 January 2020, available at: <https://www.reuters.com/article/us-myanmar-rohingya/two-rohingya-women-killed-in-myanmar-shelling-idUSKBN1ZO08H>, (last visited 2020-05-25)

¹⁷⁴ The Republic of the Union of Myanmar, Ministry of Foreign Affairs, *Press Statement on the decision on 'provisional measures' in the case brought by Gambia against Myanmar*, 23 January 2020.

obstacle for further actions by the international community.¹⁷⁵ Adding the fact that, to some extent, the military in Myanmar is unafraid of international sanctions because neighbouring countries have economic interests to pursue in Myanmar, makes the impact of intervention of the courts weaker.

What this discussion does make clear is that while the possibilities of determining the future of the Rohingyas may seem very clear and even hopeful, the situation on the ground in Myanmar, where political powers and different interests still have a great impact, makes for a more problematic process. If the processes and procedures at the international level do not change the behaviour of Myanmar's government and military leaders, then it will not prevent further atrocities against civilian populations. Nevertheless, this is not to say that they have no impact at all. At the very least, the cases before the ICC and ICJ satisfy part of the international community, by showing that there has been some response.

Considering that the situation in Myanmar is unlikely to be solved in the near future, it makes one wonder if the interventions by the ICC and the ICJ is not only an important step, but maybe even a necessary step. If the ICC did not consider it has jurisdiction over certain crimes or if the ICJ would not let Gambia bring the Myanmar case to the ICJ, there would have been less hope for bringing justice to the Rohingya. While the future of the Rohingya will be determined in distant international court rooms, it remains unclear what extent these proceedings will in fact help Rohingyas on the ground in Myanmar. International justice initiatives and responses to the Rohingya crisis are important steps, not just by their prospects for making criminal accountability possible, but also for convincing states to meet their legal obligations. They should also be paid attention to for taking steps towards truth-seeking and social reforms, and therefore be greeted by anyone hoping for justice in Myanmar. It is fair to assume that the significance of the decisions will only be as strong as the will of the international community. The proceedings at the courts may be unsuccessful from a legal point of view and might not succeed where diplomacy and sanctions have failed. However, the international courts are doing everything within their competence to bring attention to the situation, which will add pressure on Myanmar for not complying with the will of the international community.

¹⁷⁵ USIP, *China's Role in Myanmar's Internal Conflicts*, ISBN: 978-1-60127-735-0, September 2018, at 38.

5.2 The role of politics in international law

This chapter will analyse the role of politics in international law from the perspective of the ICC and ICJ cases. It aims to discuss the extent to which international law is capable of producing a politically neutral result. The discussion will be based on a theory from the article “Politics of International Law” by Martti Koskenniemi.¹⁷⁶ In the article, Koskenniemi discusses the engaging of politics in international law. Even though the article was published in 1990, the proceedings at the ICC and the ICJ shows that there is still reason to discuss his perspective and writing on the subject.

According to Koskenniemi, international law is constantly trying to separate itself from politics. He argues that organising a society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views or preferences are not. To show that international law is objective, it aims to ensure *concreteness* of the law by distancing itself from theories of natural justice, but also by guaranteeing the *normativity* of the law by creating distance between it and actual state behaviour, will or interest. It is only by fulfilling these conditions, that the law can enjoy independence from politics.¹⁷⁷ Without doing a deep-dive into Koskenniemi’s theory, his argumentation will be used as a tool to illustrate what role politics is playing in the proceedings reviewed in this thesis, and hopefully give a better understanding of the part politics plays in international law in general.

Koskenniemi argues that to avoid political subjectivism and illegitimate constraint, international law must be based on the actual verifiable behaviour, will and interest of the members of society states, in other words the international law must be concrete. The law should not be a natural, but an artificial creation, a reflection of social circumstances.¹⁷⁸ However, the international law should also be applied regardless of the political preferences on legal subjects. Therefore, the law must aspire to uphold the requirement of normativity. Legal rules whose content or application depends on the will of legal subject for whom they are valid are not proper legal rules but apologies for the legal subject’s political interests.¹⁷⁹ Thus, concreteness without normativity would render international law a moral instrument without the capacity to bind non consenters. Normativity without

¹⁷⁶ Koskenniemi, Martti, The Politics of International Law, *European Journal of International Law*, Vol 1, Issue 1, 1990, pp. 4-32.

¹⁷⁷ Koskenniemi, 1990, at 7.

¹⁷⁸ Ibid.

¹⁷⁹ Koskenniemi, 1990, at 8.

concreteness would render international law a moral instrument without a basis in the factual behaviour of states.

The rules applied in the ICC and the ICJ cases comes primarily from the Rome Statute and the Genocide Convention. To state that these are artificial creations is rather easy, but to conclude that they are a reflection of social circumstances can be bit tricky. One could of course assume that these international instruments are based on the behaviour, will and interests of states. However, one could also argue that the fact that the Rome Statute is not ratified by a large number of states means that the Rome Statute does not reflect the will and interest of the international community as a whole. Nevertheless, the interesting question for the cases regarding Myanmar and the Rohingya Crisis, is how these international instruments have been interpreted.

As mentioned above, the ICC was originally established as a court of last resort, which could step in when states were unable or unwilling to act in respect of the crimes within its jurisdiction. In the ICC's proceedings regarding the Rohingya crisis, the court's jurisdictional competence, was not interpreted narrowly. The Rome Statute is enshrined by the *pacta tertiis nec nocent nec prosunt* principle from the Vienna Convention on the Law of Treaties, which means that it should not create obligations for a third state. Yet, the ICC found that it did have jurisdiction over crimes committed by Myanmar by identifying that some crimes of the crimes in the Rome Statute have a cross-border element. In the case before the ICJ, the court did interpret that Gambia was able to bring the situation in Myanmar to the ICJ even if the existence of a dispute between Gambia and Myanmar is not obvious.

The decisions show that the powers and functions of both the ICJ and ICC continue expanding through interpretation of the international law. In one sense this should be perfectly acceptable. When creating independent judicial institutions, one must understand that law evolves through interpretation and that courts like the ICJ and the ICC are and will continue to be living institutions which will develop their own jurisprudence over time. Nevertheless, at this moment it is suitable for anyone to ask themselves the question if an expansive approach of jurisdiction is within the rule of law. It is safe to say that the jurisdictional approach taken by the ICJ seems less controversial. Myanmar has made certain reservations to the Genocide Convention, but the ICJ found that these reservations did not prevent Gambia to bring the situation to the Court. Notwithstanding this, Myanmar is also party to the Genocide Convention and it could therefore be assumed that it reflects the will and interest of the country. However, the

ICC's decision raises the question of whether the ICC has acted more on theories of natural justice. The court has taken an expansive approach to its territorial jurisdiction, despite that its member states do not necessarily support the Rome Statute being read so widely. Exercising jurisdiction over crimes committed over a non-State Party does not appear to reflect the Rome Statute's purpose in general. As mentioned before, international courts develop their jurisprudence over time, but in the case of the ICC proceedings it is fair to wonder if this is done within the rule of law. Bearing in mind that this jurisdictional approach may even affect other situations such as the crisis in Syria and the Israel-Palestine conflict, it increases the concern that the ICC is expanding its jurisdiction based on what they consider should be done, rather than in accordance with the actual rules of the Rome Statute. This decision could create the risk of inconsistent judgments and generate other negative consequences down the line. Even more significantly, the substance of the ruling extending the Court's territorial jurisdiction has the potential to generate significant backlash and to further strain the resources of the ICC at a time when support for the Court is strained and cooperation of state parties, much less non-State Parties, has proven challenging. It is hard to argue with the principle of prosecuting and punishing people who have allegedly, committed the gravest of crimes. But for this to truly be within independence of politics, it needs to be done within the rule of law.

Using Koskeniemi's terms, one could argue that wide interpretations of law weaken the concreteness of these cases since the interpretation does not necessarily reflect the behaviours, will and interests of the member states. One could, of course, argue that the approach taken by the ICJ is extensive. However, in terms of concreteness the case at the ICC is the one that could truly be questioned.

To discuss the condition of normativity, one needs to reconsider the wills of Myanmar. Regarding the ICC, Myanmar has rejected the decision of the court and refused to engage with it. Regarding the ICJ, Myanmar has rejected the ICJ ruling claiming the violence in Myanmar is a result of an internal armed conflict rather than genocide. Using Koskeniemi's terms, the proceedings of the ICC and the ICJ should be objective, regardless of the attitude of Myanmar. At least if international law in these cases are to fulfil the condition of normativity.

Myanmar not agreeing with the decisions of the courts should be seen as a political preference from the government. It has been observed in this thesis that international law is hard to enforce against states which do not want to comply with it. So far, Myanmar has only rejected the decisions, but

considering how much more problematic it is to build a case against a state which does not cooperate, this does affect the legal proceedings. It is hard to say how the current investigations will turn out, but if Myanmar would reject every decision from the courts there are few legal enforcement options available.

By observing the proceedings and the rules of the international courts one can understand the political powers of the UNSC. While the decision of the ICC was welcomed by many, it only allowed the ICC to investigate some of the many crimes against ethnic minorities in Myanmar. The Rome Statute gives the UNSC a unique jurisdictional role. Article 13(b) of the statute grants the Security Council the power, acting under Chapter VII of the UN Charter, to refer to the ICC situations in which crimes under the jurisdiction of the court have taken place. Since the current ICC investigation does not cover the crime of genocide it would be of significant value for the Rohingya if the UNSC were to refer the situation in whole of the country to the ICC. Some might even argue that its failure to do so is a mark on its credibility. The political powers of the UNSC will also be relevant for the decisions taken by the ICJ. One of the most significant aspects of this thesis is that the ICJ's orders are binding but the court has no power to enforce them. Yet, the UNSC has the competence to enforce the decisions of the ICJ. As mentioned before, a UNSC referral to the ICC and a decision on enforcement of a possible judgment from the ICJ is unlikely considering China would veto any resolutions given its strong stance on non-intervention and extensive economic and political relations with Myanmar.

While the UNSC is a political body originally charged with ensuring world peace and security under the UN, it is fair to argue that it is ill-equipped to decide matters of international justice given the fact that UN institutional rules allows its permanent members to exercise their veto powers. In a way, the unconstrained veto powers on decisions of referrals to the ICC and enforcing ICJ judgements creates a hierarchy of sovereignties, where some human rights violations are handled differently than other similar situations depending on whether or not the alleged actor has a friend in the UNSC. Considering this, it is obvious that the relationship between the international courts and the UNSC is one of the determining factors of the legitimacy of the courts.

Koskenniemi's requirement of normativity infer that law should be applied regardless of the political preferences of legal subjects. Considering the UNSC's impact on the current and future legal proceedings regarding the Rohingya, it is not difficult to conclude that the requirement for normativity is not fulfilled. The legal proceedings are not independent from political

views since the application of international law is dependent on the will of the UNSC. However, what is important to remember in this discussion is that if the UNSC were to refer the situation to the ICC or if they will enforce a potential judgement from the ICJ, it would be as much of a political action as not doing so. Therefore, the lack of normativity does of course depend on the political views of the permanent members of the UNSC, but also on the actual rules that the UNSC can make these decisions. To fulfil the requirement of normativity, the UNSC should either be obligated to make objective decisions, or not have any power at all in these questions. By the look of it, it is obvious that the legal proceedings of both the ICC and the ICJ are highly dependent on political views and these views does in fact create a hierarchy of sovereignties within the international legal system.

This discussion proves that politics have a strong impact on these proceedings and in international politics in general. Too broad interpretations weaken the concreteness of international law. Making decisions that are not founded on the initial will and interests of states but rather on theories of natural justice makes the courts a forum for politics. At the same time, the political wills of states do impact the legal proceedings of the courts. The legal proceedings are highly dependent on the cooperation of Myanmar as well as of the UNSC. It appears as international law is hard to enforce against states which do not comply with it and which have powerful political allies, especially ones with UN veto power, to protect them from official sanction. If the decisions of the courts do not result in legal sanctions but in a symbolic impact which encourages other actors to put more pressure on Myanmar, international law itself appears as toothless and lacks justification.

It is hard not to arrive to a conclusion other than that international law on these types of questions only works if everyone plays by the rules. Considering the fact that the legal proceedings may have limited effect, it might also be argued that the decisions from international legal courts in themselves may make people feel good, but in many cases are unlikely to do much practical good. Maybe one should not overestimate the effectiveness of an international legal system that is founded on the sovereign independence of states. As Koskenniemi puts it: “Any legal rule, principle or world order project will only seem acceptable when stated in an abstract and formal fashion. When it is applied, it will have overruled some interpretation, some collective experience and appear apologist”.¹⁸⁰

¹⁸⁰ Koskenniemi, 1990, at 31.

6 Conclusion

This thesis has examined the ICC's and ICJ's legal proceedings regarding the situation in Myanmar. The main purpose of the thesis is to analyse these proceedings and understand what they actually mean for the Rohingya. Initially, it can be concluded that the situation in Myanmar has attracted widespread international attention. Several international actors, including UN bodies and NGOs, have called on Myanmar authorities to stop military operations in Rakhine, allow humanitarian access to affected communities and ensure and ensure safe return of refugees. However, the Rohingya crisis is still ongoing and the international community have failed in their actions to intervene.

The situation in Myanmar has been brought before the ICC and the ICJ. ICC has decided that it may exercise jurisdiction over crimes against humanity committed in Myanmar. Myanmar is not a Party to the Rome Statute, the treaty that established the ICC. Yet, the ICC found that the alleged crimes had a cross-border element since they were partially committed on the territory of a State Party, Bangladesh. This eventually resulted in ICC authorising an investigation. What can be said about the effects of the ICC proceedings are, initially, that even if the decision has been received with a lot of enthusiasm, it is still controversial. The fact that ICC recognised a cross-border element on certain crimes was a broad interpretation of the court's jurisdiction and considering that Myanmar is not a Party to the Statute will create dissension, even among the State Parties. Especially since the decision will most likely effect other situations around the world. For instance, the Syria crisis and the Israel/Palestine conflict are two situations where the circumstances are similar and therefore could be investigated by the ICC. With this decision, ICC does even run a risk of damaging its own legitimacy. In terms of what to expect from the investigation, it is clear that the Myanmar government is rejecting the decisions. Considering the ICC's limited success in securing defendants from non-State Parties, it is fair to assume that without the active support of Myanmar the investigation will not reach its full potential. The decision also shows how much the fact that UNSC did not refer the situation to the ICC impacts the whole process. Without UNSC referring the situation as a whole, the ICC's jurisdiction and investigation will only cover crimes against humanity with a cross-border element. Myanmar has been accused of other crimes, such as genocide, but because of the absence of a UNSC referral, these will not be included in ICC's legal proceedings.

Subsequently, the thesis has discussed the effects of ICJ's legal proceedings regarding the situation in Myanmar. In 2019, Gambia filed a case at the ICJ, claiming that a conflict exists between Gambia and Myanmar and in 2020, the ICJ ordered on provisional measures. The fact that Gambia were able to bring the situation in Myanmar is ground-breaking, considering that a small country that is not directly affected by the conflict could play an important role in upholding international law. It is fair to expect that this will result in more states, not directly involved with a conflict, bringing situations to the ICC. In terms of the provisional measures, one can be sceptical about the actual effects of these. The provisional measures themselves does not bring any new obligations to Myanmar except to preserving all evidence alleged to the genocide and to submit reports to the Court on all measures that have been taken. Considering that Myanmar already denies that any genocide has taken place, it is highly unlikely that the situation on the grounds of Myanmar will change too much. Adding the fact that research shows that states which the ICJ has ordered provisional measures against before has had a hard time to comply with these, makes one even more sceptical of the actual effects. Regarding the future of the case, it can be observed that the evidentiary requirements in the case of genocide is set quite high and it is not unlikely that Gambia will be unsuccessful in proving that the alleged crimes had a "genocidal intent". Even if an ICJ judgement would bring any obligations to Myanmar, one needs to remember that the court does not have any powers to enforce its decisions. To enforce an ICJ decision, the court needs a decision from the UNSC. Such a decision is unlikely, considering Myanmar's relationship to China.

In conclusion, the legal consequences of ICC's and ICJ's legal proceedings are still unsure. However, they will most likely be limited, considering the attitude of Myanmar and the country's close relationship to a permanent member of the UNSC.

One should still point out the normative value of the legal proceedings. Even without the cooperation with the UNSC, the ICC and the ICJ has given the international community a chance to witness the persistent violation of fundamental human rights of the Rohingyas. The fact that the situation in Myanmar is now being handled on the highest international judicial levels will make it difficult for Myanmar to deny that human rights violations has taken place. It also shows that human rights violations will not be ignored. Bringing the case to both the ICC and ICJ can therefore have effects simply because of its symbolic value.

Gambia bringing the case to the ICJ is also significant for other reasons. Firstly, the ICJ has a broader international participation than the ICC and

therefore brings a broader attention to both of the legal proceedings. Secondly, the ICC lacks the ability to bring suits against states. The ICJ's ability to do this might give a more general effect on the situation since the government of Myanmar can, at least in theory, offer political changes in the country. Lastly, considering the creative jurisdictional approach from the ICC, it will not be able to investigate genocide. Therefore, bringing Myanmar to the ICJ is the only way that Myanmar will have to answer to these allegations.

To answer the second research question in this thesis, it is clear that bringing the situation in Myanmar to the ICJ in addition to the ICC will be of significant importance for the Rohingya. However, the cases at the ICC and the ICJ will still take years to conclude and considering the separate and common obstacles the processes will run into it is unsure how much effect they will actually have on the ground in Myanmar.

In answering the last question raised in the introduction a theory from Martti Koskenniemi was used. The theory was not used as a truth for the international community, but as a tool to understand what impact politics have in international law from the perspective of the ICC and ICJ proceedings. Using Koskenniemi's theory on international law's independence from politics as a tool for understanding the role of politics in international law, this thesis shows that both the ICC's and ICJ's legal proceedings are highly affected of politics.

Too broad interpretations from the international courts prevents them from distancing themselves from theories of natural justice and might even damage their legitimacy in general. This is made particularly clear when studying the ruling on jurisdiction by the ICC. Assuming that the Rome Statute is a reflection of the behaviour, will and interests of its member states, the wide interpretation of it might not be. The Statute is enshrined by the *pacta tertiis nec nocent nec* principle but still found a way to exercise jurisdiction over a non-Party State. Even though law evolves through interpretation, for it to be concrete it still has to reflect the interest and wills behind the rules and it is questionable if the ICC has not let theories of natural justice been part of its decision. Regarding the normativity of both the ICC and ICJ proceedings, it is clear that they are highly dependent on politics. The wills of Myanmar are affecting the process of the cases through China and the UNSC. The fact that similar situations can be handled differently solely based on the political views of the members of the UNSC is undoubtedly noteworthy when discussing the normativity of international law from the perspective of the cases at the international courts.

In other words, the role that politics play in these cases are striking. Not only can the ICC be alleged of forming its own path in its interpretation of the Rome Statute, but the UNSC plays a significant part on the execution of these cases. It is fair to say that if Koskeniemi is right in his theory that international law constantly tries to separate itself from politics, it has failed to do so in the regards of these types of cases.

In summary, one can conclude that the legal proceedings at the ICC and ICJ are complex. By merely studying the legal process of the courts it may appear as if it is a quite clear road to take. However, there are several obstacles that affect the impacts of the proceedings of the international courts. A vast majority of the international community applauds the proceedings, which makes it seem like people like the ICC and the ICJ, as long as it targets other problems in other countries. Nevertheless, the cases regarding the situation in Myanmar are still ongoing and only time will tell whether the ICC and ICJ proceedings will be able to bring justice to the Rohingya.

Supplement A – Regional Map



181

¹⁸¹ Amnesty International, “Caged without a roof”: Apartheid in Myanmar’s Rakhine state, 2019, available at: <https://www.amnesty.org/en/latest/news/2017/11/myanmar-apartheid-in-rakhine-state/>, (last visited 2020-05-25).

Bibliography

Literature

Ibrahim, Azeem, *The Rohingyas: inside Myanmar's hidden genocide*, Hurst & Company, London, 2016.

Mathiesen, Thomas, *Rätten i samhället: En introduktion till rättsociologin*, Studentlitteratur, Lund, 2005.

Pedersen, Morten B., *Promoting human rights in Burma: a critique of Western sanctions policy*, Rowman & Littlefield, Lanham, Md., 2008.

Schabas, William A., *The International Criminal Court: a commentary on the Rome Statute*, Oxford University Press, Oxford, 2010.

Schulte, Constanze. (red.), *Compliance with decisions of the International Court of Justice*, Oxford University Press, Oxford, 2004.

Scobbie, Iain, *Rhetoric, Persuasion, and Interpretation in International Law*, In: *Interpretation in International Law*, First edition., Oxford University Press, Oxford, United Kingdom, 2015.

Thirlway, Hugh, *The International Court of Justice*, 1. ed., Oxford University Press, Oxford, 2016.

Ware, Anthony & Laoutides, *Complexities, Misconceptions, and Context*, In: Costas, Myanmar's 'Rohingya' Conflict, [E-Resource], Oxford University Press, 2018.

Periodic Articles

Badagard, Lovisa & Klamberg, Mark, The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court, *Georgetown Journal of International Law*, Vol 48., Issue 3, 2017, pp. 639-734.

Deppermann, Lee J. F., Increasing the ICJ's influence as a Court of Human Rights: The Muslim Rohingya as a Case Study, *Chicago Journal of International Law*, Vol. 14, Issue 1, 2013, pp.291-316.

Dittmer, Lowell, Burma vs. Myanmar: What's in a Name?, *Asian Survey*, 48(6), 2008, pp. 885-888.

Guilfoyle, Douglas, The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar, *Australian Journal of International Affairs*, Vol. 73, Issue 1, February 2019, pp. 2-8.

Hale, Kip & Rankin, Melinda, Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people, *Australian Journal of International Affairs*, Vol. 73, Issue 1, February 2019.

Heller, Kevin J, Radical Complementarity, *Journal of International Criminal Justice*, Vol. 14, Issue 3, July 2016, pp. 637–665.

Hostage, John, Updating Place Names in the Name Authority File to Reflect Political Realities: The Cases of Crimea, Taiwan, and Myanmar, *Cataloging & Classification Quarterly*, Vol. 57, Issue 6, pp.407-422.

Kipgen, Nehginpao, Myanmar's Perspective on the Rohingya Crisis, *International Journal on World Peace*, Vol. 37, Issue 1, pp. 43-70.

Koskenniemi, Martti, The Politics of International Law, *European Journal of International Law*, Vol 1, Issue 1, 1990, pp. 4-32.

Morada, Noel M., Continuing Violence and Atrocities in Rakhine since 2017: Beyond the Outrage, Failures of the International Community, *Global Responsibility to Protect*, Vol. 12 Issue 1, 2020, pp.64-85.

Nishikawa, Yukiko, The Reality of Protecting the Rohingya: An Inherent Limitation of the Responsibility to Protect, *Asian Security*, Vol. 16, Issue 1, January-April 2020, pp. 90-106.

Pedersen, Morten, The Roots of the Rohingya Refugee Crisis, *Human Rights Defender*, Vol. 27, Issue 2, October 2018, pp. 16-20.

Sandgren, Claes, Är rättsdogmatiken dogmatisk?, *Tidskrift for Rettsvitenskap*, 04/05, 2005, pp. 648-656.

Schwebel, Stephen M., Human Rights in the World Court, *Vanderbilt Journal of Transnational Law*, Vol. 24, Issue 5, 1991, pp. 945-970.

Wheeler, Caleb H, Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation, *Journal of International Criminal Justice*, VI. 17, Issue 3, July 2019, pp.609-631.

Documents and Reports

ECHO, Fact Sheet, *The Rohingya Crisis*, August 2018.

Fortify Rights, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?*, October 2015.

German Delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Statement of the German Federal Minister of Justice*, 16 June 1998.

Government of the Republic of the Union of Myanmar, Ministry of the Office of State Counsellor, *Press Release*, 9 August 2018.

HRW, *"The Government Could Have Stopped This" Sectarian Violence and Ensuing Abuses in Burma's Arakan State*, ISBN: 1-56432-922-4, 1 August 2012.

HRW, *World Report 2019*, ISBN-13:978-1-60980-884-6, 2019.

Medecins Sans Frontieres, *"No One Was Left": Death and Violence Against the Rohingya in Rakhine State*, March 2018.

PILPG, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State*, September 2018.

OHCHR, *37th session of the Human Rights Council – Opening statement by UN High Commissioner for Human Rights*, 26 February 2018.

OHCHR, *Human Rights Council 36th session – Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights*, 11 September 2017.

OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30/Rev.1, August 2012.

State of Israel, Office of the Attorney General, *The International Criminal Court's lack of jurisdiction over the so-called "Situation in Palestine"*, 20 December 2019.

The Republic of the Union of Myanmar, Ministry of Foreign Affairs, *Press Statement on the decision on 'provisional measures' in the case brought by Gambia against Myanmar*, 23 January 2020.

The Republic of the Union of Myanmar, President Office, *Executive Summary of Independent Commission of Enquiry-ICOE' Final Report*, 21 January 2020.

The State of Palestine, *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute*, PAL-180515-Ref, 15 May 2018.

UNCTAD, *Dispute Settlement – The International Criminal Court*, Misc.232/Add.20, 24 June 2003.

UNGA, *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64, 10-28 September 2018.

USIP, *China's Role in Myanmar's Internal Conflicts*, ISBN: 978-1-60127-735-0, September 2018

UNSC, 8060th meeting, S/PV.8060, 28 September 2017.

UNSC, *Security Council Press Statement on Security Council Visit to Bangladesh, Myanmar*, SC/13331, 9 May 2018.

Electronic resources

Aljazeera, *Myanmar rejects ICC probe into alleged crimes against Rohingya*, 15 November 2019, available at: <https://www.aljazeera.com/news/2019/11/myanmar-rejects-icc-probe-alleged-crimes-rohingya-191115180754984.html>, (last visited 2020-05-25).

Aljazeera, *Transcript: Aung San Suu Kyi's speech at the ICJ in full*, 12 December 2019, available at: <https://www.aljazeera.com/news/2019/12/transcript-aung-san-suu-kyi-speech-icj-full-191212085257384.html> (last visited 2020-05-25)

BBC, *Myanmar Rohingya: Government rejects ICJ ruling*, 23 January 2020, available at: <https://www.bbc.com/news/world-asia-51229796>, (last visited 2020-05-25).

Bloomberg, *Aung San Suu Kyi Says Genocide Trial Against Myanmar Neglects Key Facts*, 18 December 2019, available at: <https://www.bloomberg.com/news/articles/2019-12-18/suu-kyi-says-genocide-trial-against-myanmar-neglects-key-facts>, (last visited 2020-05-25).

EJIL:Talk!, *The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya*, 21 November 2019, available at: <https://www.ejiltalk.org/the-gambias-gamble-and-how-jurisdictional-limits-may-keep-the-icj-from-ruling-on-myanmars-alleged-genocide-against-rohingya/>, (last visited 2020-05-25).

Equal Times, *Gambia's genocide case against Myanmar shows that smaller countries can also help balance the scales of international justice*, 27 March 2020, available at: <https://www.equaltimes.org/gambia-s-genocide-case-against>, (last visited 2020-05-25).

Guernica Centre for International Justice, *Press Statement: GCIJ Files Article 15 Communication with ICC Prosecutor on Syria*, 4 March 2019, available at: <https://www.guernicagroup.org/post/press-statement-gcij-files-article-15-communication-with-icc-prosecutor-on-syria> (last visited 2020-05-25).

HRW, *Myanmar – Events of 2019*, 2020, available at: <https://www.hrw.org/world-report/2020/country-chapters/myanmar-burma>. (last visited 2020-05-25).

ICC, *About*, 2020, available at: <https://www.icc-cpi.int/about>, (last visited 2020-05-25).

ICC, *How the Court works*, 2019, available at: <https://www.icc-cpi.int/about/how-the-court-works>, (last visited 2020-05-24).

ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh*, 18 September 2018, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>, (last visited 2020-05-25).

ICC, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction*, 20 December 2019, available at: <https://www.icc->

[cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine](https://www.icj-cci.org/cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine), (last visited 2020-05-25).

ICC, *The State Parties to the Rome Statute*, 2020, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, (last visited 2020-05-25).

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) – Overview of the case*, available at: <https://www.icj-cij.org/en/case/91>, (last visited 2020-05-25).

ICJ, *The Court*, 2020, available at: <https://www.icj-cij.org/en/court>, (last visited 2020-5-25).

Medium, *Myanmar's Referral to the International Criminal Court: Five Things You Should Know*, 10 September 2018, available at: <https://medium.com/chatham-house/myanmars-referral-to-the-international-criminal-court-five-things-you-should-know-2cb5ea7d21b>, (last visited 2020-05-25)

OCHA, *Rohingya Refugee Crisis*, 2019, available at: <https://www.unocha.org/rohingya-refugee-crisis>, (last visited 2020-05-25)

OHCHR, *Independent International Fact-Finding Mission on Myanmar*, 2017, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>, (last visited 2020-05-25).

Reuters, *ICC prosecutor seeks Bangladesh and Myanmar investigation*, June 26 2019, <https://www.reuters.com/article/us-war-crimes-myanmar/icc-prosecutor-seeks-bangladesh-and-myanmar-investigation-idUSKCN1TR187>, (last visited 2020-05-24).

The Guardian, *Myanmar's Aung San Suu Kyi faces first legal action over Rohingya crisis*, 14 November 2019, available at: <https://www.theguardian.com/world/2019/nov/14/myanmars-aung-san-suu-kyi-faces-first-legal-action-over-rohingya-crisis>, (last visited 2020-05-25)

The Nobel Prize, *The Nobel Peace Prize 1991*, 14 October 1991, available at: <https://www.nobelprize.org/prizes/peace/1991/press-release/>, (last visited 2020-05-25).

The Washington post, *Myanmar is now erasing the Rohingya's very name*, 16 June 2018, available at:

https://www.washingtonpost.com/opinions/myanmar-is-now-erasing-the-rohingyas-very-name/2018/06/16/e3f66986-6f40-11e8-bf86-a2351b5ece99_story.html, (last visited 2020-05-25).

U.S Department of State, *U.S. Relations With Burma*, 21 January 2020, available at: <https://www.state.gov/u-s-relations-with-burma/>, (last visited 2020-05-25).

UN, *Member States*, 2020, available at: <https://www.un.org/en/member-states/index.html>, (last visited: 2020-05-25).

UN, *Remarks at open debate of the Security Council on Myanmar*, 28 September 2017, available at: <https://www.un.org/sg/en/content/sg/speeches/2017-09-28/sgs-myanmar-remarks-security-council>, (last visited 2020-05-25).

UN, *Treaties, Convention on the Prevention and Punishment of the Crime of Genocide*, 20 May 2020, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en, (last visited 2020-05-25).

UN News, *Rohingya Refugee Crisis*, 2108, available at: <https://news.un.org/en/focus/rohingya-refugee-crisis>, (last visited 2020-05-25).

UN News, *UN Security Council Calls on Myanmar to End Excessive Military Force in Rakhine State*, 6 November 2017, available at: <https://news.un.org/en/story/2017/11/570082-un-security-council-calls-myanmar-end-excessive-military-force-rakhine-state>, (last visited 2020-05-25).

UNHCR, *Rohingya Emergency*, 2019, available at: <https://www.unhcr.org/rohingya-emergency.html>, (last visited 2020-05-25).

UNHCR, *Syria Emergency*, 19 April 2018, available at: <https://www.unhcr.org/syria-emergency.html>, (last visited 2020-05-25)

Reuters, *Two Rohingya women killed in Myanmar shelling*, 25 January 2020, available at: <https://www.reuters.com/article/us-myanmar->

[rohingya/two-rohingya-women-killed-in-myanmar-shelling-idUSKBN1ZO08H](https://www.uskbn1zo08h), (last visited 2020-05-25).

Pictures

Amnesty International, “*Caged without a roof*”: *Apartheid in Myanmar’s Rakhine state*, 2019, available at:

<https://www.amnesty.org/en/latest/news/2017/11/myanmar-apartheid-in-rakhine-state/>, (last visited 2020-05-25).

Videos

Harvard Law School, *HLS Human Rights Program | The International Court of Justice Case on Genocide in Myanmar*, Youtube, 27 February 2020, available at, <https://www.youtube.com/watch?v=gYJB-ZxRkK8&t=2s>, (last visited 2020-05-25).

International Agreements

ASEAN, Charter of the Association of Southeast Asian Nations, 15 December 2008.

UNGA, Rome Statute of the International Criminal Court (last amended 2020), 17 July 1998.

UNGA, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

United Nations, Statute of the International Court of Justice, 18 April 1946.

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

Table of Cases

International Court of Justice

Belgium v. Senegal

ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, 20 July 2012.

ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order, 28 May 2009.

Bosnia v. Serbia

ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgement, 26 February 2007.

ICJ, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Order, 8 April 1993.

Gambia v. Myanmar

ICJ, *Application Instituting Proceedings and Request for Provisional Measures (The Gambia v. Myanmar)*, 11 November 2019.

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, 23 January 2020.

ICJ, *Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim record 2019/19, 11 December 2019.

ICJ, *Separate opinion of Vice-President Xue*, 23 January 2020.

Germany v. United States

ICJ, *LaGrand case (Germany v. USA)*, Judgment, 2 June 2001.

United Kingdom v. Albania

ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Merits, I.C.J Reports, 9 April 1949, p. 22.

Advisory Opinions

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004, ICJ reports (2004).

International Criminal Court

ICC, Pre-Trial Chamber I, *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18-37, 6 September 2018.

ICC, Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27, 14 November 2019.

ICC, Pre-Trial Chamber III, *Request for authorisation of an investigation pursuant to article 15*, ICC-01/19-7, 4 July 2019.

ICC, President of the Pre-Trial Division, *Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute*, ICCRoC46(3)-01/18-1, 9 April 2018.