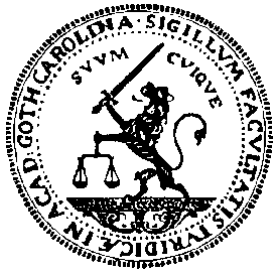


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# Paths Towards Justice for the Rohingya?

## - An Analysis of the Cases on the Rohingya and Myanmar in the International Court of Justice and the International Criminal Court

JURM02 Graduate Thesis

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# Contents

# Summary

Atrocities against members of the Rohingya group in Myanmar have since August 2017 resulted in over 10 000 deaths and close to one million people being forced to flee into neighbouring Bangladesh. In response to these events, The Gambia instituted proceedings against Myanmar before the International Court of Justice (ICJ) in November 2019. A few days later, the Prosecutor of the International Criminal Court (ICC) was authorized to commence investigations into alleged crimes under the ICC's jurisdiction in relation to the same events.

With focus on questions of jurisdiction, victims' perspective and standards of proof, this essay lays out an overview of the above-mentioned processes by comparing the preconditions of the proceedings before the ICJ and the ICC, in order to understand the two processes and their roles in potentially bringing justice to members of the Rohingya group in (and outside of) Myanmar, and to identify challenges in that regard.

In summary, the two processes regard different legal aspects of the same events. The ICJ will assess alleged state responsibility for violations of the Genocide Convention while the process in the ICC regards individual criminal responsibility under the Rome Statute. Questions of jurisdiction affect both processes. Especially, jurisdictional limitations, due to the fact that Myanmar is not a State Party to the Rome Statute, limit the process in the ICC as the Court in this case is limited to conduct proceedings in relation to crimes under its jurisdiction with a cross-border element. This further puts the ICJ in a position where it is the only existing international judicial court capable of dealing with alleged genocide in the present situation. Victims' interests are, due to the different purposes of the two organs, at a starting point satisfied to a higher degree through the ICC than through the ICJ. However, this difference levels out to some degree due to the jurisdictional limitations to the ICC in the present situation. Finally, standards of proof, arguably, are similarly high in both processes.

What regards the process in the ICJ, a key challenge will be to satisfy the applicable standard of proof, especially so in relation to the alleged genocidal intent of Myanmar. What regards the process in the ICC, a key challenge will be to conduct successful proceedings in absence of state cooperation from Myanmar. Despite the uncertainties of both processes, the mere existence of them brings a high symbolic value as it shows that events like the present ones in Myanmar, at least in this case, do not go under the radar of the existing international judicial institutions.

# Sammanfattning

Storskaliga våldsamheter mot medlemmar av folkgruppen Rohingya i Myanmar har sedan augusti 2017 lett till över 10 000 människors död och tvingat nära en miljon människor att fly till grannlandet Bangladesh. Som respons på händelserna inledde Gambia i november 2019 förfaranden i Internationella domstolen (ICJ) mot Myanmar och några dagar senare auktoriserades Internationella brottmålsdomstolens (ICC) chefsåklagare att inleda förundersökningar angående brott under ICC:s jurisdiktion begångna i Myanmar.

Med fokus på frågor om jurisdiktion, brottsofferperspektiv och beviskrav läggs det i den här uppsatsen fram en översikt av de båda ovannämnda processerna. Detta görs genom en jämförelse i syfte att skapa förståelse för de två processerna och deras respektive roller i att möjligtvis skipa rättvisa för medlemmarna av folkgruppen Rohingya, i och utanför Myanmar, samt att identifiera utmaningar i detta avseende.

Kortfattat behandlar de två processerna olika juridiska aspekter av samma händelser. ICJ kommer behandla statsansvar för påstådda brott mot Folkmordskonventionen medan processen i ICC rör individuellt straffansvar under Romstadgan. Frågor kring jurisdiktion påverkar båda processerna, men är särskilt framträdande i processen vid ICC då domstolens jurisdiktion är begränsad av det faktum att Myanmar inte är part till Romstadgan, varför ICC i detta fall enbart har jurisdiktion i fråga om brott som innehåller ett gränsöverskridande element. Detta faktum innebär vidare att ICJ är den enda existerande internationella domstol som kan hantera anklagelser om folkmord i den aktuella situationen. Brottsoffrens intressen tillgodoses, på grund av domstolarnas olika syften, som utgångspunkt till en högre grad av processen i ICC. Emellertid innebär ICC:s begränsade jurisdiktion att denna skillnad jämnas ut något då det enbart är genom processen i ICJ som brottsoffren kan hoppas på ansvarsutkrävande i förhållande till anklagelser om folkmord. Slutligen är beviskraven snarlika i de båda processerna.

Vad avser processen i ICJ kommer en nyckelutmaning vara att möta de höga beviskrav som är tillämpliga, särskilt avseende kravet på speciellt uppsåt till folkmord. Vad avser processen i ICC kommer en nyckelutmaning vara att genomföra processen utan samarbete från Myanmar. Trots de osäkerheter som råder kring de båda processernas möjlighet till ansvarsutkrävande finns det ett högt symboliskt värde redan i processernas blotta existens, detta då händelserna i Myanmar inte kommer gå obemärkta förbi de existerande internationella juridiska organen.

# Preface

I want to thank everyone who has helped, supported and encouraged me during the last five years. I sincerely hope that you know who you are, even though I sometimes need to be better at letting you know how much I appreciate it.

Men mest av allt vill jag tacka dig, mormor.

*Max Runsten*
*10 June 2020*

# Abbreviations

| | |
|---|---|
| ARSA | Arakan Rohingya Salvation Army |
| CSO | Civil Society Organisation |
| Genocide Convention | The Convention on the Prevention and Punishment of the Crime of Genocide |
| IIFFMM | Independent International Fact-Finding Mission on Myanmar |
| IIMM | Independent Investigative Mechanism for Myanmar |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICJ Statute | Statute of the International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTR Statute | Statute of the International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ICTY Statute | Updated Statute of the International Criminal Tribunal for the Former Yugoslavia |
| ILC | International Law Commission |
| OIC | Organisation of Islamic Cooperation |
| PCIJ | Permanent Court of International Justice |
| Rome Statute | Rome Statute of the International Criminal Court |
| RPE | International Criminal Court Rules of Procedure |

| | |
|---|---|
| TFV | Trust Fund for Victims |
| UN | United Nations |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNSC | United Nations Security Council |
| UN Charter | Charter of the United Nations |
| UN OHCHR | United Nations Office of the High Commissioner for Human Rights |

# 1 Introduction

## 1.1 Background

Atrocities against members of the Rohingya group in Myanmar have been described as "bearing the hallmarks of genocide"[1] and as a "human rights catastrophe"[2] with numbers of over 10 000 deaths and close to one million people, mainly members of the Rohingya group, being forced to flee into neighbouring Bangladesh.[3] This has called for judicial intervention by the international community.

On 11 November 2019, the Republic of The Gambia (The Gambia) instituted proceedings against the Republic of the Union of Myanmar (Myanmar) before the International Court of Justice (ICJ). The application submitted by The Gambia concerns acts by the Government of Myanmar against members of the Rohingya group in Myanmar, including killings, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers, that allegedly are genocidal in character and thus, allegedly, amount to violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the Genocide Convention).[4]

Then, three days later, on 14 November 2019, Pre-Trial Chamber III of the International Criminal Court (ICC) authorised the Prosecutor to open an investigation into alleged crimes within the jurisdiction of the Court committed against members of the Rohingya group from Myanmar.[5] Myanmar is not a State Party to the Rome Statute of the International Criminal Court (the Rome Statute).[6] However, Bangladesh is a State Party to the said statute since the state's ratification of it in 2010. Against this background, Pre-Trial Chamber III repeated the conclusion earlier made by

1 UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council*, 12 March 2018.
2 UNHRC *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, § 36.
3 Ibid. §§ 31-36.
4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings and Request for the indication of provisional measures.
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*, No. ICC-01/19-27, 14 November 2019.
6 United Nations Treaty Collection, Rome Statute of the International Criminal Court.

Pre-Trial Chamber I, namely that the ICC may exercise jurisdiction over crimes when at least part of the criminal act has occurred on the territory of a State Party to the Rome Statute.[7] This means that when at least part of a crime is committed in Bangladesh, or on the territory of any other State Party, the ICC can exercise jurisdiction over that crime. Furthermore, Pre-Trial Chamber III accepted that there are reasons to believe that there, in this case, has been committed widespread and/or systematic acts that could amount to the crime against humanity of deportation across the border between Myanmar and Bangladesh, as well as persecution on ground of ethnicity and/or religion against members of the Rohingya group.[8]

Thus, as the proceedings in the ICC move on from the preliminary examination phase to the investigation phase, and the parties to the dispute before the ICJ are preparing their memorials[9] after the Court's order of the 23 January 2020 on the request of The Gambia for indication of provisional measures,[10] there are now ongoing processes in two of the world's most important international courts dealing with acts committed against members of the Rohingya group. From the point of interest in ending impunity for heinous international crimes and maintaining a rule-based society this is, of course, welcomed – but how is one to understand these two parallel processes, their differences and their relation to each other in the world of international law?

## 1.2 Purpose of the Study and Research Questions

The purpose of this study is to create an overview of the above-mentioned processes, by comparing the proceedings before the ICJ and the ICC, in

[7] ICC, Pre-Trial Chamber I, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute",* No. ICC-RoC46(3)-01/18-37, 6 September 2018.
[8] Ibid.
[9] The time-limits for the filing of a Memorial by The Gambia and a Counter-Memorial by Myanmar are the 23 July 2020 and the 25 January 2021 respectively. See *The Gambia v. Myanmar*, Order of 23 January 2020, Fixing of time-limits for the filing of the initial pleadings.
[10] The ICJ indicated provisional measures in order to preserve certain rights claimed by The Gambia for the protection of the Rohingya in Myanmar on the 23 January 2020. See *The Gambia v. Myanmar,* Order of 23 January 2020, Request for the indication of provisional measures. In the end of May it was reported that Myanmar had submitted to the ICJ a first report on its compliance with the provisional measures. It is unclear whether this report will be made public. Critics say, however, that the situation in Myanmar at the time of writing is unchanged. See Al Jazeera, *Myanmar Submits First Report on Rohingya to UN's Top Court,* 24 May 2020 and Amnesty International, *Myanmar: Government Fails to Protect Rohingya After World Court Order,* 22 May 2020.

order to understand the two processes and their roles in potentially bringing justice to members of the Rohingya group in (and outside of) Myanmar.

Thus, this study does not seek to examine or discuss in detail what acts have been committed against members of the Rohingya group. Instead, the aim is to, on the assumed basis that gross violations of international law de facto have been committed against members of the Rohingya group, explore the legal preconditions to claim accountability for these acts through the processes in the ICJ and the ICC, as well as to identify challenges in that regard.

For reasons of clarity and space limitation, three focus areas will be highlighted in this process: (1) the question of jurisdiction, (2) the presence of a victims' perspective in the processes, and (3) the relevant standard(s) of proof. Other areas could have been included as well, however, I have chosen these three areas because 1) they are key to understanding the different natures of the two processes, 2) they make a good base for a comparison, and 3) each of them relates to highly relevant questions within international law. The question of jurisdiction deals with the conflict of interests between state sovereignty and functional international legal mechanisms, the question of victims' perspective deals with the question of the role of individual victims of human rights violations in international law and the tension between individual rights holders and state sovereignty, and finally, the question of standard of proof highlights fundamental procedural prerequisites in the field of international law and is particularly interesting in cases of alleged violations of the Genocide Convention as compared to international criminal law, which we will come back to later on.

Finally, there has been a lot of literature written on the topic of fragmentation, diversification and regime interaction in international law.[11] While this essay does not aim to dig deeper into this area in specific, it will touch upon these questions from a practical perspective and thus, to some extent, provide an input into the field of understanding different regimes and potential regime interaction in international law.

Thus, the research questions are:

1. What are the preconditions of the proceedings in the ICJ and the ICC in general, and in specific in relation to 1) establishing jurisdiction, 2) inclusion of a victims' perspective and 3) meeting the standard(s) of proof?
2. How do the abovementioned preconditions differ from each other?

[11] See section 1.5.

3. In relation to the focus areas and in the meaning that a successful process is one where accountability for violations of international law against members of the Rohingya group is claimed and reparations provided to victims – what are the biggest challenges for each of the two processes to be successful?

## 1.3 Delimitations

While the section above dealt with the purposes of this study, it did also touch upon a few things that are not the purpose of the study. As explained, this thesis does not seek to examine or discuss in detail what acts have been committed against members of the Rohingya group in Myanmar, nor does it seek to precede any judgement that could come out of the processes in the ICJ and/or the ICC. To do so would simply be speculative.

Furthermore, as explained above, it does not in specific seek to discuss the overarching question of fragmentation, diversification and regime interaction in international law. This area has been widely discussed in the last fifteen or twenty years,[12] and thus the scope of this study would hardly allow for any relevant theoretical contribution to the field. However, the present study will, to some extent, touch upon these questions from a practical, "case-based" approach.

This study does only seek to discuss the ongoing processes in the ICJ and the ICC. Thus, the complaint[13] filed in Argentina on 13 November 2019 by the Burmese Rohingya Campaign UK, petitioning Argentinian courts to open criminal investigations against several top military and civilian leaders,[14] will not be discussed in specific except from when it might be relevant for the two processes in focus for this study.

Lastly, the present study will not touch upon the bilateral repatriation agreement between Myanmar and Bangladesh[15] and questions related to Refugee Law that the mentioned agreement gives rise to.

[12] See section 1.5.

[13] Burma Campaign, Certified Translation of Complaint, *Complainant Files A Criminal Complaint of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar*.

[14] Burma Campaign, Media Release, *Argentinean Courts Urged to Prosecute Senior Myanmar Military and Government Officials for the Rohingya Genocide*.

[15] The Guardian, *Myanmar Signs Pact with Bangladesh Over Rohingya Repatriation*, 23 November 2017.

## 1.4 Methodology and Material

The method used for this study is a mixture of a classical doctrinal research method and a comparative method. For the main part of this study, in chapter 3 and 4, the classical doctrinal research method has been applied in order to assess the preconditions of each process. The classical doctrinal research method aims at finding the solution to a specific legal problem, i.e. determine what is established law by examining the conventional sources of law.[16] For this study, those sources of law are the ones applicable by the ICJ and the ICC.

According to Article 38(1) of the Statute of the International Court of Justice (ICJ Statute) the sources of law for the Court to apply are international conventions, international customary law and general principles. Judicial decisions and the teachings of the most highly qualified publicists are subsidiary means for interpreting the law. When it comes to the ICC, Article 21 of the Rome Statute stipulates that the Court shall, in first place, apply the same statute, Elements of Crime and its Rules of Procedure and Evidence. Secondly and when appropriate, the Court shall apply *"applicable treaties and the principles of international law, including the established principles of international armed conflict"*[17] and failing that, the Court shall apply general principles of law derived from national laws of legal systems of the world, provided that those principles are not inconsistent with the Rome Statute, international law and international recognized norms and standards.[18] Finally, the ICC may apply "*principles and rules of law as interpreted in its previous decisions"*.[19]

The comparative method, applied mainly in chapter 5 to answer the second research question, in its essence, is a study of law by a systematic comparison of two or more legal systems.[20] The comparative method is most commonly used to compare two national legal systems, in order to understand similarities and differences for the purpose of gaining a deeper knowledge, identifying practical legislative solutions and harmonising and communicating across the boundaries of different legal systems.[21] However, for the purpose of this study, the comparative method has been used to

16 Sandgren, *Rättsvetenskap för Uppsatsförfattare: Ämne, Material, Metod och Argumentation*, 4th edition, Norstedts Juridik, 2018, p. 49.
17 Rome Statute, Article 21(1)b.
18 Ibid, Article 21(1)c.
19 Ibid, Article 21(2).
20 Kamba, *Comparative Law: A Theoretical Framework*, The International and Comparative Law Quarterly, 1974, p. 486.
21 Valguarnera, *Den komparativa metoden* (Ch. 6), in Nääv and Zamboni (red.), Juridisk metodlära, Studentlitteratur AB, Lund, 2013, pp. 144–176 (143–44).

compare how, and to what extent, two different regimes of international law, i.e. the ICJ and the ICC, can deal with judicial questions originating from the same, or closely related, acts (atrocities committed against members of the Rohingya group in Myanmar). The argument for doing so is that a comparison helps fulfilling the overall purpose of this study, i.e. to create an overview of the processes in the ICJ and the ICC respectively and their relation to each other. This purpose is in line with one of the overall purposes of the comparative method – to understand similarities and differences between two or more legal systems.[22]

While the sources of law described in this chapter make up the most important material used for this study, relevant literature from the academia has, of course, also been useful. Furthermore, for the sake of describing the situation of the Rohingya group in Myanmar, reports of the United Nations (UN) and Civil Society Organisations (CSOs), as well as material from mainstream media, have also frequently been used.

## 1.5 Current State of Research

As previously mentioned, there has been an extensive amount of research done on the ICJ and the ICC and their roles in international law in light of fragmentation, diversification and regime interaction.[23] This work includes the outcome of an International Law Commission Study Group on the matter.[24] There has also, of course, been extensive research done on the present conflict in Myanmar, as well as on different aspects of the ICJ, the Genocide Convention and the ICC in general. However, while all of the above, at a brief level, will be encompassed by the current work, it is not the purpose of it.

When it comes to what is closer to the purpose of the current work, i.e. the ICJ and the ICC dealing with, or potentially dealing with, atrocities committed against members of the Rohingya group in Myanmar there have been a lot of comments made particularly on the ICC Pre-Trial Chamber I's decision of the 6 September 2018 on the matter of the Court's jurisdiction.[25]

[22] Ibid.
[23] E.g.: Van Den Herik and Stahn (red.), *The diversification and fragmentation of international criminal law*, M. Nijhoff, Leiden, 2012; Young, (red.), *Regime interaction in international law: facing fragmentation*, Cambridge University Press, Cambridge, 2012 and Webb, *International judicial integration and fragmentation*, Oxford University Press, Oxford, United Kingdom, 2013.
[24] For the final report of the study group, see: ILC, *Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi,* UN Doc. A/CN.4/L.702, 18 July 2006.
[25] E.g.: Akhavan, *The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute*, Journal of International Criminal Justice, vol.

A few others have commented on the possibilities for the ICJ and/or other international judicial mechanisms to take action against the atrocities against members of the Rohingya group.[26] In terms of comparisons between the two now actual processes and the roles they play as parts of the international community responding to atrocities in Myanmar, one is however so far left with blog posts from blogs such as EJIL: Talk! and OpinioJuris.[27]

## 1.6 Outline

This introductory chapter has provided the reader with the reasons behind, and the tools used for, this study. Next, chapter 2 will follow with a short description of the situation that is the basis for the study, i.e. the situation of the Rohingya group in Myanmar. That chapter will then be followed by chapter 3 and 4, in which the processes in the ICJ and the ICC respectively will be discussed with focus on the three aforementioned "focus areas". In these two chapters, some assessment of the findings will be made and commented, however, the majority of such critical assessment will be done in the last two chapters, as chapter 5 will deal with the relationship between the processes through an explicit comparison and a discussion on the potential interaction between the processes and, at last, chapter 6 will contain conclusions and reflections on some of the biggest challenges in regard to each of the two processes.

17, no. 2, 2019 and Wheeler, *Human Rights Enforcement at the Borders*, Journal of International Criminal Justice, 14 November 2019.

[26] E.g. Deppermann, *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, no. 1, June 2013.

[27] E.g.: Becker, *The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar*, on EJIL: Talk! (ejiltalk.org), 14 December 2019 and Kourtis, *The Rohingya Genocide Case: Who is Entitled to Claim Reparations?* on OpinioJuris.org, 21 November 2019.

# 2 The Rohingya in Myanmar

As already mentioned, atrocities against members of the Rohingya group in Myanmar have been described as "bearing the hallmarks of genocide"[28] and as a "human rights catastrophe"[29] with numbers of over 10 000 deaths and close to one million people being forced to flee into neighbouring Bangladesh.[30] Furthermore, the chair of the UN Independent International Fact-Finding Mission on Myanmar (IIFFMM) has warned that some 600 000 Rohingya left in Myanmar live under the threat of genocide.[31]

This chapter will briefly, for the sake of understanding, lay out the historical context to the current situation in Myanmar. It should be mentioned that the depiction presented here is a simplified one, and that there exist nuances to the present conflict that will not get attention here. Following the presentation of the context to the conflict, this chapter will present the existing UN mechanisms for Myanmar that are of highest relevance in the process towards judicial accountability. A brief presentation of other UN mandates and the most recent resolution by the UN General Assembly on the situation will also be made. There are multiple actors and organisations working on the situation of human rights in Myanmar. However, I have limited the depiction to the ones of the UN for reasons of space limitation.

## 2.1 Historical Context

The underlying conflict to the present situation in Myanmar is not new. Instead, it is highly historical, and has been described as one where *"fear, grievance, and tension, on all sides, have resided just below the surface for decades".*[32]

Myanmar is one of Asia's most ethnically diverse countries with approximately 87.9 per cent Buddhists, 6.2 per cent Christians and 4.3 per cent Muslims.[33] Eight "national ethnic groups" are identified in The

[28] UN OHCHR, *Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council*, 12 March 2018.
[29] UNHRC *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, § 36.
[30] Ibid. §§ 31-36.
[31] UN OHCHR, *Myanmar's Rohingya Persecuted, Living under Threat of Genocide, UN Experts Say*, Press Release, 16 September 2019.
[32] Ware and Laoutides, *Myanmar's 'Rohingya' conflict*, Hurst & Company, London, 2018, p. 14.
[33] According to the 2014 census. See: UNHRC *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, § 13.

Citizenship Law of 1982, with the major one being the Bamar that constitutes approximately two thirds of the population. The eight "national ethnic groups" are then further divided into 135 "national races". Simplified, these 135 national races are the ones considered to belong in Myanmar.[34]

Rohingya Muslims constitute the largest percentage of Muslims in Myanmar. The majority of the Rohingya Muslims lives in Rakhine State and the group is self-identified as a distinct ethnic group with its own language and culture. However, the group is not included in the list of recognized national ethnic groups or national races and does therefore not have access to Myanmar's political community.[35] Most members of the Rohingya group are stateless, with documented restrictions on access to movement, education and health services, to name a few. However, members of the group have had some access to temporary identification cards that confirmed their legal residence in Myanmar.[36]

From 1962, when the military seized power, the country was ruled by a succession of military regimes until 2008 when a new constitution was adopted which, after historical elections in 2015, lead to the transfer of power to a civilian government in early 2016 (lead by the State Counsellor, and 1991 Nobel Peace Prize laurate, Aung San Suu Kyi). However, the Tatmadaw (the armed forces) retains 25 per cent of the seats in legislative bodies, selects candidates for the key ministerial posts Defence, Home Affairs and Border Affairs, and has a de facto veto on constitutional amendments. Thus, the Tatmadaw de facto controls the National Defence, the Security Council and the security apparatus.[37]

Since Myanmar's independence in 1948, the Tatmadaw has used various non-international ethnically based armed conflicts to justify its power as the Tatmadaw presents itself as a guarantor of national unity. The Rohingya crisis is one of these conflicts.[38]

## 2.2 Clearance Operations in 2017

As outlined above, the conflict is not new, nor are violations of members of the Rohingya group's human rights. However, the situation worsened

[34] UNHRC, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar,* UN Doc. A/HRC/32/18, 29 June 2016, p. 2 f. and Ware et al., 2018, p. 21 f.
[35] Ibid.
[36] UNHRC, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar,* UN Doc. A/HRC/32/18, 29 June 2016, p. 2 f.
[37] UNHRC *Report of the independent international fact-finding mission on Myanmar,* UN Doc. A/HRC/39/64, 12 September 2018, § 11.
[38] Ibid, §§ 11-14.

dramatically in August 2017. On 25 August 2017, the Arakan Rohingya Salvation Army (ARSA), a self-claimed Rohingya resistance organization, attacked a military base and some 30 security force outposts across northern Rakhine, mainly using simple weaponry and untrained villagers, which resulted in the death of twelve security personnel. The attack was launched as a response to the increased pressure on Rohingya communities.[39]

The security forces responded to this attack by launching so called "clearance operations", officially aimed to eliminate the terrorist threat posed by the ARSA, but the operations targeted the entire Rohingya population. As a consequence of security forces using intense and indiscriminate gunfire, explosions and setting houses on fire, some 700 000 members of the Rohingya group were forced to flee to Bangladesh.[40] Médecins Sans Frontières estimated that at least 9 400 people lost their lives during the month following the 25 August 2017, of which at least 6 700 people as a direct consequence of violence.[41] Human Rights Watch reported of systematic use of sexual violence, including a widespread use of gang rape,[42] and the destruction of several hundred villages.[43] These findings have been supported by the UN Fact-Finding Mission on Myanmar, which we will turn to in the next section. The same fact-finding mission concluded in September 2019 that, although culminating in 2017, the grave situation of the Rohingya population in Myanmar had remained mainly unchanged with a serious risk of genocidal acts recurring.[44]

## 2.3 UN Mechanisms and General Assembly Resolutions

### 2.3.1 Independent International Fact-Finding Mission on Myanmar

On 24 March 2017, the United National Human Rights Council (UNHRC) decided to dispatch an independent international fact-finding mission in Myanmar, in order to *"establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to*

[39] UNHRC *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, § 31 f.
[40] Ibid.
[41] Médecins Sans Frontières, *No One Was Left*, March 2018, p. 5.
[42] Human Rights Watch, *Sexual Violence by the Burmese Military Against Ethnic Minorities*, 25 July 2018.
[43] Human Rights Watch, *World Report 2018, Burma*.
[44] UNHRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/42/CRP.5, 16 September 2019, § 667.

*arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims…".*[45]

The Independent International Fact-Finding Mission on Myanmar (IIFFMM) presented a first report in September 2018, based in part upon 875 in-dept interviews with victims and eyewitnesses[46] and a second report, focusing on the mission's activities since the first one, in August 2019.[47] Both reports were followed by separate conference-room papers with detailed findings.[48] The findings of the mission have above been used to describe the situation in Myanmar and there is no need, in this section, to go further into the findings of the mission. However, one of the central conclusions of the mission is worth mentioning here – the mission called on the international community, and welcomed efforts already taken, to advance accountability for atrocities committed against members of the Rohingya population. As part of this, it welcomed the establishment of Independent Investigative Mechanism for Myanmar.[49]

### 2.3.2 Independent Investigative Mechanism for Myanmar

The Independent Investigative Mechanism for Myanmar (IIMM) was established in September 2018. It is mandated to *"collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.*[50] Furthermore, *"the mechanism shall […] be able to*

[45] UNHRC, *Resolution 34/22 Situation of human rights in Myanmar,* UN Doc. A/HRC/RES/34/22, 24 March 2017, § 11.
[46] UNHRC, *Report of the independent international fact-finding mission on Myanmar,* UN Doc. A/HRC/39/64, 12 September 2018.
[47] UNHRC, *Report of the independent international fact-finding mission on Myanmar,* UN Doc. A/HRC/42/50, 8 August 2019.
[48] UNHRC, *Report on the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2, 17 September 2018 and UNHRC, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar,* UN Doc. A/HRC/42/CRP.5, 16 September 2019.
[49] UNHRC, *Report of the independent international fact-finding mission on Myanmar,* UN Doc. A/HRC/42/50, 8 August 2019, § 122.
[50] UNHRC, *Resolution 39/2 Situation of human rights of Rohingya Muslims and other minorities in Myanmar,* UN Doc. A/HRC/RES/39/2, 3 October 2018, § 22.

*make use of the information collected by the fact-finding mission and continue to collect evidence, […] have the capacity to document and verify relevant information and evidence, including through field engagement and by cooperating with other entities, as appropriate […]* (and) *report on its main activities on an annual basis to the Human Rights Council as of its forty-second session and to the General Assembly as of its seventy-fourth session.*[51]

The mechanism became operational on 30 August 2019[52] and has at the time of writing only presented a very first report outlining its mission and challenges.[53] The mechanism is, by judging from its mandate, a continuation on the work of the IIFFMM with a clearer focus on supporting judicial processes for the sake of advancing accountability.

### 2.3.3 General Assembly Resolution and More

The UN General Assembly (UNGA) has dealt with the situation in Myanmar on several occasions, and recently through the adoption of a resolution on 27 December 2019 where it, most importantly, strongly condemned all violations and abuses of human rights in Myanmar and called upon both Myanmar and the international community to work towards holding those responsible accountable.[54]

Other UN mandates working on Myanmar includes the Special Rapporteur and the Special Envoy. In 1992, the United Nations Commission on Human Rights decided to nominate a Special Rapporteur on the situation of human rights in Myanmar and the mandate has since then been extended annually.[55] Since January 2018, the Special Rapporteur has been denied access to Myanmar.[56] The current Special Envoy on Myanmar was appointed by the UN Secretary General in 2018. All UN mandates working on Myanmar are complementary to each other.[57]

[51] Ibid, § 23.
[52] UN, *Letter from SG*, dated 27 August 2019.
[53] UNHRC, *Report of the Independent Investigative Mechanism for Myanmar*, UN Doc. A/HRC/42/66, 7 August 2019.
[54] UNGA, *Resolution 76/246 Situation of human rights of Rohingya Muslims and other minorities in Myanmar,* UN Doc. A/RES/74/246, 15 January 2020, § 2 f.
[55] UN OHCHR, *Special Rapporteur on the situation of human rights in Myanmar*.
[56] UNGA, *Resolution 76/246 Situation of human rights of Rohingya Muslims and other minorities in Myanmar,* UN Doc. A/RES/74/246, 15 January 2020, preamble 3.
[57] Ibid, Preamble 7.

# 3 The International Court of Justice

After having presented the background to the processes in focus for this study, it is now time to turn to the first of the two processes. First, a very brief introduction to the process in the International Court of Justice (ICJ) will be given, before we turn to each of the three focus areas.

## 3.1 Introduction to the Case in the ICJ

As mentioned, The Gambia, backed by the Organization of Islamic Cooperation (OIC), instituted proceedings against Myanmar before the ICJ on 11 November 2019.[58] The application submitted by The Gambia, to a large extent based upon the findings of the IIFFMM, concerns acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group in Myanmar. The acts include killings, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, and more, that allegedly are genocidal in character and thus amount to violations of the Genocide Convention.[59]

Article 34(1) of the ICJ Statute stipulates that only states may be parties in cases before the Court, in this case The Gambia[60] and Myanmar. Article 36(1) of the ICJ Statute provides that "*the jurisdiction of the Court comprises […] all matters specially provided for […] in treaties and conventions in force"*.[61] What The Gambia requests is that the Court

58 It is in this context natural to wonder why The Gambia, and not any other state, did so. While it is not the purpose of this study to analyse that question in depth, and there might be many reasons and ways to answer the question, it has been suggested that the rationale for the West African state to do so must be seen against the country's own development from an abusive past towards a functioning democracy, together with the Minister of Justice's personal experiences from the International Criminal Tribunal for Rwanda (ICTR). See: Human Rights Watch, *What Makes Gambia a Good Champion of the Cause of the Rohingyas*, 16 December 2019.

59 *The Gambia v. Myanmar*, Application instituting proceedings and Request for the indication of provisional measures.

60 The Gambia submitted its application to the ICJ with support from the Organisation for Islamic Cooperation (OIC) with 57 member states. See Reuters, *Gambia files Rohingya genocide case against Myanmar at World Court: justice minister*, 11 November 2019. Additionally, in the end of February it was reported that Maldives will intervene in the case, see The Guardian, Amal Clooney to pursue Rohingya case at The Hague, 27 February 2020.

61 UN, *Statute of the International Court of Justice* (hereafter "ICJ Statute"), Article 36(1).

adjudges and declares that Myanmar is responsible for violations of the Genocide Convention, to which both states are contracting parties.[62]

The Genocide Convention stipulates that genocide is a crime under international law that the contracting parties to the convention undertakes to both prevent and to punish,[63] and although the specific wording of the Convention does not say so, the contracting parties also undertake not to commit genocide themselves.[64] Thus, a contracting party must not only refrain from committing genocide, it must also make sure that individuals committing genocide will be persecuted, tried and punished.[65] If there is a dispute between contracting parties to the Genocide Convention relating to the interpretation, application or fulfilment of the convention, article IX stipulates that the dispute shall be submitted to the ICJ at the request of any party to the dispute. The Gambia, in its application to the ICJ, requested the Court to adjudge and declare that Myanmar have violated all of the abovementioned obligations.[66]

To conclude, the case in the ICJ concerns a dispute between states about alleged state responsibility for violations of an international convention, i.e. the Genocide Convention. As such, it is not a criminal procedure. We will now turn to the three focus areas to look further into some details of the process.

## 3.2 Jurisdiction

### 3.2.1 In General

A prerequisite for The Gambia's application to be successful is that the Court finds that it has jurisdiction. The basic principle is that the parties need to consent to the jurisdiction of the Court. The consent can be either direct in a present case or established through dispute settling clauses in bilateral or multilateral treaties.[67]

[62] United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide.
[63] Genocide Convention, Article I.
[64] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, § 166. Hereafter "Bosnia Genocide Case".
[65] Ibid, article I, IV, V and VI and Bosnia Genocide Case.
[66] For a complete and more detailed list of the request, see *The Gambia v. Myanmar*, Application instituting proceedings and Request for the indication of provisional measures, § 112.
[67] ICJ Statute, Article 36(1).

Both The Gambia and Myanmar are members of the United Nations and thus parties to the ICJ Statute.[68] The Gambia argues that the Court has jurisdiction based on Article 36(1) of the ICJ Statute and on Article IX of the Genocide Convention.[69] As already mentioned, Article 36(1) provides that "*the jurisdiction of the Court comprises […] all matters specially provided for […] in treaties and conventions in force"*.[70] Article IX of the Genocide Convention reads *"disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute"*.[71]

Neither of the states have made any reservations to Article IX but Myanmar has made reservations to Article VI and VIII.[72] The reservation to Article VI reads *"…nothing contained in the said Article shall be construed 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."*[73] Since article VI regards proceedings against individuals charged with genocide, and not state responsibility, the reservation to Article VI does not hinder the ICJ from having jurisdiction in the present case. Whether Myanmar's reservation to Article VIII is relevant for the question of the jurisdiction of the ICJ is not equally clear. This will be addressed later on.[74]

As mentioned in the introduction, the Court, on 23 January 2020, indicated provisional measures in the case[75] and while doing so the Court dealt with the matter of *prima facie* jurisdiction. While the finding of *prima facie* jurisdiction does not mean that the Court is definitively satisfied that it has jurisdiction as regards the merits of the case, it makes sense to take a look at how the Court reasoned as it likely will give a lead on what the final outcome on the question of jurisdiction will be.

[68] UN Charter, Article 93.
[69] Ibid, §§ 16-19.
[70] ICJ Statute, Article 36(1).
[71] Genocide Convention, Article IX.
[72] United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, Myanmar.
[73] Ibid.
[74] See section 3.2.3.
[75] *The Gambia v. Myanmar*, Order of 23 January 2020, Request for the indication of provisional measures.

### 3.2.2 The Existence of a Dispute

In order for the Court to have jurisdiction based on Article IX of the Genocide Convention there must exist a dispute between contracting parties relating to the interpretation, application or fulfilment of the Convention. In the Court's order on provisional measures of 23 January 2020 it repeated its earlier finding that a dispute exists when states hold *"clearly opposite views concerning the question of the performance or non-performance of certain international obligations".*[76] It must be shown that the claim of one party is positively opposed by the other,[77] however the matter is one of substance and not of form.[78] The Court must also assess whether the acts complained of are capable of falling within the provisions of the Genocide Convention, in other words, if the Court has jurisdiction *ratione materiae* over the dispute.[79] The date for determining if a dispute exists is, in principle, the date on which the application is submitted to the ICJ.[80]

A question raised on beforehand was whether The Gambia had succeeded in showing that a dispute exists between the parties.[81] In its order on provisional measures the Court established, against the contention made by Myanmar who was of the meaning that The Gambia acted as a "proxy" for the OIC in circumvention of Article 34(1) of the ICJ Statute, that the fact that The Gambia had sought and obtained support from other states or international organisations in itself did not preclude the existence of a dispute between the parties.[82] The Court then stated that several indications of a dispute between the parties existed when the Court noted the report of the IIFFMM in August 2019 that affirmed the mission's conclusion *"that Myanmar incurs state responsibility under the prohibition against genocide"*[83] and that the parties clearly had expressed dissenting views on

[76] Ibid, § 20, citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.
[77] South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.
[78] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 270, §§ 35-36).
[79] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016, p. 1159, para. 47.
[80] *Marshall Islands v. India*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 271, para. 39.
[81] See for instance Van Poecke, Hermez and Vernimmen, *The Gambia's gamble, and how jurisdictional limits may keep the ICJ from ruling on Myanmar's alleged genocide against Rohingya*, on EJIL: Talk! (ejiltalk.org), 21 November 2019.
[82] *The Gambia v. Myanmar*, Order of 23 January 2020, Request for the indication of provisional measures, § 25.
[83] UNHRC, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/42/50, 8 August 2019, § 18.

the conclusion of the IIFFMM report in the UN General Assembly.[84] Moreover, the Court noted that a Note Verbal was sent from The Gambia to Myanmar on 11 October 2019 in which The Gambia declared its understanding that Myanmar was in an ongoing breach of the Genocide Convention. Myanmar had not answered to the mentioned Note Verbal as of the time of the submission of the application to the ICJ, and the Court found that the lack of response may be another indication of a dispute, as a response in this case was called for.[85]

Finally, while the Court noted that it could only assess whether any violations of Myanmar's obligations under the Genocide Convention have been made when the Court is examining the merits of the case, it found that *"at least some of the acts alleged by The Gambia are capable of falling within the provisions of the convention".*[86] Thus, the Court found that the existence of a dispute between the parties relating to the Genocide Convention could be established *prima facie*.[87]

### 3.2.3 Myanmar's Reservation to Article VIII

Article VIII of the Genocide Convention reads *"any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."* As mentioned, Myanmar has made a reservation to the article that it shall not apply to Myanmar.[88]

Certainly, the ICJ is a "competent organ of the United Nations". Could Myanmar's reservation mean that The Gambia cannot seize the Court based on Article IX of the Genocide Convention? The answer is, following the reasoning in the Court's order on provisional measures: no.[89] Myanmar argued that only Article VIII (and thus not Article IX) allows a Contracting Party not specially affected by the alleged violations to bring a claim before the Court. The Court rejected this argument and noted that the articles have different areas of application in the sense that Article VIII in general terms allows a Contracting Party to call upon the competent organs of the UN,

[84] *The Gambia v. Myanmar*, Order of 23 January 2020, Request for the indication of provisional measures, § 27-28.
[85] Ibid.
[86] Ibid, §§ 29-30.
[87] Ibid, § 31.
[88] United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, Myanmar.
[89] *The Gambia v. Myanmar*, Order of 23 January 2020, Request for the indication of provisional measures, §§ 36.

while only Article IX is relevant to the seizing of the Court in this case.[90] This conclusion seems logical, as the opposite interpretation would mean that Article IX would lose its purpose.

### 3.2.4 The Signification of *Prima Facie* Jurisdiction and a Short Summary

Paragraph 85 of the order on provisional measures reads *"the Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of The Gambia and Myanmar to submit arguments and evidence in respect of those questions".*[91] Thus, the Court's finding that it has *prima facie* jurisdiction does not preclude it from coming to another conclusion later on, at least in theory. It is at this stage, however, hard to see on what arguments such a finding could be based on as it for the time being seems clear that all the prerequisites for jurisdiction are present.

## 3.3 Victims' Perspective

This section will deal with the victims of the atrocities committed in Myanmar and their role in the discussed proceedings before the ICJ. Thus, the focus of this section is the role of victims when there is a case in the ICJ about alleged violations of the obligations under the Genocide Convention.

Several books could be, and have been, written on the many aspects (legal, psychological, sociological, to name a few) of the topic of victims in both domestic and international law. For this study, focus will be on the legal aspects of the topic with focus on 1) accountability and the role of the victims in this process and 2) reparations. The rationale behind focusing at these two questions is that finding the truth, having a possibility to be heard and recognized, punishment for responsible persons and compensation for victims have been recognized as main components of bringing victims a sense of justice.[92]

[90] Ibid, § 35.
[91] Ibid, § 85.
[92] E.g. see: Holm, *Justice for victims of atrocity crimes: prosecution and reparations under international law*, 2017, p. 10 ff., and Maršavelski, *A comparison between the ICTY and the ICJ and their contributions for the victims of international crimes*', 2008, p. 164.

### 3.3.1 Accountability and the Role of the Victims

International law has traditionally paid relatively little attention to victims. This can be explained by looking at the very nature of most international law: a field of law focused on the interstate relationship where states hold rights and obligations mainly in relation to other states.[93]

As we have seen earlier, according to Article 34(1) of the ICJ Statute, only states can be parties to a contentious case before the ICJ, which makes it a good example of the interstate nature of international law. As a consequence, the Court can only be of help for the victims in finding truth and claiming accountability if a state brings the case before the Court. This is also reflected in Article IX of the Genocide Convention that provides that "*disputes between the Contracting Parties […] shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*".

Normally, following the interstate nature of international law, it would be the state of which the victims are nationals that would bring a case before the ICJ. However, in this case it is not the state of the victims that has done so, but another state, i.e. The Gambia. This is made possible through the *erga omnes* character of the obligations in the Genocide Convention, meaning that the mentioned obligations are obligations in relation to all other contracting parties. This is so because all parties to the Convention are considered to have a common interest in the accomplishment of the purposes of the Convention and thus, The Gambia needs not to show that it specifically has suffered an injury for it to be able to bring a case before the Court.[94] This did not stop Myanmar from making the argument, in the hearings on the matter of provisional measures, that only the specifically affected state (in this case Bangladesh) could bring a case before the Court. However, the Court found, with reference to its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[95] and to its judgement in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*[96] 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*

93 Fernández de Casadevante Romani, *International Law of Victims*, 2012, p. 3.
94 Kolb and Kräehenmann, *The Scope Ratione Personae of the Compulsory Jurisdiction of the ICJ*, in Gaeta (red.), *The UN Genocide Convention: a commentary*, Oxford University Press, Oxford, 2009, pp. 427 ff.
95 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 23.
96 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), I.C.J. Reports 2012 (II), p. 449.

*ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end".*[97]

What is the role of the victims in the process? In general, it depends on what the parties to the case and the Court deems necessary. The Rules of Court allows for witnesses to give testimonies before the Court, either called by one of the parties or by the Court itself.[98] This can be done either in a public hearing or, in the interest of witness protection, in a closed one, a possibility used for example in the *Croatia Genocide Case*.[99]

Another way for victims to be heard and recognized are through testimonies in the written proceedings. In the present case, where the application submitted by The Gambia in large parts builds upon the findings of the IIFFMM, this is particularly relevant, as the work of IIFFMM builds largely upon interviews with eyewitnesses and victims.[100]

## 3.3.2 Reparations

### 3.3.2.1 Does a Right Exist?

In the application of The Gambia, the applicant asks the Court, amongst other things, "…*to declare that Myanmar must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group, including but not limited to allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts, consistent with the obligation to prevent genocide under Article I…".*[101]

The question then arises on what basis the Court could make such a declaration. There is no reparation provision in the Genocide Convention. However, an article providing such a right did exist, but was removed from the Draft Convention before the adoption.[102] The article, had it remained, would have granted survivors of genocide redress as it read: "*when genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State*

[97] *The Gambia v. Myanmar*, Order of 23 January 2020, Request for the indication of provisional measures, § 41.
[98] ICJ Rules of Court, Article 62(2) and 63(1).
[99] ICJ Rules of Court, Article 59 and Article 63(2), and Thirlway, *The International Court of Justice*, Oxford University Press, Oxford, 2016, p. 102 f.
[100] See section 3.1 and 2.3.1.
[101] *The Gambia v. Myanmar*, Application instituting proceedings and Request for the indication of provisional measures, § 112.
[102] Holm, 2017, p. 152 f.

*shall grant to the survivors of the human group that is victim of genocide redress of a nature and in an amount to be determined by the United Nations"*.[103] In the present case this would have meant that Myanmar, if the ICJ finds that the state has violated its obligation under the Genocide Convention, would be obliged to grant the survivors reparations.

Is there another basis for a duty to redress? In the *Factory at Chorzów* case, ICJ´s predecessor the Permanent Court of International Justice (PCIJ), laid down the general principle that *"it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"*.[104] The Draft Articles on State Responsibility for Internationally Wrongful Acts (ILC Draft Articles), adopted by the International Law Commission (ILC), although a draft and thus not formally legally binding,[105] further confirmed this general principle as Article 31(1) reads *"the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".* It should here be mentioned that this principle mainly concerns the interstate relationship, i.e. one state's responsibility to provide reparations to another state.

However, the UN Basic Principles which build on the principles of the ILC Draft Articles, adopted by the UN General Assembly in 2005, provide that victims of gross violations of international human rights law and serious violations of international humanitarian law have the right to *"adequate, effective and prompt reparations"*.[106] Furthermore, the UN Victims Declaration, adopted in 1985, provides the state with an obligation to provide reparations to victims.[107] Based on the above, it is possible, although not uncontroversial, to argue that the duty of states to redress, and the corresponding right of the victims, have achieved status as a general principle or a customary rule under international law.[108] If we accept this,

[103] Draft Convention on the Crime of Genocide, Article XIII, UN Doc. E/447, prepared 26 June 1947 by the Secretary-General upon request by the General Assembly.
[104] PCIJ, Factory at Chorzow, 12 September 1928, ser. A, No. 17, Indemnity, p. 29.
[105] ILC Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session, UN. Doc. A/56/10.
[106] UNGA, *Resolution 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, UN Doc. A/RES/60/147, principle 11(b).
[107] UNGA, *Resolution 40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, UN Doc. A/RES/40/34, principles 11-12.
[108] See for instance Van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines* in Ferstman, Goetz, & Stephens, (red.), *Reparations for victims of genocide, war crimes and crimes against humanity systems in place and systems in the making*, M. Nijhoff, Leiden, 2009; Holm, p. 153 and

the question remains: who is entitled to raise a claim for reparations in the present case? As we have seen above, the right holders themselves cannot.

#### 3.3.2.2 Who Can Raise the Claim?

It is clear that a state responsible for violations of the Genocide Convention has a duty to provide reparations to the injured state.[109] However in this case, the injured are not another state but members of the Rohingya group.

As we have seen, the victims of atrocities in Myanmar cannot themselves bring a case before the ICJ so, simplified, The Gambia did it and was able to do so because of the *erga omnes* character of the obligations under the Genocide Convention. Could The Gambia also raise a claim for reparations on behalf of the victims? It has been suggested that the *erga omnes* character of the Convention could give third parties, in this case The Gambia, a right to do so, but this has never been tested.[110]

Article 48 of the previously mentioned ILC Draft Articles deals with invocation of responsibility by a state other than an injured state. On reparations, Article 48(2) provides that *"any State entitled to invoke responsibility […] may claim from the responsible State […] performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.* However, reading from the comments to the abovementioned provision, it is not clear if this only encompasses the possibility to seek declaratory relief or also other kinds of reparation, and even more, how the third party in that case could show that it is actually acting on behalf of the right-holder community, i.e. members of the Rohingya.[111]

### 3.3.3 A Short Summary

It is obvious that the process in ICJ is not one where focus is on the rights and interests of individual victims of the atrocities, nor is it supposed to be, as it is better to be understood as a permanent mechanism for peaceful settlement of international disputes between States.[112] This does, however, not mean that the discussed process in the ICJ is not important to the victims as it is the only chance to have a declaration, by an international court, of

Kourtis, *The Rohingya Genocide Case: Who is Entitled to Claim Reparations?* on OpinioJuris.org, 21 November 2019.
[109] See the reasoning above under 2.2.2.1. and Bosnia Genocide Case, p. 43, § 463.
[110] Seibert-Fohr, *Accountability of States for Genocide,* in Gaeta, Paola (red.), *The UN Genocide Convention: a commentary*, Oxford University Press, Oxford, 2009, pp. 368 f.
[111] ILC *Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session*, UN Doc. A/56/10, p. 127, §§ 11-12.
[112] Thirlway, p. 3.

state responsibility for violations of the Genocide Convention in the present case. This is, of course, in line with the need for recognition and accountability for the acts committed against victims and thus, in this situation, the process is of large importance from a victims' perspective even though victims are not central to the process itself.

However, when it comes to compensation, the question is if the Court can declare such a right to the victims and if so, who could raise a claim for that compensation (as the victims themselves cannot) and what the compensation would encompass. The unclarity in this aspect is of course not ideal and the present case could be a major opportunity for the Court to develop its jurisprudence on the matter. However, for the time being, the outcome is uncertain. It should also be mentioned that the authoritative value of only a declaratory judgement by the ICJ should not be underestimated, as it would be a recognition of the rights of victims.

## 3.4 Standards of Proof

The third and last focus area for this study is, as mentioned before, the applicable standard of proof. We have learned that the process in the ICJ regards violations of the Genocide Convention through acts adopted, taken and condoned by Myanmar and that The Gambia requests that the ICJ adjudges and declares that Myanmar has committed genocide, failed to prevent genocide and failed to punish genocide.[113] What is the standard of proof to meet in order for the process to be successful?

The ICJ has dealt with state responsibility for violations of obligations under the Genocide Convention on two previous occasions, in the *Bosnian Genocide Case*[114] and in the *Croatian Genocide Case.*[115] Thus, this section will to a large extent build upon the Court's reasoning in those cases.

### 3.4.1 Actus Reus and Dolus Specialis

A first question is what it is that has to be proved? The definition of genocide under the Genocide Convention consists of two elements. The first of these elements is a prohibited act as listed under Article II of the

[113] *The Gambia v. Myanmar*, Application instituting proceedings and Request for the indication of provisional measures, § 112.
[114] Bosnia Genocide Case, Judgment, I.C.J. Reports 2007, p. 43.
[115] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3. Hereafter "Croatia Genocide Case".

Convention.[116] However, for it to amount to genocide, it is not sufficient that members of a group have been killed deliberately, it must have been done with the *"…intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"*.[117] These two elements constitute the *actus reus* (the genocidal act) and the *dolus specialis* (special genocidal intent), of which the latter must have been present at the time of the former. This makes the crime of genocide different from other international crimes, as it is a crime with a double mental element, i.e. both the general intent to perform the prohibited act *(mens rea)* and the special genocidal intent *(dolus specialis)*.[118]

This is important when talking about proof, as when it comes to proving genocide, one has to bring enough evidence to prove both the genocidal act and the genocidal intent. What then is "enough evidence", i.e. what is the standard of proof that the evidence presented by The Gambia needs to meet?

### 3.4.2 The Bosnia and Croatia *Genocide* Cases

As mentioned, the ICJ has dealt with the Genocide Convention mainly on two previous occasions, in the *Bosnia Genocide Case* and in the *Croatia Genocide Case.* Both cases dealt with allegations against Serbia (and counterclaims) that it had violated its obligations under the Genocide Convention during the 1992-1995 war.

The outcomes of the cases were similar. In both cases, the Court found that the *actus reus* had been established but dismissed the claims as the standard of proof for the *dolus specialis* had not been met,[119] meaning that the Court considered it established that prohibited acts under Article II of the Genocide Convention had taken place, but not that it had done so with the perpetrators intent to *destroy, in whole or in part, a national, ethnical, racial or religious group, as such*.[120] The literature on these two cases is vast, and a lot of it has focused on the standard of proof applied.[121]

[116] These are: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
[117] Genocide Convention, Article II.
[118] Ambos, *What does 'intent to destroy' in genocide mean?*, International Review of the Red Cross, 91(876), 2009, p. 833.
[119] Bosnia Genocide Case, § 471 and Croatia Genocide Case, § 524. In the Bosnia Genocide Case, the Court found however, that Serbia had failed to punish and prevent genocide.
[120] See 114.
[121] E.g. SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro*, Human Rights Brief, vol. 15, no. 1, 2007, pp. 2–6; Schabas, *Genocide and the International Court of Justice: Finally, a Duty*

The ICJ applied the same standards of proof in the *Croatia Genocide Case* from 2015 as in the *Bosnia Genocide Case* from 2007.[122] In both cases, the Court applied a standard earlier found in the case *Corfu Channel,*[123] namely that *"…claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive"* and that *"the Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts."*[124]

When it comes to inferences of the *dolus specialis,* the Court articulated that "*for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent"*.[125]

This is a very high standard. In fact, it has been argued to be analogous to the standard of "beyond reasonable doubt", as used in both national and international criminal law.[126] While the intention here not is to discuss into detail whether this high standard is suitable or not as this has already been done extensively,[127] it should be noticed that the Court did not provide any motivation for this high standard.[128]

The standard of proof applied raises also another question. As intent is a "mental state", how does one infer the genocidal intent of a State? It seems almost impossible to imagine a situation where a pattern of conduct can only reasonably be understood as reflecting that intent. It has been suggested that what is to be understood by intent in this situation is thus not so much a "mental state", but rather a "plan or a policy" of a state.[129] On the other hand, that is not how the provision in the Genocide Convention reads. Perhaps, the proof of such a plan or a policy is what it takes to have a situation where a pattern of conduct can only reasonably be understood as

*to Prevent the Crime of Crimes*, Genocide Studies and Prevention, vol. 2, no. 1, 2007, pp. 101–122 and Tzeng, *Proving Genocide: The High Standards of the International Court of Justice* in Recent Development, Yale Journal of International Law, vol. 40, no. 2, 2015, pp. 419–422.

122 Croatia Genocide Case, §§ 177–179.

123 Corfu Channel Case, Judgment of April 9th 1949, I.C.J. Reports 1949, p. 4.

124 Bosnia Genocide Case, § 209.

125 Croatia Genocide Case, § 510.

126 E.g. Schabas, p. 108 and Tzeng, p. 420.

127 E.g. see articles cited under note 116.

128 Tzeng, p. 421.

129 Schabas, p. 111.

reflecting genocidal intent. Notwithstanding the bearing of this argument, we can conclude that inferring genocidal intent of a state is not an easy task.

### 3.4.3 The Evidence Relied On

Another matter relevant for meeting the standard of proof is the evidence provided and to what extent the Court is willing to rely on such evidence. Previously, the Court has distinguished between different types of fact-finding processes and the evidence gathered through them. In this context the Court historically has been more willing to rely on findings generated through a court-like process.[130] Specifically, the ICJ has noted that *"evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention"*.[131]

In both the *Bosnia Genocide Case* and the *Croatia Genocide Case* the Court gave some extra weight to the findings of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Bosnia Genocide Case,* the Court stated that *"it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight"*[132] and this was repeated in the *Croatia Genocide Case*.[133] This makes sense as we have seen that the standards of proof are similar.

In the present case, it is unlikely that there will be any such findings, generated through a court-like process, for The Gambia to refer to. This is the case as neither the process in the ICC (which we will turn to soon) nor the process in Argentina are likely to outpace the process in the ICJ.[134] Instead, The Gambia has so far relied heavily on the findings of the aforementioned fact-finding mission on Myanmar[135] (IIFFMM) both on its factual findings and on the existence of a genocidal intent.[136] The question is to what extent the Court will be willing to rely on these findings when

[130] Becker, *The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar,* on EJIL: Talk! (ejiltalk.org), 14 December 2019.
[131] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, § 61.
[132] Bosnia Genocide Case, § 223.
[133] Croatia Genocide Case, § 182.
[134] Becker.
[135] See section 2.3.1.
[136] *The Gambia v. Myanmar,* Application instituting proceedings and Request for the indication of provisional measures.

considering whether the standards of proof have been met in establishing the *actus reus* and the *dolus specialis.* Certainly, the findings of the IIFFMM will be entitled weight, but it might be that the Court requires something more,[137] and while the purpose of this study not is to dig deeper into the findings or the methodology of the IIFFMM or to assess the value of its findings, it is in the context of standard of proof worth mentioning that the evidential value of the findings of the IIFFMM most certainly will be questioned by Myanmar.

### 3.4.4 A Short Summary

Genocide, as stipulated in the Genocide Convention, is an international crime different from others as it consists of both a prohibited act *(actus reus)* and a genocidal intent *(dolus specialis)*. The ICJ has, when it previously has dealt with the Convention, applied a very high standard of proof in terms of both elements, however it seems especially hard to prove the genocidal intent from only a pattern of conduct. The standards of proof previously applied by the ICJ in relation to both the prohibited act and the genocidal element appear especially high bearing in mind that the procedure in the ICJ is not a criminal procedure.

In the present case, thus, one of the big challenges for The Gambia will be to meet the applicable standards of proof. When the Court previously has considered the *actus reus* of genocide established, it has given weight to the findings of parallel criminal procedures. The fact that this most likely not will be possible in the present case might make the challenge for The Gambia even bigger. However, we have yet to see how the Court will assess the findings of the IIFFMM and the findings to come from the work of the IIMM and others.[138]

[137] Becker.
[138] See section 2.3.2.

# 4 The International Criminal Court

The previous chapter discussed the process in the ICJ with specific attention paid to the three areas in focus for this study. It is now time to turn to the process in another of The Hague's judicial institutions, i.e. the International Criminal Court (ICC). This chapter, too, will begin with a brief introduction and overview, before we turn to each of the three focus areas.

## 4.1 Introduction to the Process in the ICC

As mentioned in the introduction, on 14 November 2019, Pre-Trial Chamber III of the ICC authorised the Prosecutor to open an investigation into alleged crimes within the jurisdiction of the Court committed against members of the Rohingya group from Myanmar.[139]A key in the previous sentence is "within the jurisdiction of the Court", and the following section will deal with the matter of jurisdiction and how it affects the process in the ICC. Before turning to that matter, however, it is suitable to lay down the basics of the process in the ICC.

The ICC is a permanent international criminal court and as such, it tries individuals accused of the most serious crimes of international concern.[140] The Court is complementary to national justice systems, meaning that it is only intended to prosecute when states do not, or when they are unwilling or unable to do so genuinely.[141] The governing statute of the Court is the Rome Statute, and Article 5 of that statute lays down that the crimes the Court can deal with are genocide, crimes against humanity, war crimes and the crime of aggression. Each of these crimes are defined in the Articles 6–8bis, and through the Elements of Crimes, a separate document.[142]

A situation can come under the jurisdiction of the ICC in three different ways. It can be referred to the Prosecutor by a State Party, it can be referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, or the Prosecutor can initiate an investigation him-/herself.[143] The situation in focus for this study is an example of the last alternative.

[139] ICC-01/19-27.
[140] Rome Statute, Article 1.
[141] Ibid, Article 17.
[142] Ibid, Article 9.
[143] Rome Statute, Article 13.

A prerequisite for the Prosecutor to initiate an investigation is that the Pre-Trial Chamber has authorized the Prosecutor's request to do so, which it only does if there is a reasonable basis to proceed with the investigation and the case appears to fall within the jurisdiction of the Court.[144] This is what happened on the 14 November 2019 and thus, the process at the time of writing this is at the investigation phase. If, during this stage, enough evidence is gathered and individual suspects are identified, the next step is for the Prosecutor to request the Pre-Trial Chamber to issue an arrest warrant or a summons to appear,[145] before the case could eventually move on to the next step of the pre-trial stage. At that stage, the Pre-Trial Chamber shall determine whether there are *substantial grounds to believe* that the suspect committed the crimes charged, and if that is the case, the process can move on to the trial stage.[146] After a potential trial appeals might follow.[147]

The section above has, in a simplified matter, outlined what the process in the ICC in this case could look like with the purpose of understanding what it means that the case is now at the investigation phase. Concludingly, the process in the ICC is about individual criminal responsibility for crimes under the jurisdiction of the Court, as stipulated by the Rome Statute. For now, the process is at an early stage, i.e. the one of investigation. Next, we will once again turn to each of the three focus areas.

## 4.2 Jurisdiction

### 4.2.1 In General

When there is a referral of a case by a state, or when the Prosecutor has opened investigations (as in the present case), the Court may exercise jurisdiction over crimes that occurred on the territory of a State Party *(ratione loci)* or when the person accused is a national of a State Party *(ratione personae)*.[148] The Court may also exercise jurisdiction if the state of which the accused is a national or on whose territory the crime has been committed has accepted the Court's jurisdiction in the specific case, without the state being a State Party.[149] Furthermore, the crime must have been committed after the Rome Statute has entered into force in relation to the

144 Ibid, Article 15.
145 Ibid, Article 58.
146 Ibid, Article 61.
147 Ibid, Article 81.
148 Ibid, Article 12.
149 Rome Statute.

relevant State Party, or the state must accept the Court's jurisdiction in the specific case *(ratione temporis),*[150] and the alleged crime must be one of the crimes the Court has jurisdiction to deal with according to Article 5 of the Rome Statute *(ratione materiae).*[151] In the following, the most central matters in relation to jurisdiction in the present case will be discussed.

### 4.2.2 Ratione Loci and Ratione Temporis

Above, the prerequisites for the Court's jurisdiction, in a case where the Prosecutor has initiated investigations, have been laid out. A first question does here arise. Myanmar is not a State Party to the Rome Statute, nor has it accepted the Court's jurisdiction in the present case and jurisdiction *ratione personae* is not likely to be relevant in this case.[152] How then can there be a process in the ICC, related to atrocities against the Rohingya in Myanmar, at all?

The answer can be found in the already mentioned Pre-Trial Chamber III decision of 14 November 2019 and in a Pre-Trial Chamber I decision of 6 September 2018,[153] and how the chambers have dealt with the question of territorial jurisdiction. In the decision of 2019, Pre-Trial Chamber III referred to the decision of 2018, in which Pre-Trial Chamber I found that "*the Court may assert jurisdiction […] if at least one element of a crime within the jurisdiction of the Court or part of such crime is committed on the territory of a State Party to the Statute".*[154]

The decision of 2018 followed a request by the Prosecutor seeking a ruling from the Pre-Trial Chamber whether the Court may exercise jurisdiction over alleged deportation and persecution (as crimes against humanity) of members of the Rohingya group from Myanmar to Bangladesh, the latter a State Party to the Rome Statute since 2010. Because deportation is a crime of cross-border nature and the crime, in this case, partially has been committed in Bangladesh, Pre-Trial Chamber I found that the Court has jurisdiction *ratione loci.*[155] This decision has been vastly discussed in the literature since, by both supporters emphasizing its normative value in strengthening the Court's legal position,[156] and opponents arguing that the ICC has extended its territorial jurisdiction too far and thus risks worsening

[150] Ibid, Article 11.
[151] Ibid, Article 5.
[152] The reason for this is simply that the alleged perpetrators are Myanmar officials.
[153] ICC-RoC46(3)-01/18-37.
[154] ICC-01/19-27, § 1.
[155] ICC-RoC46(3)-01/18-37, § 1.
[156] E.g. Hale and Rankin, *Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people*, Australian Journal of International Affairs, 73:1, 2019, pp. 22–28.

the situation of an already unstable political support of the Court.[157] However, from a purely legal point of view, it has been argued that the Court's reasoning over its territorial jurisdiction is rather routine and practice among states as the *actus reus* of some crimes simply comprises a cross-border element.[158]

Following Pre-Trial Chamber I's decision, the Prosecutor requested Pre-Trial Chamber III to authorize the Prosecutor to commence investigations into the situation in Myanmar and Bangladesh from 9 October 2016 and forward.[159] On 14 November 2019, the mentioned chamber authorised the Prosecutor to commence investigations in relation to any crime where at least part of the *actus reus* has taken place in Bangladesh or in any other State Party or state accepting the Court's jurisdiction, committed on or after 1 June 2010 (the date the Rome Statute entered into force for Bangladesh) and related to the situation of atrocities against members of the Rohingya group.[160]

### 4.2.3 Ratione Materiae

The Court is, as we have seen in the previous section, clearly limited to conduct proceedings in relation to crimes which fulfils the requirement of territorial jurisdiction in the meaning that they must have been at least partially committed on the territory of Bangladesh or another State Party to the Rome Statute.

However, Pre-Trial Chamber III also had to deal with the question of jurisdiction *ratione materiae*, i.e. if there was a reasonable basis to believe that crimes within the jurisdiction of the Court had occurred in the present situation, in order to be able to authorise the commencement of investigations.[161] In assessing if this prerequisite was fulfilled in relation to the alleged crimes focused on in the request of the Prosecutor, i.e. crimes against humanity in form of deportation, persecution and other inhumane acts,[162] the chamber divided its reasoning into several parts. Article 7 of the Rome Statute stipulates that *"'crime against humanity' means any of the following acts when committed as a widespread or systematic attack directed against any civilian population"* and then a list of underlying

[157] E.g. Guilfoyle, *The ICC pre-trial chamber decision on jurisdiction over the situation in Myanmar*, Australian Journal of International Affairs, 73:1, 2019, 2–8.
[158] Akhavan.
[159] ICC, Office of the Prosecutor, *Request for authorisation of an investigation pursuant to article 15*, No. ICC-01/19, 4 July 2019.
[160] ICC-01/19-27, §§ 124-134.
[161] Ibid, § 41.
[162] ICC-01/19.

crimes follows. The chamber therefore first had to assess the contextual elements (if there was a "widespread or systematic attack") and then the allegations of specific underlying crimes ("following acts"). In its conclusion, the chamber wrote that there was a reasonable basis to believe that such attacks may have been committed against the Rohingya civilian population *"including murder, imprisonment, torture, rape, sexual violence, as well as other coercive acts, resulting in their large-scale deportation. Given that there are many sources indicating the heavy involvement of several government forces and other state agents, there exists reasonable basis to believe that there may have been a state policy to attack the Rohingya"*.[163]

Thus, while the Court does not have jurisdiction to conduct proceedings over crimes that occurred entirely on the territory of Myanmar (e.g. murder, imprisonment, torture, rape etc.) or on state responsibility per se, the chamber considered these elements in assessing whether there was a reasonable basis to believe that the contextual elements of crime against humanity were present,[164] and in doing so, Pre-Trial Chamber III actually said something about the probability that these events occurred in Myanmar.

The chamber then found that there was a reasonable basis to believe that the underlying criminal acts of deportation and persecution had occurred, and thus the requirement of jurisdiction *ratione materiae* was met at a level sufficient for the Prosecutor to commence investigations.[165] However, as already mentioned, the forthgoing investigations are not limited to these specific crimes but can include any crime, as long as they fall within the Court's jurisdiction.

### 4.2.4 A Short Summary

The Court's jurisdiction in relation to atrocities against the Rohingya is limited to crimes partially committed in Bangladesh or any other State Party or state accepting the Court's jurisdiction, and as a UN Security Council referral to the Court is unlikely,[166] this limitation will remain. Accordingly, while genocide is a crime under the Court's jurisdiction *ratione materiae,* the Court cannot conduct proceedings in relation to allegations of that crime in the present situation and the same goes for any other crime not fulfilling the requirement of territorial (or personal) jurisdiction. As we have seen how the matter of jurisdiction limits the scope of the judicial proceedings in

[163] ICC-01/19-27, § 92.
[164] Ibid, § 93.
[165] Ibid, §§ 110 ff.
[166] E.g. Reuters, *U.N. Security Council mulls Myanmar action; Russia, China boycott talks*, 17 December 2018.

the ICC in relation to atrocities against the Rohingya, we will now turn to the topic of a victims' perspective in the ICC-process.

## 4.3 Victims' Perspective

Similar to the section on victims' perspective in relation to the process in the ICJ (chapter 3.3.), this section will deal with the matter of victims and their role in the process in the ICC. As with the section on victims and the ICJ, focus here too will be on 1) accountability and the role of the victims in the process and 2) reparations. The rationale behind this focus is the same as in chapter 3.3.[167]

### 4.3.1 Accountability and the Role of the Victims

How can the ICC contribute to finding truth and ensuring punishment for persons responsible for atrocities against members of the Rohingya group? And what role does the Rome Statute give to the victims in this process? Preamble 2 of the Rome Statute reads *"…during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"* and thus, victims are put in a central role of the purpose of the Court. It is safe to say that the Rome Statute goes further than other governing texts of international tribunals in taking into account the victims' perspective throughout proceedings as victims have the right not only to participate as witnesses, but also to have their views and concerns heard and considered by the Court at different stages of the proceedings.[168] Victims can participate in different ways, e.g. informing the Prosecutor of crimes they believe to have been committed against them,[169] in the courtroom through legal representatives,[170] as witnesses[171] or if the accused later on is convicted, as requesting reparations (which will be addressed more in detail later on).[172] The intention here is not to go into every detail of participation of victims in proceedings in the ICC, but to give an overview over the participation of victims in the process.

Article 68(3) of the Rome Statute stipulates that victims have the right to present their views and concerns, and that the Court shall consider these

[167] See section 3.3.
[168] Walleyn, *Victims' Participation in ICC Proceedings: Challenges Ahead*, International Criminal Law Review, 16(6), 2016, pp. 995 ff.
[169] De Hemptinne & Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, Journal of International Criminal Justice, vol. 4, issue 2, 2006, pp. 342–350.
[170] ICC, Rules of Procedure and Evidence (RPE), Rule 91.
[171] E.g. Rome Statute, Article 64(6)b.
[172] Rome Statute, Article 75 and RPE, Rule 94.

views and concerns at appropriate stages of the proceedings. In fact, such victims' participation is possible at any stage.[173] The general principle in relation to victims is laid down in Rule 86 of the Court's Rules of Procedure and Evidence (RPE) and reads *"a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68"*.[174] Indeed, victims are put at the center of attention. The RPE also provides that considered as a victim is one that have suffered harm as a result of any crime within the jurisdiction of the Court, and that the term "victim" in some cases can encompass organizations or institutions.[175]

Thus, already when the Prosecutor intends to seek authorization to commence investigations, he or she must inform the victims known, i.e. natural persons and/or organizations and institutions, and these victims may make representations in writing to the Pre-Trial Chamber.[176] Further on, according to Article 68 of the Rome Statute and Rule 86 of the RPE, victims have the right to be heard and considered at all stages, including pre-trial proceedings, trials, and appeals. In general, this is done in writing, but can also be done through legal representatives or testimonies during hearings.[177] Victims also have the right to be informed about the proceedings throughout the process.[178]

When it comes to protection of victims and witnesses, Article 68 of the Rome Statute lays the foundation, as the Court *"shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses"*.[179] Rule 87 and 88 of the RPE provide further details, as they allow for specific arrangements to be made, such as conducting hearings on camera, using pseudonyms, allowing a psychologist or a family member to attend the hearings, and more.

For all of this to function, several mechanisms exist within the ICC, and more specifically, within the Registry. These are the Victims Participation and Reparations System that informs victims of their rights, enables them with applications to participate in proceedings and helps with organizing legal representation, the Victims and Witnesses Section that provides support and protection to witnesses and victims that appear before the

[173] RPE, Rule 86.
[174] Ibid.
[175] Ibid, Rule 85.
[176] Ibid, Rule 50(1).
[177] Ibid, Rules 89-91.
[178] Ibid, Rule 92.
[179] Rome Statute, Article 86(1).

Court, and the independent Office of Public Counsel for Victims that assists victims in their legal representation and can act as legal representatives.[180] Additionally, the Trust Fund for Victims has been established to complement the Court's work on reparations, which we will now turn to.

### 4.3.2 Reparations

Article 75 of the Rome Statute stipulates that "*the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting".*[181] The mentioned principles were first developed after the conviction in the *Lubanga case*, the first ever conviction in the ICC, and builds on what is already stated in the Rome Statute and the RPE.[182] In short, the Court can make an order directly against a convicted person where it specifies the appropriate remedies to be granted the victims, or order that the award for reparations is made through the Trust Fund for Victims.[183] The Court may award reparations on an individual basis or, when appropriate, on a collective basis or both.[184] Either way, before making an order under Article 75, the Court shall take account of representations of the convicted, victims, other interested persons or interested states.[185]

In accordance with Article 79 of the Rome Statute, the Trust Fund for Victims (TFV) was created for the benefit of victims and their families. When it is impossible or impracticable to make individual awards directly to each victim the Court may order that it be deposited with the TFV. The Court can also order that an award for reparations be made through the TFV where the number of victims and the scope, forms and modalities makes a collective reparation more appropriate.[186] If the reparations are to be

[180] ICC, *Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the ICC*, p. 14.
[181] Rome Statute, Article 75(1).
[182] Balta, Bax, and Letschert, *Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System*, International Criminal Justice Review, 29(3), 2019, pp. 225-226; ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Decision establishing the principles and procedures to be applied to reparations*, No. ICC-01/04-01/06-2904, 7 August 2012 and ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of August 7, 2012*, No. ICC-01/04-01/06-3129, 3 March 2015.
[183] Rome Statute, Article 75(2).
[184] RPE, Rule 97(1).
[185] Rome Statute, Article 75(3).
[186] RPE, Rule 98(2) and 98(3).

implemented through the TFV, the TFV is tasked with creating an implementation plan which the Court then has to approve before it can start with the implementation.[187] However, the TFV is not only mandated to implement the Court's decisions on reparations after a conviction, it may also provide general assistance to victims already prior to or in the absence of a conviction.[188] Assistance of the latter kind is financed through other resources than those collected from awards for reparations, fines and forfeitures, mainly through voluntary contributions and private donations.[189]

So far, the Court has ordered reparations in three cases *(Lubanga, Katanga and Al Mahdi)* and the Court is still in relatively early stages of developing its jurisprudence on the matter.[190] However, implementation has until now been slow, and the functionality of the Court's reparation regime has been questioned as it faces several practical realities and difficulties.[191] For example, it has been argued that there is a mismatch between the strict procedural characteristics of a criminal trial that the Court needs to uphold in order to respect the rights of the accused on one hand, and delivering reparations to victims of mass crimes on the other hand. This mismatch limits the number of victims benefiting from reparations.[192] As the ICC and the TFV have different objectives (one upholding the standards of a fair criminal proceeding and the other one providing reparations to victims), the Court's requirements for the implementation plans results in tough formal requirements that are hard for the TFV to meet, as the TFV works on war-torn ground were it might be hard to provide exact lists of beneficiaries and estimations of costs, which in turn makes the processes long and ineffective, which leaves victims (and convicts) in uncertainty and in worst case, without reparations.[193]

Some of the practical and judicial challenges might be due to the relatively vague legal and policy framework on reparations as provided by the Rome Statute and the RPE, which leaves a lot of open questions. This might be a result of the fact that reparations to victims was a complicated issue at negotiations of the statute, which resulted in details being left out of the

[187] ICC, Assembly of State Parties, *Regulations of the Trust Fund for Victims,* ICC-ASP/4/Res.3, 3 December 2005, Article 57.
[188] Ibid, Article 42 and 48.
[189] Ibid, Article 47.
[190] Trust Fund for Victims, *Reparation Orders*.
[191] Owiso, *The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?,* International Criminal Law Review, 19(3), 2019, pp. 505–531.
[192] Balta, Bax, and Letschert, p. 236.
[193] Ibid.

texts to ensure agreement.[194] Nevertheless, a quite ambitious reparation regime is in place, and as the jurisprudence of the Court and the practices of the TFV are being evaluated and hopefully improved,[195] the regime might become more effective in the future.

### 4.3.3 A Short Summary

The Rome Statute puts the victim in a central position and goes further than its preceding international criminal tribunals and courts. Victims are highly involved at all stages of the proceedings which contributes to bringing victims some sense of justice, in the meaning that individual accountability for atrocities in the best case is achieved, but also in that victims are given a possibility to be listened to. Furthermore, victims are not only listened to as they function as witnesses, but also have a saying in the actual proceedings as the Court shall consider their views and concerns at all stages of the process. For instance, in the present case, the Court received views on the request of the Prosecutor to be authorized to commence investigations by hundreds of thousands of victims, unanimously expressing a wish for an investigation by the Prosecutor.[196]

When it comes to reparations, there is an ambitious and noble reparations regime embedded within the Rome Statute system. However, it will take years for the process to potentially get to the reparations stage and getting there will only be a reality if there first is a conviction. Furthermore, once at the reparations stage, a big challenge, both legally and practically, will be to make reparations a reality for the thousands of victims affected. Nevertheless, the task is not impossible, and ambitions are high.

A small reflection on the consequences by the aforementioned jurisdictional limitations should also be made. The Court can only conduct proceedings in relation to crimes under its jurisdiction which in this case clearly limits the scope of the proceedings and thus, the scope of atrocities against members of the Rohingya people for which accountability can be achieved. This, in turn, limits potential reparations further down the road. A challenge for the

[194] Ferstman and Goetz, *Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings* in Ferstman, Goetz, and Stephens (red.), *Reparations for victims of genocide, war crimes and crimes against humanity systems in place and systems in the making*, M. Nijhoff, Leiden, 2009.
[195] E.g. there is an ongoing review of the ICC and the Rome Statute System taking place that, amongst several other topics, is expected to deal with the topics of victims and reparations, and to result in recommendations on how to improve the ICC and the Rome Statute System. See ICC, Assembly of State Parties, *Review of the International Criminal Court and the Rome Statute system*, ICC-ASP/18/Res.7, 6 December 2019.
[196] ICC-01/19-27, §§ 18-39.

Court in this context will be to communicate and explain to victims why the Court is only dealing with such a limited scope of crimes committed against the victims, while the reality is that far more atrocities are likely to have been committed than those that can come under the jurisdiction of the ICC in the current process.

## 4.4 Standards of Proof

We now turn to the third and last focus area for this study before a more concrete comparison between the studied processes will be the focus of chapter 5. For this part, a brief overview of the applicable standards of proof in the different stages of the ICC-process will be given. Having done so, focus will then be on the applicable standard of proof required for a conviction at the trial, and potentially, appeals stage.

### 4.4.1 Different Standards at Different Stages

Naturally, the same standard of proof cannot be applied at every stage of a process in the ICC. If an authorization to commence investigations would require the same standard of proof as a conviction, it would be impossible for the Prosecutor to get an authorization to collect the evidence required for a conviction, alternatively, the whole investigation process leading up the trial-stage would be pointless as enough evidence was already gathered. Therefore, like most national criminal law-systems, the Rome Statute provides different standards of proof for different stages of the proceedings.

As mentioned before in section 4.1 and 4.2.3, for the Prosecutor to investigate, there must be *reasonable basis* to proceed with such investigations, including a *reasonable basis to believe* that crimes under the Court's jurisdiction has been committed.[197] Then, if and when individual suspects are identified, the Pre-Trial Chamber shall issue an arrest warrant or a summons for appear if it is satisfied that there are *reasonable grounds to believe* that the individual committed a crime under the Court's jurisdiction.[198] Following that, the next threshold comes at the Confirmation of charges hearing, during which the Prosecutor must show that there are *substantial grounds to believe* that the suspect committed each of the crimes charged.[199] If the Pre-Trial Chamber is satisfied that so is the case, it will confirm the charges and the process moves on to the trial stage. There, the Court must be convinced of the guilt of the accused *beyond reasonable*

[197] Rome Statute, Article 53.
[198] Ibid, Article 58.
[199] Rome Statute, Article 61.

*doubt*.[200] As this is the highest and final standard of proof applicable for the process to be successful in terms of accountability, this is where focus will be at in the following.

### 4.4.2 Beyond Reasonable Doubt

Article 66(3) of the Rome Statute stipulates that *"in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt"*.[201] The standard, familiar to many as it is used widely in common law systems and also in some civil law systems, has also been adopted by other international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[202] However, there is no exact definition of what the standard actually means within the scope of international criminal law in general or the ICC in specific.[203] While the purpose of this section is not to discuss in detail the Court's approach to the applicable standard of proof (space limitations would not allow for a comprehensive review of the Court's jurisprudence), some keys to understanding the applicable standard will be provided.

The Court has generally articulated that the standard is considered satisfied when there is only one reasonable conclusion to be drawn from the particular facts.[204] Furthermore, "reasonable doubt" must be objective, derived from evidence, and cannot be imaginary.[205] A few more keys to understanding the Court's view on the standard of proof has been articulated in the recent judgement in the Ntaganda-case, where it refers to previous cases and notes that the standard *"is to be applied not to 'each and every fact in the Trial Judgment', but only to the facts constituting the elements of the crime and mode of liability of the accused as charged"*[206] and that *"when determining whether the applicable evidentiary threshold has been*

[200] Ibid, Article 66(3).
[201] Ibid.
[202] For ICTY, see Article 21(3) of the ICTY Statute and Rule 87(a) of the Rules of Procedure and Evidence for the ICTY. For ICTR, see Article 20(3) of the ICTR Statute and Rule 87(a) of the Rules of Procedure and Evidence for the ICTR.
[203] Seclì, *Reaching the 'Beyond Reasonable Doubt' Standard in International Criminal Law Cases: A Comparison with Italian Doctrine and Jurisprudence*, Faculty of Law, Stockholm University Research Paper No. 67, 2019.
[204] I.e. ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu and Narcisse Arido, Trial Chamber VII, *Judgement*, No. ICC-01/05-01/13, 19 October 2016, §. 188 and ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *Judgement*, No. ICC-01/04-01/06, 14 March 2012, § 111.
[205] ICC-01/05-01/13, § 187 and Seclì, p. 9.
[206] ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, *Judgment*, No. ICC-01/04-02/06, 8 July 2019, § 44.

*met, […] 'is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue'"*.[207]

From that we learn that the applicable standard of proof is a high one, where a conviction requires that no reasonable explanation can be made from the evidence other than the guilt of the accused. The standard of proof must be met in relation to the facts constituting the elements of the crime and the mode of liability of the accused,[208] but not every other fact presented in the case. Finally, when determining whether the standard has been met, the Court is required to undertake a holistic approach to its evaluation of the evidence present.

Lastly, the Court is authorized to freely assess all evidence in the case.[209] This is in line with what is often known as the free evaluation of evidence principle, meaning that the Court itself can choose the method for evaluating the evidence and its relevance.

### 4.4.3 Challenges in Relation to Evidence

A question worth raising in the context of standard of proof and evidence is the obvious challenge that the investigations will meet in gathering evidence and carrying out investigations because of the fact that Myanmar is not a State Party to the Rome Statute.

Article 86 of the Rome Statute stipulates that State Parties are obliged to cooperate fully with the Court in its investigations and prosecutions of crimes within the Court's jurisdiction. However, as Myanmar is not a State Party, this obligation does not obligate the state to cooperate. Predictably, Myanmar has protested against the jurisdiction of the ICC in the present case,[210] invoking the principle that treaties such as the Rome Statute does not create rights or obligations for third parties if there is no consent from the third party in question.[211] Thus, the likelihood that Myanmar will cooperate with the investigations is non-existing.

Why is this such a big challenge? The ICC is purely a judicial institution, and it does not have a police force or an enforcement body. As such, it must rely on states to enforce arrest warrants and answer on requests for information. Thus, the Court is dependent on state cooperation in its work to

[207] Ibid, § 45.
[208] See the Rome Statute, Article 25, for different modes of liability.
[209] Rome Statute, Article 69 and RPE, Rule 63(2).
[210] Reuters, *Myanmar to ICC: Rohingya jurisdiction request 'should be dismissed'*, 9 August 2018.
[211] Guilfoyle, p. 2.

bring perpetrators to the Court,[212] and as a result, it has so far not been very successful in cases where such cooperation has been absent.[213]

While the Court has found that it has jurisdiction (although limited) in the present situation and State Parties involved such as Bangladesh is obliged to cooperate fully with the Court, it might prove difficult to carry out sufficient investigations as much of the evidence and most likely possible individual suspects remain in Myanmar, out of reach for the investigation and further down the road, out of reach for potential arrest warrants. It is in this context not the purpose of the current work to go deeper into themes like state sovereignty, immunities, international arrest warrants or other themes that could be relevant for the success or not of the current proceedings, but merely to highlight that the absence of cooperation might prove to be a big challenge in gathering enough evidence, and eventually, to bring suspects to trial in The Hague. Moreover, one could ask what position the Court will find itself in if it because of these reasons fail to gather enough evidence as it in that case first will have, arguably, extended its jurisdiction in the present situation too far[214] and then, because of exactly that reason, not been able to conduct successful proceedings. Surely, the voices of those already criticizing the Court, blaming it for poor functionality, will become even louder.

### 4.4.4 A Short Summary

The standard of proof required for a conviction is that the guilt of the accused must be established *beyond reasonable doubt*. This high standard is to be met both in relation to the facts constituting the elements of crime and the mode of liability of the accused. When assessing the evidence, the Court must take a holistic approach, but can otherwise assess the evidence available freely.

A major challenge for the investigations might be to gather evidence enough to meet the standard of proof, as Myanmar is not likely to cooperate with investigations.

[212] Hillebrecht and Straus, *Who Pursues the Perpetrators?: State Cooperation with the ICC*, Human Rights Quarterly, 39(1), 2017, pp. 162–188.
[213] Guilfoyle, p. 5.
[214] See section 4.2.2.

# 5 Comparison

The focus of this chapter will be to make a comparison between the processes in the ICJ and the ICC for the purpose of understanding their differences, similarities and roles in relation to each other and international law in general.[215] This chapter will follow the structure of the two previous ones. Thus, it will start with an overviewing comparison, before all of the three focus areas are dealt with in specific, one at the time.

## 5.1 Overview

Although both processes exist as judicial responses to atrocities against members of the Rohingya group in Myanmar[216] they are, at the very basics, fundamentally different. Three keys to their differences can be identified.

First, the process in the ICJ is one that deals with the potential state responsibility of Myanmar, while the ongoing investigations in the ICC seek to hold individual perpetrators accountable.[217] Secondly, the law applied is different as The Gambia's application to the ICJ regards alleged breaches of obligations under the Genocide Convention, while the process in the ICC is limited to crimes under that Court's jurisdiction, i.e. the crimes listed in the Rome Statute.[218] Although genocide is one of the crimes listed in the Rome Statute (the wording is identical to the one in the Genocide Convention[219]), because of jurisdictional limitations,[220] the ICC is unable to conduct proceedings in relation to that crime in this specific case. Thirdly, as the process in the ICJ regards state responsibility for alleged violations of the Genocide Convention and the one in the ICC regards crimes under the Rome Statute, only the latter is a criminal procedure. However, it is not to be forgotten that one of the alleged violations of the Genocide Convention by Myanmar is failing to conduct criminal proceedings against responsible perpetrators and thus, criminal accountability is an ultimate aim of both processes.

As such, the very purposes and roles of the different processes are fundamentally different from each other. However, they both relate to the same events, the victims are the same, and so far, evidence put forward in

[215] See section 1.2 and 1.4.
[216] See chapter 2.
[217] Section 3.1 and 4.1.
[218] Ibid.
[219] Rome Statute, Article 6 and Genocide Convention, Article 2.
[220] See section 5.2.

both processes are largely based on the same findings of the IIFFMM.[221] In other words, the two processes deal with different legal aspects of the same events and as such they can be understood as complementary to each other rather than overlapping.

## 5.2 Jurisdiction

As we have seen in section 3.2 and 4.2, both cases have given rise to questions about the two courts' jurisdiction. What regards the process in the ICJ, the questions have been whether a dispute between The Gambia and Myanmar exists and if Myanmar's reservation to Article VIII of the Genocide Conventions stops a not specially affected state, i.e. The Gambia, from bringing the claim before the Court.[222] The ICC, on the other hand, is faced with the problem that Myanmar is not a State Party to the Rome Statute.[223]

While the specific questions that have arisen due to the applicable law on jurisdiction are different in respective process, the surrounding circumstances are similar. In a more standard case, the ICC can easily establish jurisdiction on *ratione loci* or *ratione personae*, or there is a UN Security Council referral, but this is not the case here. The same goes for the ICJ, as a more standard case would be one where one state has caused harm on another state, while it in the present case is Myanmar causing harm on individuals with no connection to any other state. Thus, in these processes, a fundamental question in relation to both processes has been whether jurisdiction can be established at all, as neither case falls within the category of situations where the question of jurisdiction is an easy one. As such, at an outset, the present situation in Myanmar does not clearly fit under any of the two Courts' jurisdictions.

Nevertheless, in both cases, the courts seem satisfied that jurisdiction can be established. However, this has required the questions to be addressed in specific and some creative argumentation has been necessary.[224] This is especially true what regards the jurisdiction of the ICC, and as we have seen, the decision has been criticized for perhaps taking the Court's jurisdiction too far. What regards the jurisdiction of the ICJ, things seem a little bit more straightforward. Nevertheless, as the Court has only

[221] See 2.3.1, 2.4.3 and ICC-01/19.
[222] See section 3.2.2 and 3.2.3.
[223] See section 4.2.
[224] See section 3.2 and 4.2.

established its jurisdiction *prima facie*, Myanmar certainly will continue to question the jurisdiction of the Court, which will prolong the process.

Questions about jurisdiction, and the solutions on how to address these questions, further affect the proceedings differently. While the process in the ICJ can move on pretty straightforward once jurisdiction has been established, the process in the ICC clearly is limited by the Court's territorial jurisdiction as the Court can only, per se, conduct proceedings in relation to a fraction of the atrocities committed, i.e. those with a cross-border element.[225] These jurisdictional limitations also have consequences for victims, which we will turn to in the following.

## 5.3 Victims' Perspective

The roles of victims are fundamentally different in the two processes. As we have seen how the process in the ICJ, essentially, is a process about an alleged breach of an international treaty, victims are put on the side-line as only states can be parties to the dispute.[226] From a victims' perspective, this is not ideal. However, that victims in this process are put somewhat to the side is logical simply because the ICJ is a court established to settle disputes between states, and thus, providing justice to victims is not the central purpose of the Court.[227] As consequence, victims are dependent on states, in this case The Gambia, in their hope for accountability and truth-finding through the ICJ. Needless to say, The Gambia takes on itself a big task in this process as victims, when it comes to potential accountability for genocide, have to put all their hopes to The Gambia and the process in the ICJ. This is so as the process is the only way through which an international court can establish accountability for the crime of genocide in the present situation, since the jurisdiction of the ICC is limited.[228] Thus, the way the process in the ICC is limited by jurisdiction affects the importance of the process in the ICJ in relation to victims.

The Rome Statute, in contrast to the ICJ Statute and the Genocide Convention, puts victims in a central role of the processes in a way unprecedented by other international criminal tribunals as it includes and takes into consideration the needs and opinions of victims at all stages of the proceedings.[229] However, as the ICC because of jurisdictional limitations

[225] See section 4.2.
[226] See section 3.3.1.
[227] See section 3.3.
[228] See section 5.2.
[229] See section 4.3.

can only conduct proceedings in relation to some of the crimes allegedly committed against members of the Rohingya group, it can only satisfy victims' need for accountability to a limited extent. Nevertheless, as we have seen, the Court is likely to say something about the probability that atrocities such as murder, rape, and more have occurred in Myanmar,[230] as the Court comments on this when dealing with the overall contextual assessment needed to establish crimes against humanity.[231] This could give victims at least some recognition also in relation to these events.

The two processes also differ on the matter of reparations to victims. What regards the process in the ICJ, arguably, individual victims' right to reparations has achieved status as customary international law.[232] Even so, it is uncertain if such a right can be invoked by The Gambia on behalf of the individual right holders in the present case. In this aspect, if the case comes so far, it could be a major opportunity for the Court to develop its jurisprudence.[233] In relation to processes in the ICC on the other hand, there is an extensive reparations regime put in place through the Rome Statute, the RPE and the TFV.[234] However, as reparations are dependent on a conviction, also the atrocities for which reparations can be ordered as compensation are limited by the jurisdictional limitations of the process.[235] On top of that, the reparations regime of the ICC has been criticized for slow and ineffective implementation, as it faces several practical issue, some of which on war-torn ground.[236] Nevertheless, the reparations regime of the ICC is there and by the time, and if, the process reaches the reparations stage, one could hope that is has improved its efficiency.

Overall, while it is clear that victims are recognized and considered to a greater extent through the process in the ICC, both processes mean that atrocities against members of the Rohingya group are now addressed at two of the most important international courts in the world. As such, they both inherently bring recognition to victims, which in itself must be considered to be of high value.

[230] To some extent it has already done so. See section 4.2.3.
[231] See section 4.2.3.
[232] See section 3.3.2.1.
[233] See section 3.3.2.2.
[234] See section 4.3.2.
[235] Aid could also be provided through the TFV's assistance mandate, which is not dependent on a conviction, however, such aid is based on voluntary contributions of states. See section 4.3.2.
[236] See section 4.3.2.

## 5.4 Standards of Proof

The standards of proof are high in both processes. When the ICJ previously dealt with the Genocide Convention it has applied very high standards both in relation to the *actus reus* (the genocidal act) and the *dolus specialis* (special genocidal intent). Evidence shall be *fully conclusive,* and the Court must be *fully convinced* that the genocidal acts have been *clearly established*. When assessing the genocidal intent from a pattern of conduct, it requires that the conduct *can only reasonably be understood as reflecting* the genocidal intent.[237] The high standards can arguable be seen as analogous to the standard of *beyond reasonable doubt* as used in the ICC.[238] As the ICC has articulated that this latter standard is considered satisfied when only one reasonable conclusion can be drawn from the facts of the case,[239] the standards appear, if not identical, at least very close to each other.

What regards the ICC, which is a criminal procedure where the accused is at risk of being deprived of his or her liberty, it is easy to understand why such a high standard is being applied just like in most criminal justice systems around the world. However, while it is not the purpose of this study to discuss whether the standards used are reasonable or not, one could wonder why the ICJ requires such a high standard, as the process before the Court is not de facto a criminal procedure.[240] On one hand, state responsibility for Genocide could have extensive geopolitical and legal consequences, but on the other hand no individual's liberty is, at least directly, at stake. Notwithstanding one's position on that matter, it can be concluded that meeting the standards of proof when trying to prove violations of the Genocide Convention is similar to do so in a criminal procedure. Thus, the standards of proof to be applied in the for this study relevant proceedings are similarly high.

[237] See section 3.4.2.
[238] Ibid.
[239] See section 4.4.2.
[240] For a reference to literature discussing this, see note 116.

# 6 Conclusions

This final chapter will be dedicated to conclusions and reflections in relation to the research questions provided in chapter 1.[241]

What regards the first and the second of the three questions, i.e. what are the preconditions of each process in general and in relation to the focus areas, and how they differ, the answers have mainly been provided through chapters three to five. Thus, there is no reason to repeat in detail what is said in those chapters. To conclude, the two processes cover different legal aspects of the same events, as the process in the ICJ is about state responsibility under the Genocide Convention and the process in the ICC is about individual criminal responsibility under the Rome Statute. Questions of jurisdiction are central to both processes. However, it is especially the process in the ICC that is affected by jurisdictional limitations as Myanmar is not a State Party to the Rome Statute. Because of these limitations, the ICC cannot conduct proceedings in relation to the alleged crime of genocide, and thus, the ICJ is the only existing international court that can deal with allegations of genocide in relation to the situation in Myanmar. Victims are, due to the interstate nature of the ICJ, more central to and recognized through the process in the ICC. However, also the process in the ICJ plays an important role in giving victims recognition and justice, especially so as it is the only international process that can deal with alleged genocide in Myanmar. Thus, arguably, the jurisdictional limitations of the process in the ICC influences how we should understand the process in the ICJ and the importance it potentially can have for victims. Finally, the standards of proof are similarly high in both processes.

On the matter of the proceedings' relation to each other, one could on the basis of the above argue that understanding the jurisdictional limitations to the proceedings in the ICC is key to understanding both processes' roles in the world of international law and their relation to each other, as we have seen how these limitations creates a situation where the ICJ is the only international court able to deal with allegations of genocide in the present case and thus, there is no overlap between the processes what regards the proceedings *per se*.[242]

[241] See section 1.2.
[242] As stated in section 5.1, the two processes deal with different aspects of the same events and as such, can be understood as complementary to each other rather than overlapping.

To answer the third research question, in the pursuit of accountability and reparations to victims, a few key challenges can be identified in relation to each of the two processes. What regards the process in the ICJ two key challenges will be highlighted. First, a major challenge will be to satisfy the applicable standard of proof, a challenge that might be even harder in the present process compared to the ones in the *Bosnia Genocide Case* and the *Croatia Genocide Case,* as there in this case likely will be no findings from a court-like process to rely on.[243] Especially challenging will likely be to provide enough evidence to prove the alleged genocidal intent of Myanmar, as it before has proven difficult to satisfy the standards of proof in this regard by only referring to a pattern of conduct.[244] Secondly, the question of reparations to victims is a challenging one. Even if the Court would accept that a right to reparations exists, the question remains if The Gambia can invoke that right on behalf of the victims.[245]

What regards the process in the ICC, the biggest challenge to be identified is likely the one of facing the consequences of the fact that Myanmar is not a State Party to the Rome Statute, nor does it accept the Court's jurisdiction in the present case. As a result, the Court has to establish jurisdiction based on cross-border elements of crimes under its jurisdiction, which strictly limits the scope of atrocities that the Court can conduct proceedings in relation to.[246] Furthermore, because of these circumstances, the Prosecutor must conduct investigations in the total absence of cooperation from the territorial state, i.e. Myanmar, where parts of the elements of the crimes investigated have taken place. Specifically, gathering evidence sufficient to establish the *systematic attack* as required will be challenging without access to Myanmar as most elements of the systematic attack have occurred in Myanmar.[247] Here, the Court might find itself in a situation where it first has, according to critics, extended its jurisdiction too far[248] and then, because of that very same "extension of jurisdiction" into an unwilling Myanmar cannot gather enough evidence to conduct successful proceedings.[249] Of course, another way of looking at it, is that the Court has only applied the legal tools available to it and then, because of the legal reality of a world built upon state sovereignty, has a hard time accessing evidence. Nevertheless, a failure to conduct successful proceedings for the reasons mentioned in this section will very likely come with heavy criticism

[243] See section 3.4.3.
[244] See section 3.4.2.
[245] See section 3.3.2.2.
[246] See section 4.2.
[247] See section 4.4.3 and 4.2.3.
[248] See section 4.2.2.
[249] See section 4.4.3.

against the ICC and the decision to start investigations into the present situation in the first place.

A further challenge that exists as a consequence of the jurisdictional limits is how to explain to victims why the Court is only conducting proceedings in relation to a very limited scope of the crimes the victims likely have suffered, as explaining this is an important aspect of providing victims recognition and a feeling that justice has been provided.[250] Victims are not likely to be aware of the details of both proceedings and what differs them procedurally, and while the primary object of the courts are to conduct judicial proceedings a lot of worth, especially in relation to victims' perspective, could be lost if outreach to victims is not successful in providing the sense of justice and recognition that victims deserve and need.

Concludingly, the path forward is long regarding both processes and it is all but clear that the processes will be successful in the sense that Myanmar and/or individuals are held accountable for the reported atrocities against members of the Rohingya group. In many ways, e.g. jurisdiction, meeting standards of proof, conducting investigations where there is no state cooperation, ensuring reparations to victims and so on, both processes can be seen as somewhat of a gamble by The Gambia and the Prosecutor respectively as the outcomes of the proceedings are all but certain and the stakes for victims, the ICC and the international community are high.

Nevertheless, the mere existence of these responses by the international community, including the establishment of the IIFFMM and the IIMM, to the reported atrocities committed in Myanmar (and Bangladesh) are, arguably, to be considered small victories in themselves, as there is a symbolic value in the fact that events like the present ones will not go under the radar of the existing international judicial institutions. This is also true in relation to victims, as they actually get to be listened to and recognized by the international community. Ideally, victims would have standing in the ICJ, and the ICC would not be limited by jurisdiction because of the unwillingness of states to accede to the Rome Statute. However, in a world of international law built upon the basis of, and limited by, sovereignty of states, that is not the case. Perhaps, thus, the best way of understanding the two processes and their roles in the world of international law is as two processes through which the international community is trying, with the tools available, to hold perpetrators accountable for the atrocities against the Rohingya in Myanmar.

[250] See section 4.3.1.

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