

# The Rape of the Rohingya: Road towards Gender Justice?

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## PREFACE

1. As an unwanted, ever-persecuted minority living in Myanmar, the Rohingya have been victims of human rights violations for many years. On 25 August 2017, a brutal campaign of violence began, changing their lives forever. To escape the suffering and destruction, more than half of the population has fled to neighbouring Bangladesh. During the conflict, thousands of Rohingya were killed, houses were burned to the ground and women became the victim of sexual violence. Soldiers of the Tatmadaw, the Burmese military, brutally raped, gang raped and mutilated women and children alike. Nevertheless, the Burmese government continues to deny the allegations made against it, hence allowing the perpetrators to walk free.

My paper “The Rape of the Rohingya: Road towards Gender Justice?” attempts to shed a light on the gruesome atrocities that these Rohingya women suffered. It examines whether the persistent culture of impunity regarding sexual violence can be put to an end by prosecuting the perpetrators at the international level. Therefore, it looks into the possibilities of prosecution before the International Criminal Court, where individual perpetrators can be held liable for genocide, crimes against humanity and war crimes.

Before I started this paper, my knowledge of the Rohingya community was limited, but as I conducted my research, I became committed to their hardship. I hope that there will come an end to the Rohingya’s suffering and that the victims of sexual violence will receive justice. Sexual violence must not be regarded as an inevitable by-product of war but must be taken as seriously as any other crime. Effective prosecution is an important step on the road to gender justice, hence ending the culture of impunity regarding sexual violence once and for all.

# 1. INTRODUCTION

## 1.1. SUMMARY

2. Since October 2016, violence has escalated in northern Rakhine State, Myanmar. The Burmese security forces, also called the ‘Tatmadaw’, have committed numerous human rights violations against the Rohingya, a Muslim minority, as a campaign of ethnic cleansing.<sup>1</sup> The Burmese government claims that the Rohingya do not deserve Burmese citizenship and considers them as illegal Bengali.<sup>2</sup> Multiple human rights reports indicate the atrocities that were committed. Besides persecution, death and destruction of their homes, the Rohingya women have also faced sexual violence. Many Rohingya victims have testified of rape and other forms of sexual violence committed during the Burmese security operations.<sup>3</sup> One of the rape victims testified: “*I was crying but they tore off all of my clothes.... They hit my children while raping me.... I went unconscious. The first thing I remember when I woke again was my children screaming that their mother was dead. I was 4-months’ pregnant [and] I bled so much I was afraid that I would lose the baby.*”<sup>4</sup> The UN Office of the High Commissioner for Human Rights (OHCHR) has concluded that the attacks against the Rohingya by the Tatmadaw very likely constitute war crimes and crimes against humanity.<sup>5</sup>

As a result of the persecution, a major part of the Rohingya population has fled to Bangladesh. This has led to a growing refugee crisis. The latest report of the UN Refugee Agency shows that ca. 880,000 Rohingya are staying in the refugee camps of Cox’s Bazar region, Bangladesh.<sup>6</sup> In the camps, the victims of sexual violence have to deal with unwanted pregnancy, physical injuries and

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<sup>1</sup> N. MESSNER, A. WOODS, A. PETTY, P.K. PARMAR, J. LEIGH, E. THOMAS, D. CURRY, H. VENTERS, A. GILBERT, T. NELSON and E. LESTER, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 4; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, Human Rights Watch report, 16 November 2017, 1.

<sup>2</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 2.

<sup>3</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 2; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-22; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 179-180; “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 5.

<sup>4</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, Human Rights Watch report, 16 November 2017, 18.

<sup>5</sup> “Situation of human rights of Rohingya Muslims and other minorities in Myanmar”, UN Human Rights Council report, 3 September 2020, 5.

<sup>6</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 2; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, Human Rights Watch report, 16 November 2017, 13; “Operational Update External”, UNHCR Bangladesh, March 2021, <https://data2.unhcr.org/en/documents/details/86333> (consulted on 1 May 2021).

trauma.<sup>7</sup> Nonetheless, there is insufficient post-rape care provided to these women and so their suffering continues. Concerns exist that women will or have already become victim of more sexual violence in those camps.<sup>8</sup>

The Rome Statute of the International Criminal Court explicitly recognizes rape and other forms of sexual violence as crimes against humanity and war crimes.<sup>9</sup> Nevertheless, sexual violence in armed conflicts often goes unpunished. This paper attempts to shed a light on how sexual violence is dealt with by the International Criminal Court (ICC). More specifically, it examines how and if the sexual violence that was committed against the Rohingya women can be prosecuted before the ICC. It focuses on two issues in particular: whether the ICC has jurisdiction over this situation and whether the sexual violence constitutes genocide, crimes against humanity and/or war crimes. The crime of aggression is not relevant and will thus not be discussed.

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<sup>7</sup> “For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence - special report”, UN News, 11 May 2018, <https://news.un.org/en/story/2018/05/1009372> (consulted on 1 May 2021).

<sup>8</sup> “Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh”, *UN Office of the High Commissioner for Human Rights* report, 11 October 2017, 11; “Sexual violence devastating, humanitarian needs mounting in Rohingya crisis”, *UNFPA News*, 20 October 2017, <https://www.unfpa.org/news/sexual-violence-devastating-humanitarian-needs-mounting-rohingya-crisis> (consulted on 1 May 2021); “Failing Rohingya Rape Victims in Bangladesh”, *Human Rights Watch*, 23 February 2018, <https://www.hrw.org/news/2018/02/23/failing-rohingya-rape-victims-bangladesh> (consulted on 1 May 2021); “Rohingya refugees allege sexual assault on Bangladeshi island”, *The Guardian*, 22 September 2020, <https://www.theguardian.com/world/2020/sep/22/rohingya-refugees-allege-sexual-assault-on-bangladeshi-island> (consulted on 1 May 2021).

<sup>9</sup> Art. 7 (1) (g) and 8 (2) (b) (xxii) and (c) (vi) UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998.

## 1.2. METHODOLOGY

### 1.2.1. Choice of case

3. This research examines the prosecution of sexual violence against Rohingya women before the ICC. Therefore, a case study is conducted. This specific case was chosen for its relevance in the current international discourse. On 14 November 2019, the ICC authorised the Prosecutor to start an investigation into the situation in Bangladesh and Myanmar.<sup>10</sup> The current investigation, however, focuses primarily on deportations from Myanmar to Bangladesh. Up until now, there has been very little attention to sexual violence that was committed against the Rohingya women.<sup>11</sup> This makes it an interesting angle. This paper does not only examine whether prosecution would be possible in the current investigation before the ICC, but also in possible investigations in the future. Since the attention for the atrocities committed against the Rohingya is quite recent, especially the attention to sexual violence, this subject allows to examine an area of international law that has not been exhausted yet. Therefore, this paper can be a contribution to the jurisprudence on gender-related issues before the ICC.

The Rohingya have known violence for many centuries.<sup>12</sup> Of course, not all of these events of the past can be discussed. Therefore, a specific timeframe must be chosen. In October 2016, a conflict between a Rohingya extremist group and the Tatmadaw led to excessive violence against the Rohingya population as a whole. It started a campaign of ethnic cleansing that drove hundreds of thousands of Rohingya to Bangladesh.<sup>13</sup> A second wave of violence started in August 2017, a period of which many Rohingya women testify of rape and sexual violence.<sup>14</sup>

Hence, the decision was made to only investigate the sexual violence that was committed since August 2017.

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<sup>10</sup> “ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar”, *ICC Press Release*, 14 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495> (consulted on 1 May 2021).

<sup>11</sup> “Statement of the Office of the Prosecutor of the International Criminal Court as delivered at the press conference in Dhaka, Bangladesh”, *International Criminal Court*, 4 February 2020, <https://www.icc-cpi.int/Pages/item.aspx?name=20200204-otp-statement> (consulted on 1 May 2021).

<sup>12</sup> S. AKHTER and K. KUSAKABE, “Gender-based Violence among documented Rohingya Refugees in Bangladesh”, *Indian Journal of Gender Studies*, 2014, Vol. 21 No. 2, 225-226.

<sup>13</sup> N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 2; “Myanmar: Crimes Against Rohingya Go Unpunished”, *Human Rights Watch*, 22 August 2019, <https://www.hrw.org/news/2019/08/22/myanmar-crimes-against-rohingya-go-unpunished> (consulted on 1 May 2021).

<sup>14</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 2; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 2.

### 1.2.2. *Limitations*

4. The scope of the research subject is limited to the following. Although the Rome Statute emphasizes that the ICC is only complementary to the national criminal jurisdiction, the prosecution under domestic law is excluded. Therefore, this paper will not examine the law of Myanmar or Bangladesh. It is only based on international law. This is justified, because it is highly unlikely that Myanmar itself will prosecute sexual violence. The authorities of Myanmar have denied the human rights violations up until now.<sup>15</sup> Aung San Suu Kyi, the then de facto leader of Myanmar, has denied the genocide before the International Court of Justice.<sup>16</sup>

Within the area of international law, this paper focuses on prosecution before one specific institution: the International Criminal Court. Consequently, possible prosecution before the International Court of Justice or another international tribunal is not discussed. This paper examines two specific legal issues: the jurisdiction of the ICC and the legal grounds, more specifically prosecution on the basis of the crime of genocide, crimes against humanity and war crimes. The crime of aggression is not discussed since this has no relevance regarding sexual violence. Furthermore, the procedural aspects of a possible trial are generally not discussed. No attention is given to the rights of the accused, participation of victims, penalties, possibility of appeal and revision, enforcement, etc. However, evidence is briefly touched upon, as this is necessary when examining the facts and the plausibility of the case before the ICC. Although it is an interesting angle, the paper neither discusses the role that the victims play in the process or the redress that they might receive. This would make the scope of the research too broad for the available time.<sup>17</sup>

### 1.2.3. *Evaluative question*

5. The research question is an evaluative question, meaning that it assesses a legal concept in the light of a certain norm.<sup>18</sup> In this research, it is

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<sup>15</sup> Myanmar rejects 'false allegations' in U.N. genocide report", *Reuters*, 29 August 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKCN1LE0AC> (consulted on 1 May 2021); "Myanmar: Crimes Against Rohingya Go Unpunished", *Human Rights Watch*, 22 August 2019, <https://www.hrw.org/news/2019/08/22/myanmar-crimes-against-rohingya-go-unpunished> (consulted on 1 May 2021).

<sup>16</sup> "Aung San Suu Kyi Denies Burmese Genocide of Rohingya at The Hague", *Human Rights Watch*, 17 December 2019, <https://www.hrw.org/news/2019/12/17/aung-san-su-kyi-denies-burmese-genocide-rohingya-hague> (consulted on 1 May 2021).

<sup>17</sup> L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Acco, Leuven, 2017, 24-25.

<sup>18</sup> L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Acco, Leuven, 2017, 64; A.R. MACKOR, "Legal doctrine as a non-normative discipline", *Law and Method*, 2012, Vol. 2 No. 1, 24-25; H. TIJSSSEN, *De juridische dissertatie onder de loep*, Boom Juridische uitgevers, The Hague, 2009, 58; G. VAN DIJCK, *Kwaliteit van de juridische annotatie*, Boom Juridische uitgevers, The Hague, 2011, 79; B.M.J. VAN KLINK and L.M. POORT, "De normativiteit van de rechtswetenschap. Een pleidooi voor meer reflectie op de normatieve basis van het recht en de rechtswetenschap", *Rechtsgeleerd magazijn Themis*, 2013, Vol. 6, 259.

assessed whether the ICC is competent to prosecute the sexual violence committed against the Rohingya women, in the light of the Rome Statute. Therefore, this paper evaluates whether the Rome Statute possesses the adequate means to prosecute the committed crimes. The two sub-questions make the central research question more concrete and are both evaluative in nature as well. First, this paper examines whether the ICC has jurisdiction over the case. Second, it examines the legal grounds on which the sexual violence can be prosecuted. In general, it evaluates whether the conditions in the Rome Statute are met, in order that the Court can prosecute these crimes.<sup>19</sup>

Since the research question is an evaluative question, evaluation criteria are used. These criteria are strictly internal. External criteria are not used. This is justified, because the research question is a legal question that is not influenced by other academic disciplines.<sup>20</sup> Different evaluation criteria are used for the two sub-questions. For the first sub-question, the criteria are: the territoriality principle, the nationality principle, Article 13 of the Rome Statute, etc. These internal criteria determine whether the ICC has jurisdiction or not. For the second sub-question, the first and foremost internal criteria that are used are the descriptions of the three core crimes in the Rome Statute, namely genocide, crimes against humanity and war crimes. These criteria are complemented by the different elements of these crimes set out in the Elements of Crimes (EoC), the interpretation of these crimes in the case law of the ICC and in the case law of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These criteria determine whether the sexual violence can be considered genocide, war crimes or crimes against humanity.<sup>21</sup>

#### 1.2.4. Sources

6. Since this research constitutes a case study, special importance is given to facts and their reliability. However, its scope does not allow it to conduct its own factual investigations in Myanmar and Bangladesh. Therefore, the research relies on human rights reports from reliable human rights organisations, such as the UN Human Rights Council, Human Rights Watch and Amnesty International. News articles from reliable sources are also used. Factual information regarding the ongoing investigation before the ICC and the future

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<sup>19</sup> J.M. BARENDRECHT, J.B.M. VRANKEN, I. GIESEN, M.J. BORGERS, W. VAN DER BURG, H.E.B. TIJSSSEN, G.C.G.J. VAN ROERMUND and W.H. VAN BOOM, "Methoden van rechtswetenschap: komen we verder?", *Nederlands Juristenblad*, 2004, Vol. 79 No. 28, 5-6; L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Acco, Leuven, 2017, 32.

<sup>20</sup> R. CRYER, T. HERVEY and B. SOKHI-BULLEY, *Research methodologies in EU and international law*, Hart Publishing, Oxford, 2011, 10; L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Acco, Leuven, 2017, 64-65; A.R. MACKOR, "Legal doctrine as a non-normative discipline", *Law and Method*, 2012, Vol. 2 No. 1, 24-25; B.M.J. VAN KLINK and L.M. POORT, "De normativiteit van de rechtswetenschap. Een pleidooi voor meer reflectie op de normatieve basis van het recht en de rechtswetenschap", *Rechtsgeleerd magazijn Themis*, 2013, Vol. 6, 259.

<sup>21</sup> L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Acco, Leuven, 2017, 64-65.

developments hereabout, are retrieved from news updates and reports published by the ICC itself and from news articles from reliable sources.

In order to apply the relevant legal sources to the Rohingya case, the following approach is used. The starting point is the relevant provisions of the Rome Statute. These have the highest authority, since the Rome Statute is a legally binding convention.<sup>22</sup> It is the Rome Statute that determines the core crimes that can be prosecuted before the ICC. These core crimes are further developed in the Elements of Crimes, which were adopted by a two-third majority of the members of the Assembly of State Parties.<sup>23</sup> They are intended to assist the Court in the interpretation and application of Articles 6, 7, 8 and 8*bis* of the Rome Statute. As the EoC are subordinate to the Rome Statute itself, they must be consistent with the Statute.<sup>24</sup> Thus, in the second step, the EoC are applied to the case.

It is only in a second phase that this research examines case law, since case law is a non-binding source under international law.<sup>25</sup> It only helps to interpret the provisions of the Rome Statute and the EoC. The case law that is primarily examined, is the case law of the ICC itself. It is important to note, however, that the ICC is not bound by its own decisions and can thus deviate from them in future cases.<sup>26</sup> The Court's practice shows that the approach of the Chambers differs from case to case. In some cases, they refer to previous case law, whereas in other cases, the judges deviate from their previous decisions.<sup>27</sup> If the case law of the ICC does not provide sufficient information, case law of other international tribunals is discussed. In the first place, it concerns case law of the ICTY and the ICTR. These two ad hoc tribunals have convicted multiple persons for sexual violence in the past.<sup>28</sup> Once again, the ICC is not bound by the decisions taken by these ad hoc tribunals. Nonetheless, they can be influential. Article 21 Rome Statute provides the legal basis for the ICC to rely on case law of other international tribunals.<sup>29</sup> On the one hand, it can be used to interpret the Rome Statute, the EoC and the Rules of Procedure and Evidence

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<sup>22</sup> Art. 21 (1) (a) Rome Statute.

<sup>23</sup> Art. 9 (1) Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 84-85.

<sup>24</sup> Art. 9 (1) and (3) and 21 (1) Rome Statute.

<sup>25</sup> Art. 38 UN General Assembly, *Statute of the International Court of Justice*, 26 June 1945.

<sup>26</sup> Art. 21 (2) Rome Statute; G. BITTI, "Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC" in C. STAHN and G. SLUITER (eds.), *The emerging practice of the International Criminal Court*, Koninklijke Brill NV, Leiden, 2009, (285) 292.

<sup>27</sup> G. BITTI, "Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC" in C. STAHN and G. SLUITER (eds.), *The emerging practice of the International Criminal Court*, Koninklijke Brill NV, Leiden, 2009, (285) 292-293.

<sup>28</sup> K.D. ASKIN, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003", *Human Rights Brief*, 2004, Vol. 11 No. 3, 16-19.

<sup>29</sup> Art. 21 (1) (b) Rome Statute; G. BITTI, "Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC" in C. STAHN and G. SLUITER (eds.), *The emerging practice of the International Criminal Court*, Koninklijke Brill NV, Leiden, 2009, (285) 296-297.

(RPE). On the other hand, the case law can fill possible gaps in the primary sources, when its principles have become customary international law or general principles of law.<sup>30</sup> The practice of the ICC shows that the judges often consider the decisions of other international tribunals. In the *Lubanga* case, the importance of the practice of other international tribunals was explicitly acknowledged. Nevertheless, the Court stresses that other tribunals' rules and decisions cannot be automatically transposed to the context of the ICC.<sup>31</sup> Thus, some caution must be at hand.

Alongside the legislation and case law, jurisprudence is also discussed. This is relevant, because it provides an overview of the majority opinion and it elaborates further on the relevant case law and the provisions of the Rome Statute. On the one hand, this paper looks at authoritative handbooks and introductory works to have a general overview of the legal context. On the other hand, it focuses on specialised articles by relevant authors.

### 1.3. STRUCTURE

7. Following this introductory chapter, the background information of the Rohingya conflict is discussed in the second chapter. First, a general overview is given of the Rohingya people, their history and the development of the conflict up until now. Then, a more specific analysis is provided of the sexual violence that was committed, according to human rights reports. The chapter is concluded with an overview of the different actions that are currently being taken on the international level.

The legal analysis will be conducted in the third chapter on the prosecution before the ICC. The analysis is divided in two main parts: the jurisdiction of the Court and the core crimes. The part on jurisdiction discusses the different forms of jurisdiction, namely jurisdiction *ratione temporis*, jurisdiction *ratione personae* and jurisdiction *ratione loci*. These principles are applied to the situation in Myanmar and Bangladesh. In the part on the core crimes, the research zooms in on the jurisdiction of the Court *ratione materiae*. The crimes of genocide, crimes against humanity and war crimes are subsequently discussed and applied to the Rohingya case.

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<sup>30</sup> H. BRADY, "The power of precedents: using the case law of the ad hoc international criminal tribunals and hybrid courts in adjudicating sexual violence and gender-based crimes at the ICC", *Australian Journal of Human Rights*, 2012, Vol. 18 No. 2, 78.

<sup>31</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial", ICC (Trial Chamber I), 30 November 2007, ICC-01/04-01/06, para. 45; H. BRADY, "The power of precedents: using the case law of the ad hoc international criminal tribunals and hybrid courts in adjudicating sexual violence and gender-based crimes at the ICC", *Australian Journal of Human Rights*, 2012, Vol. 18 No. 2, 80.



## 2. BACKGROUND INFORMATION

### 2.1. THE ROHINGYA PEOPLE

8. The Rohingya people are a Muslim and ethnic minority in northern Rakhine State, Myanmar. Rakhine State is the most western state of Myanmar and borders with Bangladesh. It is rather isolated from central Myanmar, due to the mountain range that surrounds it.<sup>32</sup> Before the current migration crisis, the Rohingya in Rakhine State were estimated to be one million people. Myanmar is ethnically very diverse, as forty percent of its population consists of minority groups. The majority of the population in Rakhine State is comprised of Buddhists.<sup>33</sup>

The United Nations (UN) have called the Rohingya ‘the most persecuted minority in the world’. Since the Second World War, the Rohingya have faced discrimination and violence by both the local Buddhists and the Burmese government. They are often called ‘Bengali’, because the Burmese government considers them as illegal immigrants from Bangladesh.<sup>34</sup> Only populations that the government has listed as ‘*taing-yin-tha*’, from which the Rohingya are excluded, are considered as indigenous and can obtain full citizenship. As a result, the Rohingya have very limited access to Burmese citizenship and the vast majority of them remains stateless.<sup>35</sup>

There is a lot of discussion about the historical origin of the Rohingya. According to Rohingya historians, there were multiple waves of Muslim migration to Rakhine State, which was formally called Arakan until 1989. The first wave would have already taken place in the sixth century, attributable to the arrival of Arab traders. These Muslims would have spread the Islamic faith in the region. In total, four waves would have occurred. The Rohingya historians place great emphasis on their pre-1823 presence in the region, before the arrival of the British, as this would prove that they are *taing-yin-tha*.<sup>36</sup> Nonetheless, this

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<sup>32</sup> A. IBRAHIM, *The Rohingyas. Inside Myanmar's Hidden Genocide*, Hurst & Company, London, 2016, 18; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, 7 April 2000, 5.

<sup>33</sup> A.K. LOWENSTEIN, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, *International Human Rights Clinic at Yale Law School*, 2015, 5; A.A. ULLAH, “Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization”, *Journal of Immigrant & Refugee Studies*, 2011, Vol. 9 No. 2, 140-142.

<sup>34</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 23-25.

<sup>35</sup> N. CHEESMAN, “How in Myanmar “National Races” Came to Surpass Citizenship and Exclude Rohingya”, *Journal of contemporary Asia*, 2017, Vol. 47 No. 3, 471; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 23-25.

<sup>36</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, 428

view is rejected by Rakhine Buddhists and the official state histories of Myanmar, which claim that the Rohingya do not form part of the history of Myanmar and only arrived as illegal immigrants in the colonial period.<sup>37</sup> Even though the historical origin of the Rohingya is controversial, there is sufficient evidence of the presence of the Rohingya in Arakan already in the early nineteenth century.<sup>38</sup>

## 2.2. HISTORY OF THE CONFLICT

### 2.2.1. Situation until 2012

9. Arakan was an independent kingdom until 1784, when it became part of the Burmese empire. Rohingya historians claim that it was already in this period that the Burmese tried to drive the Muslims out of the region. In the First Anglo-Burmese War (1824-1826), the British conquered Arakan and it became part of British India.<sup>39</sup> During this period, many Rohingya returned to Arakan after they had fled the Burmese persecution. The Burmese and Rakhine, however, claim that the Rohingya only arrived in Rakhine State for the first time in this period.<sup>40</sup>

The ethnic cleansing of the Rohingya started in the Second World War, when many Muslim villages were destroyed and even more Muslims were killed. Approximately 307 villages were wiped out and 100,000 Rohingya were massacred. The war also led to a territorial segregation between the Rohingya in the north and the Buddhists in the south. At that time, the Burmese started seeing the Rohingya population as a national threat.<sup>41</sup>

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Singapore, 2019, (17) 21-23; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, New York, 2019, 79-94; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, 7 April 2000, 5.

<sup>37</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691; S.C. DRUCE, "Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis" in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 19; N. KIPGEN, "Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum", *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300.

<sup>38</sup> A. IBRAHIM, *The Rohingyas. Inside Myanmar's Hidden Genocide*, Hurst & Company, London, 2016, 25.

<sup>39</sup> S.C. DRUCE, "Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis" in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 23-24; A. IBRAHIM, *The Rohingyas. Inside Myanmar's Hidden Genocide*, Hurst & Company, London, 2016, 18; A.A. ULLAH, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization", *Journal of Immigrant & Refugee Studies*, 2011, Vol. 9 No. 2, 143; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, New York, 2019, 95-104.

<sup>40</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691, 695; S.C. DRUCE, "Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis" in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 19, 24; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, New York, 2019, 95-104.

<sup>41</sup> A. IBRAHIM, *The Rohingyas. Inside Myanmar's Hidden Genocide*, Hurst & Company, London, 2016, 27; N. ISLAM, "Rohingya: A people Under Endless Tyranny", *Asian Affairs: An American Review*, 2020, Vol. 48 No. 1, 4; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, 429

After one hundred years of British occupation, Myanmar declared itself an independent state in 1948.<sup>42</sup> The new regime favoured the Buddhists, who were considered as the true Burmese. The Burmese security forces, the Tatmadaw, gained a central role in the new state.<sup>43</sup>

In March 1962, General Ne Win took over the power and established an authoritarian regime, in which the situation of the Rohingya worsened. They were declared aliens and Muslim officials in the military and in the administration were rapidly dismissed.<sup>44</sup> In 1982, the notorious Citizenship Law was adopted, which extremely limited the Rohingya's access to Burmese citizenship. The Rohingya are automatically excluded, as only the 135 'national races' can obtain full citizenship. If they meet certain ancestral requirements, they can qualify for the lesser 'naturalised citizenship', which does not grant any political rights. However, many Rohingya lack official documents and thus they remain excluded.<sup>45</sup> In 1978, the Burmese military started the operation 'Nagamin', which consisted of taking military actions against illegal immigrants. More than 200,000 Rohingya fled to Bangladesh, where they also faced bare conditions. In Myanmar itself, the government confiscated Rohingya lands and forced many of them to leave their villages.<sup>46</sup>

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New York, 2019, 95-104; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, 7 April 2000, 6.

<sup>42</sup> N. ISLAM, "Rohingya: A people Under Endless Tyranny", *Asian Affairs: An American Review*, 2020, Vol. 48 No. 1, 4; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, New York, 2019, 95-104.

<sup>43</sup> A. IBRAHIM, *The Rohingyas. Inside Myanmar's Hidden Genocide*, Hurst & Company, London, 2016, 36; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, 7 April 2000, 6.

<sup>44</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 697; N. ISLAM, "Rohingya: A people Under Endless Tyranny", *Asian Affairs: An American Review*, 2020, Vol. 48 No. 1, 5-6; A.K. LOWENSTEIN, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", *International Human Rights Clinic at Yale Law School*, 2015, 6-10.

<sup>45</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 699; S.C. DRUCE, "Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis" in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 30; N. KIPGEN, "Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum", *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A.A. ULLAH, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization", *Journal of Immigrant & Refugee Studies*, 2011, Vol. 9 No. 2, 149; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, 7 April 2000, 18; "Myanmar: The Rohingya minority: Fundamental rights denied", *Amnesty International* report, 18 May 2004, 9; "Detailed findings on the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 16 September 2019, 19.

<sup>46</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 702; S.C. DRUCE, "Myanmar's Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis" in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 30-31; A.K. LOWENSTEIN, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", *International Human Rights Clinic at Yale Law School*, 2015, 6-10; "International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan", *International Federation of Human Rights League* report, 7 April 2000, 6.

<sup>10</sup> Since the start of the campaign of ethnic cleansing in 1978, violence against the Rohingya has been constant. In 1992, the NaSaKa, a military border force, was established. With the authorisation of the Burmese government, the NaSaKa was responsible for large-scale abuse, consisting of forced labour, forced evictions and rape. The Rohingya were disproportionately affected by this violence in comparison with other ethnic groups.<sup>17</sup> Throughout the 1990s and 2000s, human rights violations against the Rohingya continued.<sup>18</sup>

### 2.2.2 Escalation of violence since 2012

11. The recent violence in Rakhine State occurred in three large waves, starting in 2012. After the first wave, the situation was relatively stable until the violence escalated again in 2016. And finally, August 2017 marks the beginning of the third wave, which is the focal point of this research.

On 28 May 2012, a Rakhine Buddhist woman was brutally raped and murdered. The local Burmese police arrested three suspects, all three Muslims. In response, a Rakhine mob besieged the police station and demanded that the attackers would be handed over. The tensions between the two groups, local Rakhine Buddhists and Muslims, were rising. Three days later, a group of Muslims on a bus was murdered by a group of Rakhine. The violence escalated quickly.<sup>19</sup>

Rakhine Buddhist organisations held meetings and distributed pamphlets on how the Rohingya could be forced out of Myanmar.<sup>20</sup> Eventually, the government declared a state of emergency, whereby the military was authorised to take over the administrative functions in the region. The Tatmadaw, however, are alleged to have increased the violence against the Rohingya community.<sup>21</sup>

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<sup>17</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 710-713; A.A. ULLAH, “Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization”, *Journal of Immigrant & Refugee Studies*, 2011, Vol. 9 No. 2, 145-146; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, 7 April 2000, 7.

<sup>18</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 713.

<sup>19</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 35; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300-301; “An open prison without end. Myanmar’s mass detention of Rohingya in Rakhine State”, *Human Rights Watch* report, 8 October 2020, 1.

<sup>20</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 35; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 306; “An open prison without end. Myanmar’s mass detention of Rohingya in Rakhine State”, *Human Rights Watch* report, 8 October 2020, 1.

<sup>21</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, 431

The situation escalated again in October 2012. Across Rakhine State, attacks were organised against Muslims, presumably by Buddhist organisations. More than 100,000 Muslims were removed from their homes and were confined in internally displaced people (IDP) camps.<sup>52</sup> Travel restrictions were imposed, resulting in an even stronger separation between the Muslim and Buddhist communities. Furthermore, these restrictions hindered the access of the Rohingya people to education, markets and health services.<sup>53</sup>

The detainment in IDP camps, the restricted access to fundamental services and the long history of systemic discrimination caused a growing despair in the Rohingya community, leading to the second and third wave of violence. Terrorist groups were rising in Rakhine State on both the Buddhist and the Muslim side. One of these groups was ARSA, the Arakan Rohingya Salvation Army. ARSA was responsible for two organised attacks directed against Burmese security forces in October 2016 and August 2017.<sup>54</sup> On 25 August 2017, ARSA attacked several security force outposts in Rakhine State, leading to the death of twelve members of the Tatmadaw. This led to harsh repercussions from the Burmese military, the so-called ‘clearance operations’. During these operations, the Tatmadaw surrounded the Rohingya villages and burned them down. While doing so, they committed atrocities against the Rohingya in an organised and systematic manner, including killings, sexual violence and destruction of homes.<sup>55</sup>

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Singapore, 2019, (17) 35; A.K. LOWENSTEIN, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, *International Human Rights Clinic at Yale Law School*, 2015, 19-20; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 37-38.

<sup>52</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 35; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 304; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 40; “All you can do is pray. Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State”, *Human Rights Watch* report, 22 April 2013, 6.

<sup>53</sup> A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 40; “All you can do is pray. Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State”, *Human Rights Watch* report, 22 April 2013, 6.

<sup>54</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 41-42; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 48-56.

<sup>55</sup> S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 41-42; R.J. HAAR, K. WANG, H. VENTERS, S. SALONEN, R. PATEL, T. NELSON, R. MISHORI and P.K. PARMAR, “Documentation of human rights abuses among Rohingya refugees from Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 42, 2; N. MESSNER, et al., “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 2; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 12; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* 432

### 2.2.3. Present-day conflict

12. Thousands of Rohingya are still confined in IDP camps across Rakhine State, because of the severe movement restrictions imposed by the government. In addition, many villages have been destroyed. More than two hundred settlements have been eradicated entirely.<sup>56</sup> In the IDP camps, the conditions are very poor. There is a lack of food, drinking water and healthcare. According to Rohingya testimonies, pregnant women do not receive adequate healthcare, resulting in high maternal mortality rates. Furthermore, humanitarian organisations, on which the Rohingya largely depend, are often not allowed in the camps. Besides the unbearable conditions in the camps, the movement restrictions also heavily impact the Rohingya's basic economic, social and cultural rights. Many have lost their jobs and their lands, which impedes them to farm their own food. They cannot find new employment and their children cannot attend school.<sup>57</sup>

The government has not undertaken any action to improve the legal situation of the Rohingya. On the one hand, discriminatory legislation, such as the 1982 Citizenship Law, is still in force.<sup>58</sup> The government has been forcing the Rohingya to accept National Verification Cards (NVCs), that identify the Rohingya as non-citizens. Many Rohingya have testified that they were forced to accept a NVC, under the threat that otherwise their village would be burned down or their people would be killed. These NVCs mark the Rohingya as Bengali and strongly encourage discriminatory practices.<sup>59</sup> In addition, there are

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report, 22 August 2019, 19; "An open prison without end. Myanmar's mass detention of Rohingya in Rakhine State", *Human Rights Watch* report, 8 October 2020, 3.

<sup>56</sup> "Detailed findings on the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 16 September 2019, 5.

<sup>57</sup> N. ISLAM, "Rohingya: A people Under Endless Tyranny", *Asian Affairs: An American Review*, 2020, Vol. 48 No. 1, 9-10; A.K. LOWENSTEIN, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", *International Human Rights Clinic at Yale Law School*, 2015, 19-20; A. WARE, *Myanmar's 'Rohingya' Conflict*, Oxford University Press, New York, 2019, 30-31; "Report of the Special Rapporteur on the situation of human rights in Myanmar", *UN Human Rights Council* report, 9 March 2018, 12; "Detailed findings on the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 16 September 2019, 5; "An open prison without end. Myanmar's mass detention of Rohingya in Rakhine State", *Human Rights Watch* report, 8 October 2020, 5-8; "Myanmar: Mass Detention of Rohingya in Squalid Camps", *Human Rights Watch*, 8 October 2020, <https://www.hrw.org/news/2020/10/08/myanmar-mass-detention-rohingya-squalid-camps> (consulted on 1 May 2021).

<sup>58</sup> "Exclusive: Myanmar rejects citizenship reform at private Rohingya talks", *Reuters*, 27 June 2018, <https://www.reuters.com/article/us-myanmar-rohingya-meeting-exclusive-idUSKBN1JN0D7> (consulted on 1 May 2021).

<sup>59</sup> "Report of the Special Rapporteur on the situation of human rights in Myanmar", *UN Human Rights Council* report, 9 March 2018, 12-13; "Tools of genocide": National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar", *Fortify Rights* report, 3 September 2019, 44-45, 49; "Detailed findings on the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 16 September 2019, 20-26; "Genocide card: Myanmar Rohingya verification scheme condemned", *Al Jazeera*, 3 September 2019, <https://www.aljazeera.com/news/2019/9/3/genocide-card-myanmar-rohingya-verification-scheme-condemned> (consulted on 1 May 2021); "Myanmar: New Evidence of Denial of Rohingya Citizenship", *Fortify Rights*, 16 January 2020, <https://www.fortifyrights.org/mya-inv-2020-01-16/> (consulted on 1 May 2021).

severe restrictions on the possibilities of Rohingya to marry and to have children.<sup>60</sup> On the other hand, the government has not effectively investigated the human rights violations that occurred in the clearance operations in 2017 and the following years. Those who are responsible remain unpunished.<sup>61</sup> It is uncertain, however, what the recent military coup will bring. On 1 February 2021, the Tatmadaw and its leader Senior General Min Aung Hlaing seized power in a coup d'état and removed Aung San Suu Kyi from power.<sup>62</sup> It has heightened the feelings of fear and despair among the Rohingya. But the coup has also united the Rohingya with other minorities in Myanmar, as they now have a common enemy.<sup>63</sup>

To escape the violence and neglect, tens of thousands of Rohingya have fled Myanmar to neighbouring countries, primarily Bangladesh. They often undertake a dangerous journey by boat across the Bay of Bengal or they fall prey to human trafficking.<sup>64</sup> A Rohingya woman testified: “*We know we will die in the sea. If we reach there, we will be lucky; if we die, it is okay because we have no future here.*”<sup>65</sup> The Rohingya women often face even more sexual violence while fleeing from Myanmar. Multiple women testified that they were sexually assaulted during searches at checkpoints.<sup>66</sup> When the refugees finally arrive in Bangladesh, they are often pushed back to Myanmar. Currently, approximately

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<sup>60</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “Myanmar: The Rohingya minority: Fundamental rights denied”, *Amnesty International* report, 18 May 2004, 30-31; “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar”, *Fortify Rights* report, 25 February 2014, 24.

<sup>61</sup> “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 5-6.

<sup>62</sup> “Timeline of events in Myanmar since February 1 coup”, *Al Jazeera*, 23 February 2021, <https://www.aljazeera.com/news/2021/2/23/timeline-of-events-in-myanmar-since-february-1-coup> (consulted on 1 May 2021); “Myanmar’s Coup and Violence, Explained”, *The New York Times*, 24 April 2021, <https://www.nytimes.com/article/myanmar-news-protests-coup.html> (consulted on 1 May 2021).

<sup>63</sup> “Rohingya Activists Are Hoping That the Coup in Myanmar Will Be a Turning Point for Their Struggle”, *Time*, 8 February 2021, <https://time.com/5936604/myanmar-coup-rohingya/> (consulted on 1 May 2021); “‘We cannot hope for anything good’: Myanmar coup sparks despair for Rohingya”, *The Guardian*, 14 February 2021, <https://www.theguardian.com/global-development/2021/feb/14/we-cannot-hope-for-anything-good-myanmar-coup-sparks-despair-for-rohingya> (consulted on 1 May 2021); “Is the Myanmar coup a turning point for the Rohingya?”, *Al Jazeera*, 17 February 2021, <https://www.aljazeera.com/program/inside-story/2021/2/17/is-the-myanmar-coup-a-turning-point-for-the-rohingyas> (consulted on 1 May 2021).

<sup>64</sup> N. ISLAM, “Rohingya: A people Under Endless Tyranny”, *Asian Affairs: An American Review*, 2020, Vol. 48 No. 1, 11-12; “An open prison without end. Myanmar’s mass detention of Rohingya in Rakhine State”, *Human Rights Watch* report, 8 October 2020, 7; “Rohingya survivors tell of misery and death at sea; hundreds still adrift”, *Reuters*, 3 May 2020, <https://www.reuters.com/article/idUSKBN22F0QA> (consulted on 1 May 2021).

<sup>65</sup> “An open prison without end. Myanmar’s mass detention of Rohingya in Rakhine State”, *Human Rights Watch* report, 8 October 2020, 7.

<sup>66</sup> “Briefing: Myanmar forces starve, abduct and rob Rohingya, as ethnic cleansing continues”, *Amnesty International* report, 7 February 2018, 5-6; “Myanmar: Fresh evidence of ongoing ethnic cleansing as military starves, abducts and robs Rohingya”, *Amnesty International*, 7 February 2018, <https://www.amnesty.org/en/latest/news/2018/02/myanmar-fresh-evidence-of-ongoing-ethnic-cleansing-as-military-starves-abducts-robs-rohingya/> (consulted on 1 May 2021).

880,000 Rohingya live in refugee camps in Cox's Bazar, Bangladesh.<sup>67</sup> In these overcrowded refugee camps, the living conditions are difficult as well. A recent fire has caused an enormous destruction, leaving thousands of Rohingya homeless once more.<sup>68</sup> Since November 2017, the Burmese government has expressed its willingness to repatriate the refugees, but has made no effort to improve their conditions in Rakhine State. This makes it impossible for the Rohingya to return to Myanmar.<sup>69</sup> The fear to return has only grown among the Rohingya population, now the Tatmadaw is in power.<sup>70</sup>

### 2.3. SEXUAL VIOLENCE

13. Multiple human rights reports bear witness to the sexual violence that was systematically used as a war tactic during the clearance operations that began on 25 August 2017. The majority of these acts were committed by the Tatmadaw against Rohingya women and girls as part of a campaign of ethnic cleansing. The Border Guard Police, the Myanmar Police Force and ethnic Rakhine were also responsible for some of the sexual violence, but to a lesser extent.<sup>71</sup>

It is important to note that the number of rape cases is likely much higher than those that have been reported to human rights organisations. There are no testimonies of victims that were raped and subsequently killed. Furthermore, the social stigma that is attached to sexual violence makes survivors hesitate to come forward. Other factors are also relevant, such as the culture of impunity regarding sexual violence in armed conflicts, the lack of trust in criminal proceedings and the fear of having to pay medical fees.<sup>72</sup> Someone testified: “*Yes, the military committed rape on so many women and girls but the women are ashamed to express this. They are afraid to speak out against the military. So instead they turn to God and keep silent.*”<sup>73</sup>

<sup>67</sup> “Operational Update External”, *UNHCR Bangladesh*, March 2021, <https://data2.unhcr.org/en/documents/details/86333> (consulted on 1 May 2021).

<sup>68</sup> “Bangladesh: Refugee Camp Fencing Cost Lives in Blaze”, *Human Rights Watch*, 25 March 2021, <https://www.hrw.org/news/2021/03/25/bangladesh-refugee-camp-fencing-cost-lives-blaze> (consulted on 1 May 2021); “‘We have nothing’: Refugee camp fire devastates Rohingya, again”, *Al Jazeera*, 25 March 2021, <https://www.aljazeera.com/news/2021/3/27/rebuilding-from-the-ashes-rohingya-a-year-after-deadly-blaze> (consulted on 1 May 2021); “Fire Tears Through Rohingya Camp, Leaving Thousands Homeless Once More”, *The New York Times*, 27 March 2021, <https://www.nytimes.com/2021/03/23/world/asia/bangladesh-rohingya-fire-refugees.html> (consulted on 1 May 2021).

<sup>69</sup> “An open prison without end. Myanmar’s mass detention of Rohingya in Rakhine State”, *Human Rights Watch* report, 8 October 2020, 11-13.

<sup>70</sup> “‘We cannot hope for anything good’: Myanmar coup sparks despair for Rohingya”, *The Guardian*, 14 February 2021, <https://www.theguardian.com/global-development/2021/feb/14/we-cannot-hope-for-anything-good-myanmar-coup-sparks-despair-for-rohingya> (consulted on 1 May 2021).

<sup>71</sup> “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 3, 19-20.

<sup>72</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 21.

<sup>73</sup> N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7, 435



In addition to testimonies, data about the proportion of pregnant women in the refugee camps in Cox's Bazar, Bangladesh, is highly indicative of the rapes that were committed.<sup>74</sup> The Bangladeshi home minister stated that ninety percent of the female refugees had been raped.<sup>75</sup>

### 2.3.1. Rape

14. The UN Human Rights Council and Human Rights Watch collected a multitude of testimonies on the incidents that occurred after 25 August 2017. According to these testimonies, rapes and gang rapes were committed on a massive scale between 25 August and mid-September 2017. These rapes were often mass gang rapes, meaning they involved several perpetrators and victims at the same time.<sup>76</sup> The fact-finding mission of the UN Human Rights Council has found that eighty per cent of the rape cases in this period constituted gang rapes. Incidents have been documented in which more than forty women were raped together. Usually, the rapes were committed by multiple perpetrators, sometimes by as many as ten.<sup>77</sup>

In most cases, the soldiers raped the Rohingya women in their homes, but sometimes they chose open public spaces as their crime scene. The family members and neighbours of the victim were then forced to watch.<sup>78</sup> Frequently, physical injuries were inflicted on the women as well. Many women were beaten with guns or sticks, while others were tied up, bitten or mutilated in their genital area. Multiple women suffered injuries to their reproductive organs.<sup>79</sup> These

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<sup>74</sup> S. HUTCHINSON, "Gendered insecurity in the Rohingya crisis", *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 3.

<sup>75</sup> "Many Rohingya women are raped in Myanmar, Bangladesh home minister says", *BD News*, 14 September 2017, <https://bdnews24.com/bangladesh/2017/09/14/many-rohingya-women-are-raped-in-myanmar-bangladesh-home-minister-says> (consulted on 1 May 2021).

<sup>76</sup> A. BALA and G. BSMRSTU, "Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar", October 2018, 4; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 15-17; "Report of the Special Rapporteur on the situation of human rights in Myanmar", *UN Human Rights Council* report, 9 March 2018, 11; "Sexual and gender- based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>77</sup> "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 9; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 347-348.

<sup>78</sup> A. BALA and G. BSMRSTU, "Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar", October 2018, 5; "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh", *UN Office of the High Commissioner for Human Rights* report, 11 October 2017, 7-8; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 15-17; "Report of the Special Rapporteur on the situation of human rights in Myanmar", *UN Human Rights Council* report, 9 March 2018, 11; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 9; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>79</sup> A. BALA and G. BSMRSTU, "Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar", October 2018, 4; N. MESSNER, *et al.*, "Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar", *Conflict & Health*, 2019, Vol. 13 No. 41, 7; "They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar", *Fortify Rights* report, 14 November 2017, 10; "All of my

testimonies are confirmed by reports from doctors in Cox's Bazar, who found evidence of sexual violence among the Rohingya refugees.<sup>80</sup> In addition, many victims were verbally harassed or laughed at.<sup>81</sup> In the end, the victims and even their children were often killed. A Rohingya woman of the age of 25 testified: *"The military came around 6 pm and started firing at people. People died from the shooting. They came by motorcycle. After the shooting I ran to the hills with other villagers and my husband. When the military caught us they beat my husband and three men took me, they tore my clothes as one held and pushed me to the ground. They used their penis to rape me. They took many other women, around ten or twenty, who were also raped."*<sup>82</sup>

The victims of these rapes were mainly women and girls between 13 and 25 years old. It indicates that the Tatmadaw primarily targeted women of reproductive age.<sup>83</sup> In some cases, the girls were even younger. The OHCHR interviewed victims of seven and five years old, who had been raped in front of their families.<sup>84</sup>

According to the UN Human Rights Council, the Burmese security forces were responsible for eighty-two per cent of the rapes.<sup>85</sup> Victims have identified the perpetrators as members of the Tatmadaw. According to their testimonies, the men wore green camouflage or plain green uniforms. In some cases, the perpetrators were said to be wearing a grey-blue camouflage uniform, which suggests they were part of the Border Guard Police.<sup>86</sup> A survivor testified: *"They were all in green uniform.... One grabbed me around the mouth, one*

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body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch report*, 16 November 2017, 15-17; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council report*, 12 September 2018, 9; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council report*, 22 August 2019, 20-21.

<sup>80</sup> S. HUTCHINSON, "Gendered insecurity in the Rohingya crisis", *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 3; "They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar", *Fortify Rights report*, 14 November 2017, 10; "Report of the Special Rapporteur on the situation of human rights in Myanmar", *UN Human Rights Council report*, 9 March 2018, 12.

<sup>81</sup> A. BALA and G. BSMRSTU, "Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar", October 2018, 4; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch report*, 16 November 2017, 15-17; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council report*, 22 August 2019, 20-21.

<sup>82</sup> "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council report*, 22 August 2019, 20-21.

<sup>83</sup> "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council report*, 12 September 2018, 9; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council report*, 22 August 2019, 20-21.

<sup>84</sup> "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh", *UN Office of the High Commissioner for Human Rights report*, 11 October 2017, 7.

<sup>85</sup> "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council report*, 17 September 2018, 348.

<sup>86</sup> "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh", *UN Office of the High Commissioner for Human Rights report*, 11 October 2017, 7; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch report*, 16 November 2017, 16.

*man held me down and then they all raped me, one by one.*<sup>87</sup> Another testimony confirmed this: *“The men in uniform, they were grabbing the women, pulling a lot of women, they pulled my clothes off and tore them off.”*<sup>88</sup>

According to the human rights organisations, similar incidents took place in a multitude of villages and thus strongly indicate a premeditated pattern of sexual violence. They conclude that rape was used as a deliberate, well-planned tactic of the Tatmadaw to punish, terrorise and oppress the Rohingya population and to make them flee.<sup>89</sup>

### 2.3.2. Other forms of sexual violence

15. Besides rape, other forms of sexual violence were common, such as forced nudity, genital mutilation and sexual humiliation.<sup>90</sup> For instance, there are several testimonies of people who witnessed soldiers mutilate women. Someone testified: *“The military came and took my 35-year-old pregnant cousin and her husband from the village into the rice fields. They killed the husband immediately and raped my cousin. They cut off her breasts and then killed her and left her in the fields.”*<sup>91</sup> Another witness testified: *“I saw her taken from the house and raped by military soldiers. It happened outside, beside a house. We watched from inside the house. After they raped her, they killed her. Only one person [raped her], then she was taken to the road, and he cut her neck and cut her breasts off.”*<sup>92</sup>

Sexual slavery was also widespread. Rohingya women and girls were abducted and subsequently detained in military camps for long periods of time, where they were raped on a regular basis.<sup>93</sup> An 18-year-old woman described how she was detained in a military compound for five days, where she was gang raped. She also heard other women scream and estimated that there were up to twenty women detained and raped in the compound.<sup>94</sup>

<sup>87</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15.

<sup>88</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 20.

<sup>89</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>90</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 349.

<sup>91</sup> R.J. HAAR, *et al.*, “Documentation of human rights abuses among Rohingya refugees from Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 42, 10.

<sup>92</sup> “They gave them long swords. Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 19 July 2018, 68-69.

<sup>93</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9.

<sup>94</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 218.

## 2.4. INTERNATIONAL ACTION

16. The scale and the organised nature of the atrocities indicate that Myanmar has a culture of impunity regarding sexual violence. The security forces and military officials did not have to fear any possible sanctions, because perpetrators were never prosecuted in the past either.<sup>95</sup> The Burmese government has not undertaken any serious investigations into the allegations of sexual violence and continues to deny that Rohingya women were raped, despite the overwhelming evidence.<sup>96</sup> A Burmese colonel even said, in reaction to the allegations, “*Look at those women who are making these claims - would anyone want to rape them?*”<sup>97</sup>

In November 2017, the UN Committee on the Elimination of Discrimination against Women (CEDAW) requested the Burmese government to submit a report on the situation of women in Rakhine State. Only months after the deadline, the government submitted a report in which it denied the allegations of rape and declared that there was no evidence to convict anyone.<sup>98</sup> Hence, effective prosecution of the perpetrators in Myanmar is deemed highly unlikely.

Over the past years, the international community has increasingly responded to and condemned the violence against the Rohingya. In 2017, the UN adopted a resolution urging Myanmar to take the appropriate action.<sup>99</sup> On 11 November 2019, the Gambia filed a lawsuit against Myanmar before the International Court of Justice (ICJ), accusing the State of the crime of genocide.<sup>100</sup>

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<sup>95</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15-16; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348.

<sup>96</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 7; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 10; “Report of the Special Rapporteur on the situation of human rights in Myanmar”, *UN Human Rights Council* report, 9 March 2018, 14; “Myanmar’s Hollow Denial of Rape of Rohingya: Overwhelming Evidence of Military Role in Hundreds of Sexual Assaults”, *Human Rights Watch*, 7 February 2019, <https://www.hrw.org/news/2019/02/07/myanmars-hollow-denial-rape-rohingya> (consulted on 1 May 2021).

<sup>97</sup> “Rohingya Muslim Crisis: Burmese colonel dismisses ethnic cleansing claims, asking ‘who would want to rape them?’”, *Independent*, 11 September 2017, <https://www.independent.co.uk/news/world/asia/rohingya-muslim-myanmar-latest-aung-san-su-kyi-ethnic-cleansing-news-colonel-rape-a7941556.html> (consulted on 1 May 2021).

<sup>98</sup> “Myanmar’s Hollow Denial of Rape of Rohingya: Overwhelming Evidence of Military Role in Hundreds of Sexual Assaults”, *Human Rights Watch*, 7 February 2019, <https://www.hrw.org/news/2019/02/07/myanmars-hollow-denial-rape-rohingya> (consulted on 1 May 2021).

<sup>99</sup> UN General Assembly, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, 5 December 2017, A/HRC/S-27/L.1.

<sup>100a</sup> “The Republic of the Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures”, *ICJ Press Release*, 11 November 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf> (consulted on 1 May 2021); “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Request for the indication of provisional measures - The Court to hold public hearings from Tuesday 10 to Thursday 12 December 2019”, *ICJ Press Release*, 439

Aun San Suu Kyi, the then de facto leader of Myanmar, denied before the Court that the Tatmadaw committed genocide.<sup>101</sup> By way of provisional measures, the ICJ has now ordered Myanmar to prevent and not to commit genocide and to preserve the evidence of genocidal acts that might have been committed against the Rohingya people.<sup>102</sup>

Currently, the ICC is also investigating the situation in Myanmar. Since the end of 2017, the Office of the Prosecutor has received multiple communications and reports on crimes that were allegedly committed in Myanmar during the clearance operations that started in August 2017 in Rakhine State.<sup>103</sup> Therefore, the Prosecutor made a request for a ruling concerning the jurisdiction of the ICC over the situation.<sup>104</sup> After the confirmation of the Pre-Trial Chamber I that the Court could exercise jurisdiction, the Prosecutor started a preliminary investigation.<sup>105</sup> On 14 November 2019, the ICC authorised a full investigation into the crimes committed against the Rohingya, which is now ongoing.<sup>106</sup> At the moment, the case is still in the pre-trial phase. The Burmese government, however, has rejected the investigation, arguing that it is not in accordance with international law.<sup>107</sup>

The focus of the current investigation before the ICC lies on the deportations of Rohingya from Myanmar to Bangladesh, although the Prosecutor has said that any crime that was committed on the territory of a State

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18 November 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191118-PRE-01-00-EN.pdf> (consulted on 1 May 2021).

<sup>101</sup> “Aung San Suu Kyi Denies Burmese Genocide of Rohingya at The Hague”, *Human Rights Watch*, 17 December 2019, <https://www.hrw.org/news/2019/12/17/aung-san-suu-kyi-denies-burmese-genocide-rohingya-hague> (consulted on 1 May 2021).

<sup>102</sup> *The Gambia v. Myanmar*, “Request for the indication of provisional measures”, ICJ, 23 January 2020, para. 86; “What Myanmar Is and Is Not Doing to Protect Rohingyas from Genocide”, *Human Rights Watch*, 23 July 2020, <https://www.hrw.org/news/2020/07/23/what-myanmar-and-not-doing-protect-rohingyas-genocide> (consulted on 1 May 2021).

<sup>103</sup> “Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh”, *International Criminal Court*, 18 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> (consulted on 1 May 2021).

<sup>104</sup> “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC (President of the Pre-Trial Division), 9 April 2018, ICC-RoC46(3)-01/18-1.

<sup>105</sup> “Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute””, ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18; “Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh”, *International Criminal Court*, 18 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> (consulted on 1 May 2021).

<sup>106</sup> “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19; “ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar”, *ICC Press Release*, 14 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495> (consulted on 1 May 2021).

<sup>107</sup> “Myanmar rejects ICC probe into alleged crimes against Rohingya”, *Al Jazeera*, 15 November 2019, <https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya> (consulted on 1 May 2021).

Party is open for investigation.<sup>108</sup> Whether the sexual violence that was committed will also be investigated, is still an open question. Human rights reports call for international action against the sexual violence that was committed and emphasise the possibility to prosecute sexual violence before the ICC.<sup>109</sup> Pramila Patten, the Special Representative of the UN Secretary-General on Sexual Violence in Conflict, announced that she would address the Prosecutor and the President of the ICC on the possibility to prosecute the sexual violence against the Rohingya.<sup>110</sup>

### 3. PROSECUTION BEFORE THE ICC

17. Both human rights organisations and UN officials have claimed that the crimes committed against the Rohingya amount to crimes against humanity and should thus be prosecuted before the ICC.<sup>111</sup> On the basis of the findings of

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<sup>108</sup> “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar”, *International Criminal Court*, 22 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar> (consulted on 1 May 2021).

<sup>109</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 4; “They gave them long swords. Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 19 July 2018, 20-24; “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 178-179.

<sup>110</sup> “U.N. official says will raise sexual violence against Rohingya with ICC”, *Reuters*, 12 November 2017, <https://www.reuters.com/article/us-bangladesh-myanmar/u-n-official-says-will-raise-sexual-violence-against-rohingya-with-icc-idUSKBN1DC0N7> (consulted on 1 May 2021); “Rohingya Were Raped Systematically by Myanmar’s Military, Report Says”, *The New York Times*, 16 November 2017, <https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html> (consulted on 1 May 2021).

<sup>111</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 11; “They gave them long swords. Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, 441

the human rights reports discussed in the previous chapter, a qualification as crimes against humanity, war crimes and even genocide seems possible. This chapter examines whether the crimes can be prosecuted before the ICC.

### 3.1. JURISDICTION

**18.** Only if the ICC has jurisdiction over the situation in Myanmar, the perpetrators can be brought to justice before the Court. This section examines the jurisdictional difficulties that the ICC faces in the prosecution of the sexual violence that was committed against the Rohingya. In addition to Myanmar, the position of Bangladesh is examined, as more than half of the Rohingya population has fled to Bangladeshi territory and now resides in refugee camps in Cox's Bazar.<sup>112</sup>

The jurisdiction of the ICC is more limited than the jurisdiction of individual States, since it is founded on an international treaty, the Rome Statute. Thus, the Court does not have jurisdiction over the whole international community.<sup>113</sup> States have to accept the jurisdiction of the Court, in order for the Court to be able to exercise its jurisdiction. In this respect, there are two possibilities. A State can become a State Party to the Rome Statute and will hence be automatically submitted to the jurisdiction of the Court regarding all core crimes.<sup>114</sup> On this date, one hundred twenty-three States are Party to the Rome Statute, including Bangladesh. Myanmar, on the other hand, is not a State Party.<sup>115</sup> A second possibility is that a State accepts the jurisdiction of the Court ad hoc. In that case, the State issues a declaration of acceptance concerning a particular crime.<sup>116</sup>

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Myanmar", *Fortify Rights* report, 19 July 2018, 102-105; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 19; "U.N. official says will raise sexual violence against Rohingya with ICC", *Reuters*, 12 November 2017, <https://www.reuters.com/article/us-bangladesh-myanmar/u-n-official-says-will-raise-sexual-violence-against-rohingya-with-icc-idUSKBN1DC0N7> (consulted on 1 May 2021); "Myanmar: Crimes Against Rohingya Go Unpunished", *Human Rights Watch*, 22 August 2019, <https://www.hrw.org/news/2019/08/22/myanmar-crimes-against-rohingya-go-unpunished> (consulted on 1 May 2021).

<sup>112</sup> "Operational Update External", *UNHCR Bangladesh*, March 2021, <https://data2.unhcr.org/en/documents/details/86333> (consulted on 1 May 2021).

<sup>113</sup> W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 47.

<sup>114</sup> Art. 12 (1) Rome Statute; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 149; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 69; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 351; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Springer, Cham, 2019, 70.

<sup>115</sup> "The States Parties to the Rome Statute", Assembly of States Parties, [https://asp.icc-cpi.int/en\\_menus/asp/states parties/Pages/the states parties to the rome statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (consulted on 1 May 2021).

<sup>116</sup> Art. 12 (3) Rome Statute; R. CRYER, et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 149; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 69; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Springer, Cham, 2019, 70.

Another important limit to the jurisdiction of the ICC is the principle of complementarity, which entails that the jurisdiction of the Court is complementary to the jurisdiction of national criminal courts. Every State has the responsibility to prosecute international crimes and thus, the ICC will only exercise its jurisdiction if the national judicial system fails.<sup>117</sup> The ICC declares a case inadmissible, if the case is already being investigated or prosecuted by the State that has jurisdiction over it, or if that State has decided not to prosecute the person concerned after an investigation. However, if that State is unwilling or unable to genuinely investigate or prosecute the case, the ICC will declare the case admissible.<sup>118</sup> In addition, a case must also be of sufficient gravity in order to be admissible.<sup>119</sup>

The situations that the ICC investigates and prosecutes are not predetermined, since the jurisdiction of the Court must be triggered.<sup>120</sup> If an international crime has been committed, there are three different ways in which the case can be brought before the ICC. First, a State Party can refer the case to the Prosecutor.<sup>121</sup> Second, the Prosecutor himself can initiate an investigation *proprio motu*, as happened in the current investigation concerning the Rohingya.<sup>122</sup> And third, the UN Security Council can refer the case to the Prosecutor, acting under Chapter VII of the UN Charter.<sup>123</sup>

### 3.1.1. *Jurisdiction ratione materiae*

19. Article 5 of the Rome Statute states that the ICC has jurisdiction over four international crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. These crimes are considered as ‘the most

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<sup>117</sup> Preamble, para. 6 and art. 1 Rome Statute; K. AMBOS, “Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik” in W. KALECK, M. RATNER, T. SINGELNSTEIN and P. WEISS (eds.), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2007, (55) 64-65; A. CLAPHAM, “Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court” in P. SANDS (ed.), *From Nuremberg to The Hague. The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, (30) 63; R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, 145-146; R. CRYER, et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 155; H. KAUL, “The International Criminal Court - Its relationship to domestic jurisdictions” in C. STAHN and G. SLUTTER (eds.), *The emerging practice of the International Criminal Court*, Koninklijke Brill NV, Leiden, 2009, (31) 33-34; J.K. KLEFFNER, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford, 2008, 101; B. VAN SCHAACK and R.C. SLYE, *International Criminal Law and Its Enforcement*, Foundation Press, New York, 2007, 71; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 117-118.

<sup>118</sup> Art. 17 (1) (a) and (b) Rome Statute.

<sup>119</sup> Art. 17 (1) (d) Rome Statute.

<sup>120</sup> W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 141.

<sup>121</sup> Art. 13 (a) Rome Statute.

<sup>122</sup> Art. 13 (c) Rome Statute; “Request for authorisation of an investigation pursuant to article 15”, ICC (Pre-Trial Chamber III), 4 July 2019, ICC-01/19.

<sup>123</sup> Art. 13 (b) Rome Statute.



serious crimes of concern to the international community as a whole'.<sup>124</sup> They are defined in the Articles 6, 7, 8 and 8*bis* of the Rome Statute.<sup>125</sup>

The core crimes of genocide, crimes against humanity and war crimes are discussed in further detail under section 4.2.

### 3.1.2. *Jurisdiction ratione temporis*

**20.** Concerning the temporal jurisdiction of the ICC, the Court only has jurisdiction over crimes that were committed after the entry into force of the Rome Statute, namely 1 July 2002.<sup>126</sup>

With respect to States that become Party to the Rome Statute after the above-mentioned date, the Court only has jurisdiction over crimes that were committed after the entry into force of the Statute for this particular State.<sup>127</sup>

#### a. Bangladesh

**21.** The government of Bangladesh ratified the Rome Statute on 23 March 2010. Thereby, the Statute entered into force for Bangladesh on 1 June 2010.<sup>128</sup> By consequence, the ICC does not have jurisdiction over crimes committed in Bangladesh before 1 June 2010. As this research concerns the crimes that were committed during the clearance operations since August 2017, the situation of the Rohingya falls within the temporal jurisdiction of the ICC.

#### b. Myanmar

**22.** As Myanmar is not a State Party, the Rome Statute is not in force for Myanmar.<sup>129</sup> If the Burmese government would ratify the Rome Statute in the

<sup>124</sup> Preamble, para. 4 and art. 5 Rome Statute; I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute" in D. MCGOLDRICK, P. ROWE and E. DONNELLY (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (65) 66-67; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 74-75.

<sup>125</sup> Art. 6, 7, 8 and 8*bis* Rome Statute.

<sup>126</sup> Art. 11 (1) and 126 (1) Rome Statute; K. AMBOS, "Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik" in W. KALECK, *et al.* (eds.), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2007, (55) 55; R. RASTAN and M.E. BADAR, "Article 11: Jurisdiction *ratione temporis*" in O. TRIFFTERER and K. AMBOS (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Beck, München, 2016, (657) 657; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 54; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 341; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Springer, Cham, 2019, 60; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 122.

<sup>127</sup> Art. 11 (2) Rome Statute.

<sup>128</sup> "Bangladesh ratifies the Rome Statute of the International Criminal Court", *ICC Press Release*, 24 March 2010, <https://www.icc-cpi.int/Pages/item.aspx?name=bangladesh+ratifies+the+rome+statute+of+the+international+criminal+court&ln=en> (consulted on 1 May 2021).

<sup>129</sup> "The States Parties to the Rome Statute", *Assembly of States Parties*, [https://asp.icc-cpi.int/en\\_menus/asp/states+parties/Pages/the+states+parties+to+the+rome+statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states+parties/Pages/the+states+parties+to+the+rome+statute.aspx) (consulted on 1 May 2021).

future, the Statute would enter into force for Myanmar on the first day of the month after the sixtieth day following the deposit of the instrument of ratification.<sup>130</sup> But even then, the ICC would not have temporal jurisdiction over the clearance operations that started in August 2017, as the jurisdiction of the Court is not retroactive.<sup>131</sup>

If Myanmar would issue an ad hoc declaration accepting the jurisdiction of the ICC over certain crimes committed against the Rohingya, the Court would have temporal jurisdiction. Such declarations are retroactive by their very nature.<sup>132</sup>

### 3.1.3. *Jurisdiction ratione personae and ratione loci*

**23.** During the negotiations of the Rome Statute, some States were reluctant to agree to the principle of universal jurisdiction, which would imply that the Court would have jurisdiction to prosecute crimes, regardless of where they were committed and regardless of the nationality of the perpetrator. Instead, the parties agreed that the jurisdiction of the ICC would be based on the principle of territoriality and the nationality principle.<sup>133</sup>

The principle of territoriality is expressed in Article 12 (2) (a) of the Rome Statute, according to which the Court has jurisdiction over crimes that were committed on the territory of a State Party. The nationality of the perpetrator is irrelevant in this respect.<sup>134</sup> In addition, the Court has jurisdiction over crimes that were committed on the territory of a State that accepts the jurisdiction of the Court ad hoc.<sup>135</sup> There is also an important exception to the principle of territoriality, namely the UN Security Council referral. The UN Security Council can refer a situation to the ICC, even if the relevant State is not a State Party or has not given its consent.<sup>136</sup> Thus, the jurisdictional reach of the ICC can be extended to the territories of non-State Parties.

<sup>130</sup> Art. 126 (2) Rome Statute.

<sup>131</sup> W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 53-55.

<sup>132</sup> Art. 12 (3) Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 54.

<sup>133</sup> I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute" in D. MCGOLDRICK, *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (65) 72; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 148-149; M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 2-3.

<sup>134</sup> Art. 12 (2) (a) Rome Statute; R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, 144; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 66; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 351- 352; D. SCHEFFER, "The International Criminal Court" in W.A. SCHABAS and N. BERNAZ (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, (67) 73; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Springer, Cham, 2019, 33; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 120.

<sup>135</sup> Art. 12 (3) Rome Statute.

<sup>136</sup> L. ARBOUR and M. BERGSMO, "Conspicuous Absence of Jurisdictional Overreach" in H. VON HEBEL, J. LAMMERS and J. SCHUKKING (eds.), *Reflections on the International* 445

The nationality principle, on the other hand, entails that the Court can exercise jurisdiction, when a crime is committed by a national of a State Party, regardless of the territory on which the crime was committed. This principle is formulated in Article 12 (2) (b) of the Rome Statute.<sup>137</sup>

### a. Bangladesh

24. Bangladesh is a State Party to the Rome Statute.<sup>138</sup> Therefore, the crimes that were committed on the territory of Bangladesh can be prosecuted before the Court. The territoriality principle allows for this prosecution regardless of the nationality of the perpetrators. Thus, the crimes that were committed by the Tatmadaw, who are Burmese nationals, on Bangladeshi soil do fall under the jurisdiction of the Court. Reasonably, the crimes committed on the territory of Bangladesh by Bangladeshi nationals can be prosecuted before the Court as well, but this has less relevance in this case, considering that the majority of the acts of sexual violence were committed by the Tatmadaw.

Bangladesh being a State Party to the Rome Statute allowed the ICC to assume jurisdiction over the situation of the Rohingya. On 6 September 2018, the Pre-Trial Chamber I of the ICC decided that the Court has the competence to exercise jurisdiction over the alleged deportations of Rohingya from Myanmar

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*Criminal Court*, T.M.C. Asser Press, The Hague, 1999, (129) 139; V.O. AYENI and M.A. OLONG, "Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court", *African Journal of International and Comparative Law*, 2017, Vol. 25 No. 2, 243, 248; L. CONDORELLI and S. VILLALPANDO, "Can the Security Council extend the ICC's jurisdiction?" in G.J. CASSESE (ed.), *The Rome Statute of the International Criminal Court*, Vol. I, Oxford University Press, Oxford, 2002, (571) 581; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 150; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court*, BRILL, Boston, 2018, 2; L. SADAT, "The International Criminal Court" in W.A. SCHABAS (ed.), *International Criminal Law*, Cambridge University Press, Cambridge, 2016, (137) 146-147; D. SAROOSHI, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in D. MCGOLDRICK, P. ROWE and E. DONNELLY (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (95) 98; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 121.

<sup>137</sup> Art. 12 (2) (b) Rome Statute; A. CLAPHAM, "Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court" in P. SANDS (ed.), *From Nuremberg to The Hague. The Future of International Criminal Justice*, Cambridge University Press, Cambridge, 2003, (30) 30; R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, 144; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 148-149; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 59; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 354; D. SCHEFFER, "The International Criminal Court" in W.A. SCHABAS and N. BERNAZ (eds.), *Routledge Handbook of International Criminal Law*, Routledge, London, 2011, (67) 73; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 120.

<sup>138</sup> "Bangladesh ratifies the Rome Statute of the International Criminal Court", *ICC Press Release*, 24 March 2010, <https://www.icc-cpi.int/Pages/item.aspx?name=bangladesh+ratifies+the+rome+statute+of+the+international+criminal+court&ln=en> (consulted on 1 May 2021).

to Bangladesh.<sup>139</sup> The Pre-Trial Chamber's main argument in this respect, is that the crime of deportation is of a transboundary nature and is thus necessarily committed in more than one State. At least one of the elements of the crime would be committed on the territory of a State Party, namely Bangladesh.<sup>140</sup> At first sight, this argumentation seems to suggest that sexual violence would not fall within the scope of the investigation, as this generally does not have a transboundary nature. However, the ICC seems to have a broad understanding of its jurisdiction. The Pre-Trial Chamber expressly stated that the jurisdiction of the Court may extend to other crimes as well, on the condition that one or more elements of the crime were committed on the territory of a State Party. By way of example, the Pre-Trial Chamber mentions the crime against humanity of persecution.<sup>141</sup> In the Prosecutor's statement of 18 September 2018, the Prosecutor has announced that she will investigate all possible crimes under Article 7 of the Rome Statute, including sexual violence.<sup>142</sup> On 14 November 2019, the Pre-Trial Chamber III of the ICC authorised the Prosecutor to commence the investigation and the Chamber emphasised again that this investigation could concern any crime, including any future crime, but under the important condition that the crime is at least partially committed on the territory of a State Party.<sup>143</sup> In paragraph 31 on the scope of the investigation, "alleged sexual violence underlying the alleged coercive acts" is explicitly included.<sup>144</sup>

## b. Myanmar

**25.** Myanmar is not a Party to the Rome Statute, which complicates the prosecution of the sexual violence against the Rohingya before the ICC. In

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<sup>139</sup> "Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"", ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18.

<sup>140</sup> "Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"", ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18, para. 70-72; K. HALE and M. 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*, 2019, Vol. 73 No. 1, 23.

<sup>141</sup> "Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"", ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18, para. 74-76.

<sup>142</sup> "Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh", *International Criminal Court*, 18 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> (consulted on 1 May 2021).

<sup>143</sup> "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar", ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 126; "ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar", *ICC Press Release*, 14 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495> (consulted on 1 May 2021); "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar", *International Criminal Court*, 22 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar> (consulted on 1 May 2021).

<sup>144</sup> "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar", ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 31.

accordance with the territoriality principle, acts of sexual violence that were committed on the territory of Myanmar, do not fall within the jurisdictional scope of the Court. Nevertheless, there are some possibilities in both the current investigation as in possible future investigations.

*b.1 Current investigation*

**26.** The current investigation allows for any crime to be prosecuted before the Court, including acts of sexual violence, if they were at least partially committed on the territory of Bangladesh. Based on testimonies, human rights reports indicate that most rapes and other acts of sexual violence were committed in Buthiduang, Maungdaw, Kyauktaw, Rathedaung, Mrauk-U, Kyaukpyu and Ponnagyun Townships in Rakhine State.<sup>145</sup> Since these crimes were exclusively committed on the territory of Myanmar, they are likely to be excluded from the current investigation.

Nevertheless, there seems to be a possibility to prosecute the sexual violence through the crime against humanity of persecution on the grounds of ethnicity and religion, that the Court has explicitly mentioned in its decisions.<sup>146</sup> Article 7 (1) (h) of the Rome Statute prohibits persecution on several grounds, including gender.<sup>147</sup> The crime of persecution must be connected to another crime under the jurisdiction of the Court, which is in this case the crime of rape, set out in Article 7 (1) (g) of the Rome Statute.<sup>148</sup> In the case law of the ICC, persecution has previously been used to prosecute sexual violence, even on other grounds than the ground of gender.<sup>149</sup> In the *Gbagbo & Blé Goudé* case, the Prosecutor charged the rape of thirty-eight women and girls not only as rape, but also as persecution (not on the ground of gender, but on political, national, ethnic and religious grounds).<sup>150</sup> Other examples can be found in the *Ahmad Harun & Ali Kushayb* and *Hussein* cases, in which rape was also charged as

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<sup>145</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8-9; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 108-109; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20.

<sup>146</sup> “Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18, para. 74-76; “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 95-96.

<sup>147</sup> Art. 7 (1) (h) Rome Statute.

<sup>148</sup> Art. 7 (1) (h) Rome Statute; B. BEDONT, “Gender-Specific provisions in the Statute of the International Criminal Court” in F. LATTANZI and W.A. SCHABAS (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Il Sirente, Ripa Fagnano Alto, 1999, (183) 200-202.

<sup>149</sup> R. GREY, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*, Cambridge University Press, Cambridge, 2019, 278-279.

<sup>150</sup> *Prosecutor v. Laurent Gbagbo*, “Decision on the confirmation of charges against Laurent Gbagbo”, ICC (Pre-Trial Chamber I), 12 June 2014, ICC-02/11-01/11, para. 272.

persecution.<sup>151</sup> These cases suggest the possibility to prosecute sexual violence as part of a larger crime, the crime of persecution, that does fulfill the condition of a transboundary nature. If the sexual violence can be seen as a tool to persecute the Rohingya and drive them from Myanmar to Bangladesh, this would fall under the jurisdiction of the Court.

Another possibility might be found in the effects doctrine. According to the effects doctrine, territorial jurisdiction can be extended to the effects of a crime on the territory of a State, whereas the conduct that caused the effects took place on the territory of another State. The effects are not elements of the description of the crime in question but are the direct consequence of the crime.<sup>152</sup> Regarding the jurisdiction *ratione loci* of the ICC, this would imply that the Court has jurisdiction if the crime took place on the territory of a non-State Party but created effects on the territory of a State-Party. Effects, in this respect, must be interpreted as the broader social or economic consequences of a crime. VAGIAS provides the example of a massive exodus of refugees to a neighbouring State Party, which is the result of a campaign of ethnic cleansing. Such an exodus creates significant social and economic consequences, as it requires the setting up and maintaining of refugee camps and providing decent living conditions for the refugees.<sup>153</sup> This example describes precisely the case of the Rohingya, thousands of whom fled to neighbouring Bangladesh. The application of the effects doctrine would imply that crimes that were committed on the territory of Myanmar, a non-State Party, but had effects on the territory of Bangladesh, a State-Party, fall within the territorial jurisdiction of the ICC.

However, the question whether the effects doctrine can be applied to the jurisdiction of the ICC is rather controversial in jurisprudence. Some authors argue that the effects doctrine cannot be applied, since the Rome Statute does not explicitly include the concept. They are in favour of a strict reading of Article 12 (2) (a) of the Rome Statute.<sup>154</sup> On the other hand, VAGIAS argues in favour of a teleological reading. Despite certain difficulties, such as the reluctance of States to accept such a broad understanding of territorial jurisdiction and the possible increase of jurisdictional conflicts, he suggests that the effects doctrine can be applied to the jurisdiction of the ICC. As criteria, he suggests that the effects must be substantial, reasonably foreseeable and direct, meaning causally

<sup>151</sup> *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, "Decision on the Prosecution Application under Article 58(7) of the Statute", ICC (Pre-Trial Chamber I), 27 April 2007, ICC-02/05-01/07, counts 10, 21 and 39; *Prosecutor v. Abdel Raheem Muhammad Hussein*, "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein", ICC (Pre-Trial Chamber I), 1 March 2012, ICC-02/05-01/12, para. 11.

<sup>152</sup> "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC (President of the Pre-Trial Division), 9 April 2018, ICC-RoC46(3)-01/18-1, para. 31, footnote 59; M.N. SHAW, *International Law*, Cambridge University Press, Cambridge, 2017, 515-516; M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 162-163.

<sup>153</sup> M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 162-163.

<sup>154</sup> W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 67-68.

connected to the crime.<sup>155</sup> The ongoing refugee crisis in Bangladesh as the effect of the campaign of ethnic cleansing in Myanmar definitely fulfils these criteria. There is no doubt that it was substantive, as ca. 880,000 Rohingya now reside in refugee camps in Bangladesh. The massive exodus was also reasonably foreseeable and the direct consequence of the atrocities that were committed against the Rohingya. In addition, VAGIAS uses as a possible precedent the *Mbarushimana* case, where the territorial jurisdiction of the ICC was challenged. In this case, the Court used a ‘sufficient link’ test, meaning that the events had to be sufficiently linked to the situation of crisis that triggered the jurisdiction of the Court.<sup>156</sup> This test resembles the criteria that VAGIAS suggests.

Nevertheless, the application of the effects doctrine to the jurisdiction of the ICC is not without challenges. The Court would break entirely new ground in the history of international criminal law. Such a broad understanding of territorial jurisdiction would definitely meet resistance of both States and legal scholars alike.<sup>157</sup> It must be noted as well that the position of VAGIAS stands fairly alone in jurisprudence. Despite these concerns, the Pre-Trial Chamber III explicitly followed the *Mbarushimana* case law, as it once again referred to the principle of a ‘sufficient link’.<sup>158</sup> This can definitely be considered as a step towards the application of the effects doctrine. In the end, it is up to the Court to decide whether international criminal law is ready for the effects doctrine. It seems unlikely, however, that the effects doctrine will be applied in the current investigation, since the Prosecutor explicitly clarified in her request that it concerned the territoriality principle and not the effects doctrine.<sup>159</sup> But potentially, it could be applied in possible future investigations.

It is important to note that, even if the Court concludes that it does not have the jurisdiction to prosecute the sexual violence that was committed on the territory of Myanmar, it can still be taken into account. In the decision of 14 November 2019, the Pre-Trial Chamber III clarified that it can consider facts that fall outside its jurisdiction, in order to establish the contextual elements of the crimes that may have been committed. The crime of rape is explicitly mentioned in this respect.<sup>160</sup>

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<sup>155</sup> M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 195.

<sup>156</sup> *Prosecutor v. Callixte Mbarushimana*, “Decision on the “Defence Challenge to the Jurisdiction of the Court””, ICC (Pre-Trial Chamber I), 26 October 2011, ICC-01/04-01/10, para. 16, 39; M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 196-197.

<sup>157</sup> M. VAGIAS, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, 187-188.

<sup>158</sup> “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 124, 129.

<sup>159</sup> “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC (President of the Pre-Trial Division), 9 April 2018, ICC-RoC46(3)-01/18-1, para. 31.

<sup>160</sup> “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 93.

*b.2 Possible future investigations*

27. It cannot be ruled out that a new investigation is initiated in the future. A first possibility would be for Myanmar to accept the jurisdiction of the ICC ad hoc. Article 12 (3) of the Rome Statute provides the possibility for States to lodge a declaration with the Registrar, by which the State accepts the jurisdiction of the ICC with regard to the crime at issue.<sup>161</sup> Such a declaration can thus extend the scope of the territorial, personal and temporal jurisdiction of the ICC.<sup>162</sup> There was some discussion in jurisprudence as to whether the State lodging such a declaration could limit the object of the declaration to certain crimes.<sup>163</sup> Rule 44 (2) of the RPE suggests that this is not possible: “*has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.*”<sup>164</sup> The Court clarified the issue in the *Gbagbo* case, in which it stated that an ad hoc declaration cannot limit the jurisdiction of the Court to certain crimes.<sup>165</sup> By consequence, any crime can be prosecuted before the ICC, following an ad hoc declaration.

However, to this day, no non-State Party has ever really lodged such a declaration.<sup>166</sup> As a matter of fact, it is hard to believe that a State, who generally

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<sup>161</sup> Art. 12 (3) Rome Statute.

<sup>162</sup> C. STAHN, M. EL ZEIDY and H. OLASOLO, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, *American Journal of International Law*, 2005, Vol. 99 No. 2, 423.

<sup>163</sup> J.T. HOLMES, “Jurisdiction and Admissibility” in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (321) 326; G. PALMISANO, “The ICC and Third States” in F. LATTANZI and W.A. SCHABAS (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Il Sirente, Ripa Fagnano Alto, 1999, (391) 393-394; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 357-358; W.A. SCHABAS and G. PECORELLA, “Article 12: Preconditions to the exercise of jurisdiction” in O. TRIFFTERER and K. AMBOS (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Beck, München, 2016, (672) 684-685; C. STAHN, et al., “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, *American Journal of International Law*, 2005, Vol. 99 No. 2, 427-428.

<sup>164</sup> Rule 44 (2) ICC Rules of Procedure and Evidence, adopted at Assembly of States Parties to the Rome Statute of the International Criminal Court, First session (3-10 September 2002), ICC-ASP/1/3 and Corr. 1 (2002); W.A. SCHABAS and G. PECORELLA, “Article 12: Preconditions to the exercise of jurisdiction” in O. TRIFFTERER and K. AMBOS (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Beck, München, 2016, (672) 685; C. STAHN, et al., “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, *American Journal of International Law*, 2005, Vol. 99 No. 2, 427-428.

<sup>165</sup> *Prosecutor v. Laurent Gbagbo*, “Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC02/11-01/11-129)’”, ICC (Pre-Trial Chamber I), 15 August 2012, ICC-02/11-01/11, para. 59; W.A. SCHABAS and G. PECORELLA, “Article 12: Preconditions to the exercise of jurisdiction” in O. TRIFFTERER and K. AMBOS (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Beck, München, 2016, (672) 685.

<sup>166</sup> There have been two declarations, one by Côte d’Ivoire and one by Uganda. However, Côte d’Ivoire signed the Rome Statute on 30 November 1998, but only ratified it in February 2013. As for Uganda, it ratified the Rome Statute on 14 June 2002. The Statute entered into force on 1 September 2002 with respect to Uganda, so two months after the entry into force of the Statute itself. W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 359; W.A. SCHABAS and G. PECORELLA, “Article 12: Preconditions to the exercise of jurisdiction” in O. TRIFFTERER and K. AMBOS (eds.), *The*



rejects the jurisdiction of the ICC, would be willing to accept the jurisdiction of the Court when a specific situation arises.<sup>167</sup> The current position of Myanmar seems to support this view, as the government continues to deny the allegations of genocide and sexual violence.<sup>168</sup> Thus, it is highly unlikely that Myanmar will accept the jurisdiction of the ICC ad hoc.

A second possibility lies in the UN Security Council referral. Article 13 (b) of the Rome Statute determines that the UN Security Council can refer any situation to the Prosecutor, acting under Chapter VII of the UN Charter.<sup>169</sup> Chapter VII of the UN Charter gives the UN Security Council the power to impose binding decisions on all States in order to maintain or to restore the international peace and security.<sup>170</sup> By consequence, the UN Security Council can refer cases to the ICC, regardless of the territory where the crimes were committed and regardless of the nationality of the perpetrator. This is an important exception to the territoriality principle and the nationality principle, which generally determine the jurisdiction of the ICC. It is thus a very powerful tool, as it allows for non-State Parties to be prosecuted before the Court.<sup>171</sup>

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*Rome Statute of the International Criminal Court: A Commentary*, Beck, München, 2016, (672) 686.

<sup>167</sup> I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute" in D. MCGOLDRICK, *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (65) 82; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Springer, Cham, 2019, 70.

<sup>168</sup> "Myanmar rejects 'false allegations' in U.N. genocide report", *Reuters*, 29 August 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKCNILE0AC> (consulted on 1 May 2021); "Myanmar rejects ICC probe into alleged crimes against Rohingya", *Al Jazeera*, 15 November 2019, <https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya> (consulted on 1 May 2021); "Aung San Suu Kyi Denies Burmese Genocide of Rohingya at The Hague", *Human Rights Watch*, 17 December 2019, <https://www.hrw.org/news/2019/12/17/aung-san-suu-kyi-denies-burmese-genocide-rohingya-hague> (consulted on 1 May 2021).

<sup>169</sup> Art. 13 (b) Rome Statute.

<sup>170</sup> Art. 39 United Nations, *Charter of the United Nations*, 24 October 1945.

<sup>171</sup> L. ARBOUR and M. BERGSMO, "Conspicuous Absence of Jurisdictional Overreach" in H. VON HEBEL, *et al.* (eds.), *Reflections on the International Criminal Court*, T.M.C. Asser Press, The Hague, 1999, (129) 139; V.O. AYENI and M.A. OLONG, "Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court", *African Journal of International and Comparative Law*, 2017, Vol. 25 No. 2, 243, 248; L. CONDORELLI and S. VILLALPANDO, "Can the Security Council extend the ICC's jurisdiction?" in G.J. CASSESE (ed.), *The Rome Statute of the International Criminal Court*, Vol. I, Oxford University Press, Oxford, 2002, (571) 581; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 150; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court*, BRILL, Boston, 2018, 2; L. SADAT, "The International Criminal Court" in W.A. SCHABAS (ed.), *International Criminal Law*, Cambridge University Press, Cambridge, 2016, (137) 146- 147; D. SAROOSHI, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in D. MCGOLDRICK, *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (95) 98; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 121.

There is a lot of criticism, however, that the UN Security Council is a highly political organ.<sup>172</sup> The five permanent members, namely Russia, the United States, France, China and the United Kingdom, have the power to veto any resolution that refers a case to the ICC.<sup>173</sup> Russia, the United States and China are non-State Parties and are generally not in favour of referring cases to the Court. In 2014, the UN Security Council failed to refer the situation in Syria to the ICC, because the resolution was blocked by Russia and China as allies of the Assad government.<sup>174</sup>

There have been two UN Security Council referrals up to this date, which could be important precedents for a future UN Security Council referral of the situation in Myanmar. The first time that the UN Security Council referred a case to the ICC was in 2005 in the case of Darfur, Sudan.<sup>175</sup> The second time took place in 2011 and concerned the situation in Libya.<sup>176</sup> Neither States were State Party to the Rome Statute.<sup>177</sup> However, in both cases it was a difficult task to get the support of all the five permanent members. In the case

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<sup>172</sup> V.O. AYENI and M.A. OLONG, “Opportunities and Challenges to the UN Security Council Referral under the Rome Statute of the International Criminal Court”, *African Journal of International and Comparative Law*, 2017, Vol. 25 No. 2, 258-260; I. CAMERON, “Jurisdiction and Admissibility Issues under the ICC Statute” in D. MCGOLDRICK, *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford, 2004, (65) 82; G.M. LENTNER, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, *International Criminal Law Review*, 2020, Vol. 20 No. 2, 256-257, 265; “Rohingya Symposium: A Strategy for Strong Security Council Action on Myanmar”, *Human Rights Watch*, 28 August 2020, <https://www.hrw.org/news/2020/08/28/rohingya-symposium-strategy-strong-security-council-action-myanmar> (consulted on 1 May 2021); “The Security Council’s Appalling Record of Referring Situations to the ICC”, *Justice in Conflict*, 23 May 2014, <https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/> (consulted on 1 May 2021); “The Politicisation of the International Criminal Court by United Nations Security Council Referrals”, *Accord*, February 2017, <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-United-nations-security-council-referrals/> (consulted on 1 May 2021).

<sup>173</sup> Art. 27 UN Charter.

<sup>174</sup> G.M. LENTNER, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, *International Criminal Law Review*, 2020, Vol. 20 No. 2, 265; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 35; “Russia, China block Security Council referral of Syria to International Criminal Court”, *UN News*, 22 May 2014, <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court> (consulted on 1 May 2021); “UN Security Council: Vetoes Betray Syrian Victims”, *Human Rights Watch*, 22 May 2014, <https://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims> (consulted on 1 May 2021); “The Security Council’s Appalling Record of Referring Situations to the ICC”, *Justice in Conflict*, 23 May 2014, <https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/> (consulted on 1 May 2021).

<sup>175</sup> UN Security Council, *Security Council resolution 1593*, 31 March 2005, S/RES/1593.

<sup>176</sup> UN Security Council, *Security Council resolution 1970*, 26 February 2011, S/RES/1970.

<sup>177</sup> A.S. GALAND, *UN Security Council Referrals to the International Criminal Court*, BRILL, Boston, 2018, 2; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 35; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 375; G. WERLE and F. JESSBERGER, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2020, 121.

of Darfur, both the United States and China abstained in the vote.<sup>178</sup> China argued: “*We cannot accept any exercise of the ICC’s jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorisation of such an exercise of jurisdiction by the ICC.*”<sup>179</sup> In the case of Libya, the resolution to refer the situation to the ICC was adopted unanimously.<sup>180</sup> But China emphasised that this case was “*entirely exceptional*” and “*(did) not set a precedent for the future of Chinese foreign policy*”.<sup>181</sup>

Multiple human rights organisations have called on the UN Security Council to take action and to refer the situation in Myanmar to the ICC.<sup>182</sup> Up until now, however, the UN Security Council has not done so. Human Rights Watch speaks about a ‘deafening silence’ and emphasises that the UN Security Council should refer the entire situation to the ICC.<sup>183</sup> It cannot be excluded that the UN Security Council will refer the case in the future, but the veto power of the permanent members might be an important obstacle. China has significant economic and political relations with Myanmar and thus might be reluctant to accept such a resolution. Moreover, the Chinese government has not yet spoken out against the human rights violations in Myanmar.<sup>184</sup> In 2017, China and Russia blocked the adoption of a press statement concerning the violence in

<sup>178</sup> G.M. LENTNER, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, *International Criminal Law Review*, 2020, Vol. 20 No. 2, 269-270; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 377; M. VANHULLEBUSCH, “Regime change, the Security Council and China”, *Chinese Journal of International Law*, 2015, Vol. 14 No. 4, 684.

<sup>179</sup> “Security Council, 60<sup>th</sup> year: 5158<sup>th</sup> meeting, Thursday, 31 March 2005, New York”, UN Security Council, 31 March 2005, S/PV.51585.

<sup>180</sup> G.M. LENTNER, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, *International Criminal Law Review*, 2020, Vol. 20 No. 2, 274; W.A. SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2016, 377.

<sup>181</sup> G.M. LENTNER, “The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism”, *International Criminal Law Review*, 2020, Vol. 20 No. 2, 275.

<sup>182</sup> “UN Security Council: Refer Myanmar to ICC”, *Human Rights Watch*, 8 May 2018, <https://www.hrw.org/news/2018/05/08/un-security-council-refer-myanmar-icc> (consulted on 1 May 2021); “UN Security Council Should Seek Justice for Myanmar Atrocities”, *Human Rights Watch*, 27 August 2018, <https://www.hrw.org/news/2018/08/27/un-security-council-should-seek-justice-myanmar-atrocities> (consulted on 1 May 2021); “U.N. Security Council: Refer Myanmar to the International Criminal Court”, *Fortify Rights*, 7 September 2018, <https://www.fortifyrights.org/mya-2018-09-07/> (consulted on 1 May 2021); “Myanmar: ICC decision to investigate Rohingya atrocities an important step towards justice”, *Amnesty International*, 14 November 2019, <https://www.amnesty.org/en/latest/news/2019/11/myanmar-icc-referral/> (consulted on 1 May 2021).

<sup>183</sup> “Rohingya Symposium: A Strategy for Strong Security Council Action on Myanmar”, *Human Rights Watch*, 28 August 2020, <https://www.hrw.org/news/2020/08/28/rohingya-symposium-strategy-strong-security-council-action-myanmar> (consulted on 1 May 2021).

<sup>184</sup> H.A. TAUFIQ, “China, India, and Myanmar: Playing Rohingya Roulette?” in I. HUSSAIN (ed.), *South Asia in Global Power Rivalry*, Palgrave Macmillan, London, 2019, (81) 81-82; “On Rohingya Issue, Both China and India Back Myanmar Government”, *The Diplomat*, 13 September 2017, <https://thediplomat.com/2017/09/on-rohingya-issue-both-china-and-india-back-myanmar-government/> (consulted on 1 May 2021); “Understanding China’s Response to the Rakhine Crisis”, *United States Institute of Peace*, 2018, <https://www.usip.org/sites/default/files/2018-02/sr419-understanding-chinas-response-to-the-rakhine-crisis.pdf> (consulted on 1 May 2021).

Myanmar.<sup>185</sup> In 2018, China and Russia again blocked the adoption of a resolution that wanted to threaten Myanmar with future sanctions.<sup>186</sup> These events strongly suggest that China and Russia would use their veto against a UN Security Council referral.

### 3.1.4. Conclusion

**28.** The fact that Myanmar is not a State Party to the Rome Statute poses great difficulties for the prosecution of the sexual violence against the Rohingya before the ICC. At first sight, the situation seems to fall outside the scope of the territorial jurisdiction of the Court. Nonetheless, there are some possibilities in the current investigation as well as in possible future investigations.

In the current investigation, the Court has expressly stated that the investigation could concern any crime, including sexual violence. But an important condition, however, is that an element of the crime must have been committed on the territory of a State Party, which is generally not the case. This condition makes the possibilities rather limited. However, sexual violence could be considered to be part of the larger crime of persecution, which will also be investigated by the Prosecutor. If sexual violence is considered as a tool to persecute the Rohingya and to drive them out of Myanmar to Bangladesh, the condition of the crime having a transboundary nature would be fulfilled. This reasoning is emphasised by the statement of the Court that crimes falling outside its jurisdiction will be taken into account as contextual elements. Another possibility lies in the effects doctrine. The massive exodus of Rohingya refugees to Bangladesh can be seen as the effect of the crimes committed in Myanmar. Since this effect manifests itself on the territory of a State Party, Bangladesh, the ICC would have territorial jurisdiction over the case. Nonetheless, the effects doctrine is rather controversial in international criminal law and is not followed by most legal authors. Neither has the Court mentioned the effects doctrine in its decisions concerning the Rohingya case up until now. That makes it unlikely that the doctrine will be used by the Court.

If sexual violence would be excluded from the current investigation, there are two possibilities that would trigger a new investigation. The first possibility is that Myanmar accepts the jurisdiction of the ICC ad hoc. However, this seems highly unlikely, as the Burmese government continues to deny the allegations of genocide and sexual violence. Another possibility is a UN Security Council referral. The difficulty here lies in the position of China, that has strong ties with Myanmar and is generally unfavourable towards the Court. Thus, there

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<sup>185</sup> “China, Russia block U.N. council concern about Myanmar violence”, *Reuters*, 17 March 2017, <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6> (consulted on 1 May 2021).

<sup>186</sup> “U.N. Security Council mulls Myanmar action; Russia, China boycott talks”, *Reuters*, 17 December 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN1OG2CJ> (consulted on 1 May 2021).

is a good chance that China would use its veto against a possible referral of the situation in Myanmar.

In conclusion, the prospects for the prosecution of sexual violence in Myanmar are not very promising. The best possibility lies in the crime of persecution, that is now under investigation by the Prosecutor. Sexual violence can be included in this investigation, as part of a larger crime. It can also be taken into account as a contextual element. A new future investigation, however, seems rather unlikely.

### 3.2. CORE CRIMES

**29.** Multiple human rights organisations have argued that the crimes committed by the Tatmadaw against the Rohingya can be considered as crimes against humanity.<sup>187</sup> Other legal experts have suggested that the atrocities constitute genocide.<sup>188</sup> The UN High Commissioner for Human Rights has called the situation ‘a textbook example of ethnic cleansing’.<sup>189</sup>

In this section, it is examined whether the sexual violence against the Rohingya falls under the jurisdiction *ratione materiae* of the ICC, that is competent to prosecute four international crimes: genocide, crimes against humanity, war crimes and the crime of aggression.<sup>190</sup> Hence, it is analysed whether the violence that the Rohingya women suffered amounts to acts of genocide, crimes against humanity and/or war crimes. The crime of aggression, however, is not relevant for this research.

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<sup>187</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 11; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 19; “Burma: Military commits Crimes Against Humanity”, *Human Rights Watch*, 25 September 2017, <https://www.hrw.org/news/2017/09/25/burma-military-commits-crimes-against-humanity> (consulted on 1 May 2021); “Myanmar: Crimes against humanity terrorize and drive Rohingya out”, *Amnesty International*, 18 October 2017, <https://www.amnesty.org/en/latest/news/2017/10/myanmar-new-evidence-of-systematic-campaign-to-terrorize-and-drive-rohingya-out/> (consulted on 1 May 2021).

<sup>188</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 683; A.K. LOWENSTEIN, “Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.”, *International Human Rights Clinic at Yale Law School*, 2015, 64; A.R. NASUTION, “The Crime of Genocide on the Rohingya Ethnic in Myanmar from the Perspective of International Law and Human Rights”, *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)*, 2018, Vol. 5 No. 1, 182.

<sup>189</sup> “UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein highlights human rights concerns around the world in an address to the 36th session of the Human Rights Council in Geneva”, *UN Office of the High Commissioner for Human Rights*, 11 September 2017, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E> (consulted on 1 May 2021).

<sup>190</sup> Art. 5 Rome Statute.

### 3.2.1. *Acts of genocide?*

#### a. Article 6 Rome Statute

30. The definition of genocide in the Rome Statute was literally copied from the Genocide Convention of 1948 and has not changed since.<sup>191</sup> The list of the acts of genocide is exhaustive and cannot be extended to other acts of persecution. Not all forms of genocide are punishable under the Rome Statute, such as cultural genocide and ethnic cleansing.<sup>192</sup> The definition does not explicitly mention rape or other forms of sexual violence. Several authors, however, have argued that sexual violence should be explicitly included as an act of genocide.<sup>193</sup> Nevertheless, the ICC has not yet shown any intent to amend this provision in the near future. Concerning the sub-element of causing serious bodily or mental harm, the EoC explicitly mention in a footnote that this can include, but is not restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.<sup>194</sup> Since the other sub-elements do not mention sexual violence, it is possible that the ICC would interpret the acts of genocide narrowly.<sup>195</sup>

The EoC set out the different elements that are required for an act to constitute genocide. The first element is the material element (the *actus reus*). These are the five acts that are enumerated in the definition of genocide: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting conditions of life on the group calculated to bring about physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.<sup>196</sup>

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<sup>191</sup> Art. 2 UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948; V. OOSTERVELD, "The Elements of Genocide: Introduction" in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (41) 41; W.A. SCHABAS,

<sup>192</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 440; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 93; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 207-221, 222-223.

<sup>193</sup> B. BEDONT, "Gender-Specific provisions in the Statute of the International Criminal Court" in F. LATTANZI and W.A. SCHABAS (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Il Sirente, Ripa Fagnano Alto, 1999, (183) 209; A.A. MILLER, "From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape", *Penn State Law Review*, 2003, Vol. 108 No. 1, 362-363; S. ROGERS, "Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court", *George Washington International Law Review*, 2016, Vol. 48 No. 2, 300-301; L. SHARLACH, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda", *New Political Science*, 2000, Vol. 22 No. 1, 89-90.

<sup>194</sup> Art. 6 (b), footnote 3 ICC Elements of Crimes, adopted at Assembly of States Parties to the Rome Statute of the International Criminal Court, First session (3-10 September 2002), ICC-ASP/1/3 and Corr. 1 (2002).

<sup>195</sup> S. ROGERS, "Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court", *George Washington International Law Review*, 2016, Vol. 48 No. 2, 295.

<sup>196</sup> Art. 6 (a) (1), (b) (1), (c) (1), (d) (1) and (e) (1) ICC Elements of Crimes.

Besides the material element, three other elements are required for an act to constitute genocide. These elements are identical for the different acts of genocide. First, the person or persons against whom the violence is committed, must have belonged to a particular national, ethnical, racial, or religious group.<sup>197</sup> This is a closed list, so social and political groups are excluded.<sup>198</sup> In order to identify someone as member of the group, a subjective or objective approach can be followed. According to the subjective approach, a person belongs to a group if the perpetrator considers that person as a member. According to the objective approach, there should be some objective distinctions between the different groups.<sup>199</sup> International tribunals generally follow a subjective approach.<sup>200</sup>

Furthermore, the perpetrator must have intended to destroy, in whole or in part, that national, ethnical, racial, or religious group, as such.<sup>201</sup> This element is called ‘genocidal intent’, which is a mental element (the *mens rea*) special to genocide. This special intent goes beyond the mental element that is required for every crime under the Rome Statute.<sup>202</sup> Article 30 of the Rome Statute requires that a crime is committed with knowledge and intent, meaning that the perpetrator was aware that a certain circumstance existed or a certain consequence would occur and that the perpetrator intended to engage in certain conduct or to cause a certain consequence.<sup>203</sup> In addition to this mental element, the ‘intent to destroy’, the genocidal intent, is required.<sup>204</sup> The destruction that is meant, is a physical or biological destruction, not a cultural one.<sup>205</sup> There is some discussion whether each individual perpetrator needs to have the genocidal intent or whether collective intent in the overall genocidal plan suffices. Authors have made a distinction between a purpose-based approach and a knowledge-

<sup>197</sup> Art. 6 (a) (2), (b) (2), (c) (2), (d) (2) and (e) (2) ICC Elements of Crimes.

<sup>198</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 424; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 92.

<sup>199</sup> R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 212-214.

<sup>200</sup> *Prosecutor v. Laurent Semanza*, “Judgment and Sentence”, ICTR (Trial Chamber III), 15 May 2003, ICTR-97-20-T, para. 317; *Prosecutor v. Juvénal Kajelijeli*, “Judgment and Sentence”, ICTR (Trial Chamber II), 1 December 2003, ICTR-98-44A-T, para. 811; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 92-93.

<sup>201</sup> Art. 6 (a) (3), (b) (3), (c) (3), (d) (3) and (e) (3) ICC Elements of Crimes.

<sup>202</sup> K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, Vol. 91 No. 876, 834-835; M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 409.

<sup>203</sup> Art. 30 Rome Statute.

<sup>204</sup> K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, Vol. 91 No. 876, 834-835; M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 409.

<sup>205</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 439-440; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 223; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 89; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 271.

based approach. According to the purpose-based approach, the individual perpetrators must have the required intent. The knowledge-based approach focuses on the collective dimension of genocide and requires that the individual perpetrators have knowledge of the genocidal plan of the State or similar group. The current standard, however, seems to be that every individual needs to have the specific intent.<sup>206</sup> The words ‘in whole or in part’ indicate that there is a quantitative dimension. The intent to kill only a few people of the group does not suffice. In this respect, the relevant quantity is not the number of actual victims, but the fact that the perpetrator intended to kill a large number of people of the group. Nevertheless, the number of actual victims is often significant to prove genocidal intent.<sup>207</sup>

In the *Jelisić* case, the ICTY stated that genocide can be committed by one single perpetrator.<sup>208</sup> This point of view, however, was not supported in other case law and jurisprudence.<sup>209</sup> To avoid this position, the drafters of the EoC included a last element: the conduct must have taken place in the context of a manifest pattern of similar conduct directed against that group or the conduct itself must have been able to cause such destruction.<sup>210</sup> The latter can occur, when the group is very small or when the accused has access to powerful means of destruction.<sup>211</sup> In the *Jelisić* case, the ICTY also pointed out that the existence of a plan or policy to commit genocide is not a formal requirement, but that it will be very hard to prove genocidal intent without it.<sup>212</sup> Other case law and

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<sup>206</sup> K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, Vol. 91 No. 876, 833-834; R. ARNOLD, “The *mens rea* of genocide under the Statute of the International Criminal Court”, *Criminal Law Forum*, 2003, Vol. 14 No. 2, 127-128; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 222; A. GREENAWALT, “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation”, *Columbia Law Review*, 1999, Vol. 99 No. 8, 2288; C. KRESS, “The Darfur Report and Genocidal Intent”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 3, 562; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 242-243; O. TRIFFTERER, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, *Leiden Journal of International Law*, 2001, Vol. 14 No. 2, 399-400; E. VAN SLIEDREGT, “Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide”, *Journal of International Criminal Justice*, 2007, Vol. 5 No. 1, 190-191.

<sup>207</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 421-422; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 91.

<sup>208</sup> *Prosecutor v. Goran Jelisić*, “Judgment”, ICTY (Trial Chamber), 14 December 1999, IT-95-10-T, para. 100.

<sup>209</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 94; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 218-219; W.A. SCHABAS, “The Jelisić Case and the Mens Rea of the Crime of Genocide”, *Leiden Journal of International Law*, 2001, Vol. 14 No. 1, 125; O. TRIFFTERER, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, *Leiden Journal of International Law*, 2001, Vol. 14 No. 2, 407.

<sup>210</sup> Art. 6 (a) (4), (b) (4), (c) (4), (d) (4) and (e) (4) ICC Elements of Crimes.

<sup>211</sup> R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 218.

<sup>212</sup> *Prosecutor v. Goran Jelisić*, “Judgment”, ICTY (Appeals Chamber), 5 July 2001, IT-95-10-A, para. 48.



jurisprudence, however, seem to consider a plan as a requirement.<sup>213</sup> The EoC seem to support the view that a plan is required, although it is formulated as ‘in the context of a manifest pattern’.<sup>214</sup>

## b. Case law

### b.1 ICC

31. Up until this date, there has only been one case before the ICC in which genocide was charged, namely in the case against Omar al-Bashir, the president of Sudan.<sup>215</sup> The Sudanese government used different crimes to destroy the tribal groups in Darfur, including mass rapes.<sup>216</sup> In the first arrest warrant, the Pre-Trial Chamber followed a restrictive interpretation of genocide. The majority rejected genocidal intent, because it was not the only reasonable conclusion that could be drawn from the evidence.<sup>217</sup> Yet, in the second arrest warrant, the Chamber took a broader view and accepted the charge of genocide.<sup>218</sup> Since Omar al-Bashir is still at large, the case remains in pre-trial phase.<sup>219</sup> But, the broader application of genocide is promising for future cases.

In the first arrest warrant, the Chamber also clarified its view on several matters. Referring to the contextual element, the Chamber argued that the conduct must present a concrete threat to the existence of the targeted group, or a part of it. A latent or hypothetical threat does not suffice.<sup>220</sup> This requirement sets a very high threshold for genocide and it seems that the Chamber deviated from this view in its second arrest warrant.<sup>221</sup> In addition, this targeted group must

<sup>213</sup> *Israel v. Eichmann*, “Judgment”, District Court of Jerusalem, 12 December 1961, 40/61, para. 195; *Prosecutor v. Karadzic and Mladic*, “Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence”, ICTY (Trial Chamber), 11 July 1996, IT-95-5-R61 and IT-95-18-R61, para. 94; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 90; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 245-247.

<sup>214</sup> W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 250-251.

<sup>215</sup> W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 86.

<sup>216</sup> S. VALIANI, “Genocide Left Unchecked: Assessing the ICC’s Difficulties Detaining Omar Al-Bashir”, *Berkeley Journal of International Law*, 2017, Vol. 35 No. 1, 164.

<sup>217</sup> *Prosecutor v. Omar Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 205-206; K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, Vol. 91 No. 876, 839; S. VALIANI, “Genocide Left Unchecked: Assessing the ICC’s Difficulties Detaining Omar Al- Bashir”, *Berkeley Journal of International Law*, 2017, Vol. 35 No. 1, 163.

<sup>218</sup> *Prosecutor v. Omar Al bashir*, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 12 July 2010, ICC-02/05-01/09.

<sup>219</sup> “Sudan signals it may send former dictator Omar al-Bashir to ICC”, *The Guardian*, 11 February 2020, <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc> (consulted on 1 May 2021).

<sup>220</sup> *Prosecutor v. Omar Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 124.

<sup>221</sup> C. KRESS, “The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case”, *Journal of International Criminal Justice*, 2009, 460

have certain (national, ethnic, racial or religious) positive characteristics. The group cannot be defined negatively.<sup>222</sup> Regarding genocidal intent, the Chamber confirmed the view that the intent to destroy is a mental element, additional to the general mental element of knowledge and intent, as required by Article 30 of the Rome Statute.<sup>223</sup> The Chamber also stated that a campaign of ethnic cleansing, which it defined as “*rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area*”, does not equal genocidal intent. The mere expulsion of a group is not the same as the intent ‘to destroy in whole or in part’. Nonetheless, the Chamber emphasised that ethnic cleansing can still amount to genocide, if all the elements of Article 6 of the Rome Statute are present.<sup>224</sup>

The *al-Bashir* case was the first case before the ICC in which sexual violence was charged as genocide. In earlier cases, such as the *Katanga and Ngudjolo Chui* case, sexual violence was prosecuted as a crime against humanity and a war crime, even though there was substantial evidence that acts of sexual violence were used to destroy the Hema population.<sup>225</sup> Thus, the *al-Bashir* case could present an important shift in the prosecution of sexual violence. Even though sexual violence is not enumerated in Article 6 of the Rome Statute, it can definitely be prosecuted as genocide. In June 2014, the Office of the Prosecutor published a policy paper, Policy Paper on Sexual and Gender-Based Crimes, which explicitly authorises the ICC to prosecute sexual violence as acts of genocide.<sup>226</sup> This confirms the view of the ICC Preparatory Commission, which “*recognised that rape and sexual violence may constitute genocide in the same way as any act, provided that the criteria of the crime of genocide are met*”.<sup>227</sup> According to the policy paper of 2014, all five sub-elements can contain a sexual

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Vol. 7 No. 2, 306; S. VALIANI, “Genocide Left Unchecked: Assessing the ICC’s Difficulties Detaining Omar Al-Bashir”, *Berkeley Journal of International Law*, 2017, Vol. 35 No. 1, 163-164.

<sup>222</sup> *Prosecutor v. Omar Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 135.

<sup>223</sup> *Prosecutor v. Omar Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 138-139.

<sup>224</sup> *Prosecutor v. Omar Al Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 143-145.

<sup>225</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 30 September 2008, ICC-01/04-01/07, para. 339-340, 437; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 297-298.

<sup>226</sup> “Policy Paper on Sexual and Gender-Based Crimes”, ICC (Office of the Prosecutor), June 2014, para. 25; C.E. ARRABAL WARD, *Wartime Sexual Violence at the International Level: A Legal Perspective*, Brill Nijhoff, Leiden, 2018, 196; “ICC Prosecutor, Fatou Bensouda, launches Policy on Sexual & Gender-Based Crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow #EndSexualViolence”, *ICC Press Release*, 9 December 2014, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1073> (consulted on 1 May 2021).

<sup>227</sup> “Proceedings of the Preparatory Commission at its first session (16-26 February 1999)”, Preparatory Commission for the International Criminal Court, 2 March 1999, PCNICC/1999/L.3/Rev.1.

element.<sup>228</sup> Nevertheless, one must bear in mind that this policy paper does not have the same legal value as the Rome Statute or the EoC and could simply be abolished by the Office of the Prosecutor.<sup>229</sup>

## b.2 Other international tribunals

**32.** Since there are no precedents in which the ICC tried sexual violence as genocide, the case law of the ICTY and the ICTR can offer guidance. These ad hoc tribunals have played a significant role in the prosecution of sexual violence in international criminal law.<sup>230</sup>

### b.2.1. ICTR

**33.** The ICTR Statute does not explicitly recognise sexual violence as an act of genocide, as the definition was copied from the Genocide Convention.<sup>231</sup> Nevertheless, the ICTR prosecuted sexual violence as genocide in the *Akayesu* case, concerning the genocide of the Tutsis in Rwanda.<sup>232</sup> During the genocide,

<sup>228</sup> “Policy Paper on Sexual and Gender-Based Crimes”, ICC (Office of the Prosecutor), June 2014, para. 30-31.

<sup>229</sup> S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 300.

<sup>230</sup> C. CHINKIN, “Gender-related violence and international criminal law and justice” in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, New York, (75) 78; U. KAITESI, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and gacaca courts*, Intersentia, Cambridge, 2014, 124; C. MACKINNON, “The Recognition of Rape as an act of Genocide – *Prosecutor v. Akayesu*”, *New England Journal of International Law & Comparative Law*, 2008, Vol. 14 No. 2, 110; V. OOSTERVELD, “Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court”, *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 120; V. OOSTERVELD, “The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence” in M. STERIO and M.P. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, (197) 197; T.G. PHELPS, “The Symbolic and Communicative Function of International Criminal Tribunals” in M. FINEMAN and E. ZINSSTAG (eds.), *Feminist perspectives on transitional justice from international and criminal to alternative forms of justice*, Intersentia, Oxford, 2013, (171) 171-172.

<sup>231</sup> Art. 2 (2) UN Security Council, *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, 8 November 1994; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 273.

<sup>232</sup> K.D. ASKIN, “Gender crimes: jurisprudence in the ICTR: positive developments”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 4, 1007; U. KAITESI, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and gacaca courts*, Intersentia, Cambridge, 2014, 126; C. MACKINNON, “The Recognition of Rape as an act of Genocide – *Prosecutor v. Akayesu*”, *New England Journal of International Law & Comparative Law*, 2008, Vol. 14 No. 2, 102; V. OOSTERVELD, “Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court”, *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 122; T.G. PHELPS, “The Symbolic and Communicative Function of International Criminal Tribunals” in M. FINEMAN and E. ZINSSTAG (eds.), *Feminist perspectives on transitional justice from international and criminal to alternative forms of justice*, Intersentia, Oxford, 2013, (171) 175.

many Tutsi women suffered rapes and other acts of sexual violence, often committed by more than one perpetrator and often in public. Sexual violence was generally accompanied by physical violence and death threats.<sup>233</sup> Multiple testimonies in this case suggested that the sexual violence was used as a tool to destroy the Tutsi population. One witness testified that she was not raped, “because they did not know which ethnic group she belonged to”.<sup>234</sup> According to another testimony, Tutsi women married to Hutu men “were left alone, because it was said that these women deliver Hutu children”.<sup>235</sup> In the final judgment, the Trial Chamber found that sexual violence was an integral part of the process of destruction and convicted the accused of genocide. The ICTR thus confirmed that sexual violence can amount to genocide and clarified that it can be prosecuted under sub-elements (a), (b) and (d).<sup>236</sup> In the *Akayesu* case, the ICTR also clarified what the different acts of genocide precisely entail. Sub-element (c), deliberately inflicting conditions of life, means that the perpetrator does not immediately kill the members of the group, but ultimately seeks their physical destruction.<sup>237</sup> Sub-element (d), measures intended to prevent births within the group, can include: sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages. These measures are not only physical, but can also be mental. The ICTR emphasised that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate”.<sup>238</sup>

In the *Kayishema* case, Trial Chamber II built on the reasoning of the *Akayesu* case and extended the possibility of genocidal sexual violence to sub-element (c).<sup>239</sup> These views were confirmed in the *Gacumbtsi* case and the *Muhimana* case.<sup>240</sup> In the *Muhimana* case, the fact that a Hutu woman was raped

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<sup>233</sup> *Prosecutor v. Jean-Paul Akayesu*, “Amended Indictment”, ICTR, 17 June 1997, ICTR-96-4-I, para. 12A.

<sup>234</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 438.

<sup>235</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 429.

<sup>236</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 731; K.D. ASKIN, “Gender crimes: jurisprudence in the ICTR: positive developments”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 4, 1011-1012; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 283; B. STERN and I. FOUCHARD, “Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law” in L. SADAT and P. SCHARF (eds.), *Theory and Practice of International Criminal Law*, Koninklijke Brill NV, Leiden, 2008, (285) 304-305.

<sup>237</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 505.

<sup>238</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 507-508.

<sup>239</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 116; K.D. ASKIN, “Gender crimes: jurisprudence in the ICTR: positive developments”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 4, 1012-1013.

<sup>240</sup> *Prosecutor v. Sylvestre Gacumbtsi*, “Judgment”, ICTR (Trial Chamber III), 17 June 2004, ICTR-2001-64-T, para. 291; K.D. ASKIN, “Gender crimes: jurisprudence in the ICTR: positive developments”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 4, 1015-1016.

because she was mistaken for a Tutsi, was considered conclusive evidence for genocidal intent.<sup>241</sup>

### b.2.2. ICTY

**34.** In the Yugoslavian genocide, sexual violence was also used as a tactic of war on a large scale.<sup>242</sup> At first, the ICTY showed reluctance to prosecute sexual violence as acts of genocide and prosecuted it as crimes against humanity instead, even though the possibility had been explicitly recognised by the ICTY.<sup>243</sup> In the *Kunarac* case, Trial Chamber II observed that Muslim women were specifically targeted and raped because they were Muslims, as the defendant told Muslim women that they would give birth to Serb babies and should “*enjoy being fucked by a Serb*”.<sup>244</sup> Nevertheless, the accused was convicted of crimes against humanity and war crimes, but not of genocide.<sup>245</sup>

In more recent cases, however, the ICTY has followed the approach of the ICTR and has included sexual violence explicitly in its charges of genocide. Both in the *Karadzic* case and the *Mladic* case, the accused were convicted of genocide, in part based on sexual violence.<sup>246</sup> The ICTY has prosecuted sexual violence both under sub-elements (b) and (c).<sup>247</sup> In the *Tolimir* case, the Appeals Chamber held that serious bodily or mental harm does not require permanent or irreversible harm, but the harm must amount to a grave

<sup>241</sup> *Prosecutor v. Mikaeli Muhimana*, “Judgment”, ICTR (Trial Chamber III), 28 April 2005, ICTR-95-1B-T, para. 286, 517; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 283-285.

<sup>242</sup> K.D. ASKIN, *War Crimes Against Women: Prosecution in International Tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, 295-296; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 286; L. SHARLACH, “Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda”, *New Political Science*, 2000, Vol. 22 No. 1, 96; J.M.H. SHORT, “Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court”, *Michigan Journal of Race & Law*, 2003, Vol. 8 No. 2, 509; B. STERN and I. FOUCHARD, “Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law” in L. SADAT and P. SCHARF (eds.), *Theory and Practice of International Criminal Law*, Koninklijke Brill NV, Leiden, 2008, (285) 298.

<sup>243</sup> *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 172; *Prosecutor v. Radislav Krstic*, “Judgment”, ICTY (Trial Chamber), 2 August 2001, IT-98-33-T, para. 513; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 286.

<sup>244</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 654.

<sup>245</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 883.

<sup>246</sup> *Prosecutor v. Radovan Karadzic*, “Judgment”, ICTY (Trial Chamber), 24 March 2016, IT-95-5/18-T, para. 6071; *Prosecutor v. Ratko Mladic*, “Judgment”, ICTY (Trial Chamber), 22 November 2017, IT-09-92-T, para. 5214; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 293.

<sup>247</sup> L. BAIG, M. JARVIS, E. MARTIN SALGADO and G. PINZAUTI, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 201.

and long-term disadvantage to a person's ability to lead a normal and constructive life.<sup>248</sup> In sub-element (c), 'calculated to bring about the physical destruction' must be understood as having the potential to destroy the group in whole or in part.<sup>249</sup>

### c. Application to Rohingya case

**35.** Some legal experts have suggested that the clearance operations in Rakhine State could constitute genocide.<sup>250</sup> For the sexual violence to amount to genocide, the definition of Article 6 of the Rome Statute must be met, accompanied by the different elements set out in the EoC.

#### *c.1. Material elements*

##### c.1.1. Acts

**36.** Article 6 of the Rome Statute requires that at least one of the five acts of genocide was committed. As the Policy Paper on Sexual and Gender-Based Crimes recognises that all sub-elements can contain a sexual element, all sub-elements can be considered.<sup>251</sup>

The first act is killing members of the group. According to human rights reports, sexual violence was often accompanied by physical harm. Not only were victims often killed afterwards, but many of them also suffered injuries, eventually leading to their death.<sup>252</sup> In addition, the lack of proper post-rape health care and maternal health care for survivors of sexual violence increased the mortality rates among the Rohingya.<sup>253</sup>

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<sup>248</sup> *Prosecutor v. Zdravko Tolimir*, "Judgment", ICTY (Appeals Chamber), 8 April 2015, IT-05-88/2-A, para. 201, 212.

<sup>249</sup> *Prosecutor v. Radoslav Brdanic*, "Judgment", ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 906; *Prosecutor v. Radovan Karadzic*, "Judgment", ICTY (Appeals Chamber), 11 July 2013, IT-9S-SI18-AR98bis.I, para. 40.

<sup>250</sup> A. COWLEY and M. ZARNI, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 683; A.K. LOWENSTEIN, "Prosecution of the Rohingya Muslims: is Genocide occurring in Rakhine State? A Legal Analysis.", *International Human Rights Clinic at Yale Law School*, 2015, 64; A.R. NASUTION, "The Crime of Genocide on the Rohingya Ethnic in Myanmar from the Perspective of International Law and Human Rights", *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)*, 2018, Vol. 5 No. 1, 182.

<sup>251</sup> "Policy Paper on Sexual and Gender-Based Crimes", ICC (Office of the Prosecutor), June 2014, para. 30-31.

<sup>252</sup> A. BALA and G. BSMRSTU, "Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar", October 2018, 4; N. MESSNER, *et al.*, "Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar", *Conflict & Health*, 2019, Vol. 13 No. 41, 7; "They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar", *Fortify Rights* report, 14 November 2017, 10; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 15-17; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 9; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>253</sup> "Sexual violence devastating, humanitarian needs mounting in Rohingya crisis", *UNFPA News*, 20 October 2017, <https://www.unfpa.org/es/news/sexual-violence-devastating-humanitarian-needs-465>

The EoC explicitly include rape and sexual violence in the second sub-element, causing serious bodily or mental harm to members of the group. Hence, it is most likely to be taken into consideration by the ICC.<sup>254</sup> With regard to bodily harm, many testimonies bear witness to the physical injuries that Rohingya women suffered because of acts of sexual violence. Victims were often beaten, tied up and mutilated in their genital area.<sup>255</sup> Mental harm is more difficult to prove, but it is obvious that such a degrading treatment has serious psychological consequences. In many instances, families were forced to watch their relatives being raped and victims were laughed at or verbally harassed.<sup>256</sup> Health care workers in the refugee camps testify of psychological trauma among victims.<sup>257</sup>

The third sub-element is deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Multiple human rights organisations arrived to the conclusion that the Tatmadaw used sexual violence as a tactic to terrorise the Rohingya and to make them flee.<sup>258</sup> This brutal campaign of sexual violence drove thousands of

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*mounting-rohingya-crisis* (consulted on 1 May 2021); “Rohingya Symposium: The Rohingya Cases before International Courts and the Crime of Genocide”, *Opinio Juris*, 25 August 2020, <https://opiniojuris.org/2020/08/25/rohingya-symposium-the-rohingya-cases-before-international-courts-and-the-crime-of-genocide/> (consulted on 1 May 2021); “Accounts from health care professionals indicate widespread and long-lasting impacts of sexual violence against Rohingya”, *Physicians for Human Rights*, 22 October 2020, <https://phr.org/news/accounts-from-health-care-professionals-indicate-widespread-and-long-lasting-impacts-of-sexual-violence-against-rohingya/> (consulted on 1 May 2021).

<sup>254</sup> Art. 6 (b), footnote 3 ICC Elements of Crimes.

<sup>255</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7; “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>256</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 5; “Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh”, *UN Office of the High Commissioner for Human Rights* report, 11 October 2017, 7-8; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the Special Rapporteur on the situation of human rights in Myanmar”, *UN Human Rights Council* report, 9 March 2018, 11; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>257</sup> “Accounts from health care professionals indicate widespread and long-lasting impacts of sexual violence against Rohingya”, *Physicians for Human Rights*, 22 October 2020, <https://phr.org/news/accounts-from-health-care-professionals-indicate-widespread-and-long-lasting-impacts-of-sexual-violence-against-rohingya/> (consulted on 1 May 2021).

<sup>258</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 466

Rohingya to refugee camps across the border. In these camps, living conditions are terrible and rape survivors often do not get the adequate health care, resulting in more deaths. So, it can be argued that sexual violence was used as a weapon to bring the ultimate physical destruction of the Rohingya population.<sup>259</sup>

With regard to the sub-element of imposing measures intended to prevent births within the group, there are several measures in place that prevent the Rohingya to procreate. Since 1992, Rohingya have to ask permission before they can marry. Couples who want to marry are required to pay a large sum of money and have to wait several years before they can obtain their permissions, which are often denied.<sup>260</sup> Children outside marriage are not allowed. In several cases, local authorities have forced Rohingya women to take a pregnancy test before receiving a marriage permission.<sup>261</sup> Furthermore, Rohingya couples are not allowed to have more than two children.<sup>262</sup> In 2015, the Burmese parliament passed a set of laws that creates additional obstacles for the Rohingya population to have children. The Interfaith Marriage Law heavily restricts interfaith marriages, targeting the Muslim population of Myanmar.<sup>263</sup> In addition, a birth control law allows local authorities to organise that women need to have a gap of three years between births.<sup>264</sup> In addition to these measures, the sexual violence

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2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>259</sup> “Rohingya Symposium: The Rohingya Cases before International Courts and the Crime of Genocide”, *Opinio Juris*, 25 August 2020, <https://opiniojuris.org/2020/08/25/rohingya-symposium-the-rohingya-cases-before-international-courts-and-the-crime-of-genocide/> (consulted on 1 May 2021).

<sup>260</sup> “Myanmar: The Rohingya minority: Fundamental rights denied”, *Amnesty International* report, 18 May 2004, 30-31; “Marriage ban on Rohingyas”, *The Daily Star*, 15 July 2014, <https://www.thedailystar.net/marriage-ban-on-rohingyas-33343> (consulted on 1 May 2021).

<sup>261</sup> “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar”, *Fortify Rights* report, 25 February 2014, 24.

<sup>262</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar”, *Fortify Rights* report, 25 February 2014, 24; “Burma: Revoke ‘Two-Child Policy’ For Rohingyas”, *Human Rights Watch*, 28 May 2013, <https://www.hrw.org/news/2013/05/28/burma-revoke-two-child-policy-rohingya> (consulted on 1 May 2021); “Two-child policy violates human rights of Myanmar’s Rohingyas Muslims – UN Expert”, *UN News*, 31 May 2013, <https://news.un.org/en/story/2013/05/441112-two-child-policy-violates-human-rights-myanmars-rohingya-muslims-un-expert> (consulted on 1 May 2021); “Burma’s Bluff on the Two-Child Policy for Rohingyas”, *Human Rights Watch*, 21 June 2013, <https://www.hrw.org/news/2013/06/21/burmas-bluff-two-child-policy-rohingyas> (consulted on 1 May 2021).

<sup>263</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “Myanmar’s Parliament approves controversial Interfaith Marriage Law”, *Radio Free Asia*, 7 July 2015, <https://www.rfa.org/english/news/myanmar/parliament-approves-controversial-interfaith-marriage-law-07072015152051.html> (consulted on 1 May 2021); “Burma: Reject Discriminatory Marriage Bill”, *Human Rights Watch*, 9 July 2015, <https://www.hrw.org/news/2015/07/09/burma-reject-discriminatory-marriage-bill#> (consulted on 1 May 2021).

<sup>264</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “Myanmar population control law threatens minorities: rights group”, *Reuters*, 22 April 2015, <https://www.reuters.com/article/us-myanmar-law-minorities-idUSKBN0ND1X120150422> (consulted on 1 May 2021); “Burma’s birth control law exposes Buddhist fear of Muslim minority”, *The Guardian*, 25 May 2015, 467



committed against the Rohingya during the clearance operations can also be considered as a measure to prevent births. Many women were mutilated in their genital area and suffered injuries to their reproductive organs, which often led to their inability to have sexual intercourse or to conceive in the future.<sup>265</sup> In addition, mainly women of reproductive age were targeted and brutal attacks were committed against pregnant women and babies.<sup>266</sup>

The final sub-element, forcibly transferring children of the group to another group, will not be further discussed. There does not seem to be substantive evidence that Rohingya children were forcibly transferred to another group.

### c.1.2. Group

**37.** In addition to the criminal acts, the crime of genocide requires that the persons against whom the violence was committed, belong to a protected group. This must be a particular national, ethnical, racial, or religious group.<sup>267</sup> These terms are not so easily defined and overlap.

The ICTR defined a ‘national group’ as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”.<sup>268</sup> Some authors, however, have emphasised that the term not only refers to citizenship, but also to origin.<sup>269</sup> The United States legislation implementing the Genocide Convention suggests a similar view: “a set of individuals whose identity as such is distinctive in terms of nationality or national origins”.<sup>270</sup> On the basis of the 1982 Citizenship Law, the Rohingya are not considered as a national race. Therefore, they are mainly excluded from

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<https://www.theguardian.com/world/2015/may/25/burmas-birth-control-law-exposes-buddhist-fear-of-muslim-minority> (consulted on 1 May 2021).

<sup>265</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7; “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21, 24.

<sup>266</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21, 24.

<sup>267</sup> Art. 6 Rome Statute; art. 6 (a) (2), (b) (2), (c) (2), (d) (2) and (e) (2) ICC Elements of Crimes.

<sup>268</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 512.

<sup>269</sup> S. GLASER, *Droit international pénal conventionnel*, Vol. I, Bruylant, Brussel, 1970, 111; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 135; Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr Nicodème Ruhashyankiko, Special Rapporteur”, UN Economic and Social Council, 25 June 1973, E/CN.4/Sub.2/L.583, para. 56-61.

<sup>270</sup> Genocide Convention Implementation Act of 1987, S. 1851, s. 1093, para. 5.

Burmese nationality and the majority remains stateless.<sup>271</sup> The Burmese government considers them as Bengali, illegal immigrants from Bangladesh.<sup>272</sup> The Rohingya, however, are distinct from the Bangladeshi population and have their own origin. But the historical origin of the Rohingya is a matter of controversy, thus making the qualification as a national group not so clear-cut.<sup>273</sup>

The ICTR defined an ‘ethnic group’ as “a group whose members share a common language or culture”.<sup>274</sup> The United States legislation defines it as “a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage”.<sup>275</sup> Some authors, however, have argued that the concepts of ‘ethnic group’ and ‘racial group’ should be taken together, as they largely overlap.<sup>276</sup> The Rohingya have their own distinct culture, which shows in their language and their customs with regard to clothing, food and art.<sup>277</sup> The majority of the Rohingya population speaks the Rohingya language, known as ‘Rohingyalish’, which is a dialect of Bengali.<sup>278</sup> Therefore, the Rohingya community must be considered as an ethnic group.

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<sup>271</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 699; S.C. DRUCE, “Myanmar’s Unwanted Ethnic Minority: A History and Analysis of the Rohingya Crisis” in M. OISHI (ed.), *Managing Conflicts in a Globalizing ASEAN*, Springer Singapore, Singapore, 2019, (17) 30; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A.A. ULLAH, “Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization”, *Journal of Immigrant & Refugee Studies*, 2011, Vol. 9 No. 2, 149; “International Mission of Inquiry: Burma. Repression, Discrimination and Ethnic Cleansing in Arakan”, *International Federation of Human Rights League* report, 7 April 2000, 18; “Myanmar: The Rohingya minority: Fundamental rights denied”, *Amnesty International* report, 18 May 2004, 9; “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 19.

<sup>272</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 23-25.

<sup>273</sup> A. IBRAHIM, *The Rohingyas. Inside Myanmar’s Hidden Genocide*, Hurst & Company, London, 2016, 25.

<sup>274</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 513.

<sup>275</sup> Genocide Convention Implementation Act of 1987, S. 1851, s. 1093, para. 2.

<sup>276</sup> W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 147.

<sup>277</sup> “Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees”, *UN High Commissioner for Refugees* report, 9 October 2018, 19-20; “In exile in Bangladesh, a bittersweet revival of Rohingya culture”, *Reuters*, 8 May 2019, <https://www.reuters.com/article/us-myanmar-rohingya-culture-idUSKCN1SE02F> (consulted on 1 May 2021); “Rohingya Culture”, *AROUK*, <https://thearouk.org/rohingya-culture/> (consulted on 1 May 2021); “Rohingya’s: their culture”, *Canadian Rohingya Development Initiative*, <https://www.rohingya.ca/rohingyas-have-distinct-culture/> (consulted on 1 May 2021).

<sup>278</sup> “Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees”, *UN High Commissioner for Refugees* report, 9 October 2018, 19-20; “Who are the Rohingya?”, *Radio Free Asia*, 13 April 2010, <https://www.rfa.org/english/multimedia/rohingyaPage04122010151733.html/RohingyaFactSheet-469>

According to the ICTR, a ‘racial group’ “is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”.<sup>279</sup> A similar view is found in the United States legislation, according to which a ‘racial group’ is “a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent”.<sup>280</sup> From a scientific point of view, however, the concept of race has become disputed. Nevertheless, it continues to be used in social sciences and international law.<sup>281</sup> The physical appearance of the Rohingya is slightly different from the Buddhists living in Myanmar, as they have darker skin.<sup>282</sup> It is, however, often difficult to classify. Therefore, the ICTR was reluctant to classify the Tutsi in Rwanda as a racial group.<sup>283</sup>

With regard to a ‘religious group’, the ICTR stated in the *Kayishema* case that a “religious group includes denomination or mode of worship or a group sharing common beliefs”.<sup>284</sup> The United States legislation defines a ‘religious group’ as “a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals”.<sup>285</sup> The Rohingya are Muslims, as opposed to the Burmese Buddhist majority. Hence, there is no doubt that they qualify as a religious group.

It is not sure whether the ICC would follow a subjective or objective approach in determining membership of the group. But even if the Court would require that the group has objective features, this condition is met, as the Rohingya are Muslims and speak a different language. By consequence, the Rohingya qualify as an ethnical and a religious group.

### *c.2. Mental element*

**38.** Article 30 of the Rome Statute requires both knowledge and intent for every crime punishable under the Rome Statute.<sup>286</sup> For the crime of genocide, however, a special intent is required.<sup>287</sup> This special intent entails that the

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*04132010102750.html* (consulted on 1 May 2021); “Rohingya Culture”, *AROUK*, <https://thearouk.org/rohingya-culture/> (consulted on 1 May 2021).

<sup>279</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 514.

<sup>280</sup> Genocide Convention Implementation Act of 1987, S. 1851, s. 1093, para. 6.

<sup>281</sup> W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 142-143.

<sup>282</sup> “Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya”, *The New York Times*, 24 October 2017, <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html> (consulted on 1 May 2021).

<sup>283</sup> W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 140.

<sup>284</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 98.

<sup>285</sup> Genocide Convention Implementation Act of 1987, S. 1851, s. 1093, para. 7.

<sup>286</sup> Art. 30 Rome Statute.

<sup>287</sup> K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross*, 2009, Vol. 91 No. 876, 834-835.

perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such.<sup>288</sup>

### c.2.1. Knowledge

39. The Rome Statute defines knowledge as “*awareness that a circumstance exists*”.<sup>289</sup> The knowledge that is required for genocide is mainly understood in jurisprudence and case law as knowledge of the genocidal plan or policy, hence making a genocidal plan or policy a requirement.<sup>290</sup> The EoC seem to support this view, as they require that there is a manifest pattern of similar conduct.<sup>291</sup> In the discussions on the drafting of the Rome Statute, there was consensus that there should be a ‘plan’ element and the drafters decided on this rather cautious wording.<sup>292</sup> However, the EoC clarify in the introduction of genocide that the mental element regarding the circumstances must be decided by the Court on a case-by-case basis.<sup>293</sup> Thus, it is difficult to predict the Court’s particular view.

Human rights reports indicate that sexual violence was committed against the Rohingya in multiple villages across Rakhine State.<sup>294</sup> Human Rights Watch interviewed women from nineteen different villages, mainly in Buthiduang and Maungdaw Townships, who described similar incidents.<sup>295</sup> According to Fortify Rights, the Tatmadaw followed a well-established pattern. They went from house to house, forced inhabitants to gather in open spaces, where they separated the Rohingya by gender and subsequently raped the women.<sup>296</sup> The UN Human Rights Council documented a similar pattern in Maungdaw, Buthiduang and Rathedaung Townships.<sup>297</sup> These reports strongly

<sup>288</sup> Art. 6 Rome Statute; art. 6 (a) (3), (b) (3), (c) (3), (d) (3) and (e) (3) ICC Elements of Crimes.

<sup>289</sup> Art. 30 (3) Rome Statute.

<sup>290</sup> *Israel v. Eichmann*, “Judgment”, District Court of Jerusalem, 12 December 1961, 40/61, para. 195; *Prosecutor v. Karadzic and Mladic*, “Review of the indictments pursuant to Rule 61 of the Rules of Procedure and Evidence”, ICTY (Trial Chamber), 11 July 1996, IT-95-5-R61 and IT-95-18-R61, para. 94; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 90; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 245-247.

<sup>291</sup> Art. 6 (a) (4), (b) (4), (c) (4), (d) (4) and (e) (4) ICC Elements of Crimes.

<sup>292</sup> “Article 6, The crime of genocide: discussion paper proposed by the Coordinator”, Preparatory Commission for the International Criminal Court, 25 February 1999, PCNICC/1999/WGEC/RT.1

<sup>293</sup> Art. 6, Introduction (c) ICC Elements of Crimes.

<sup>294</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>295</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15.

<sup>296</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10.

<sup>297</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

suggest a premeditated policy of sexual violence, whereby acts of sexual violence were not isolated events, but rather were part of a larger plan. By consequence, the requirement of a manifest pattern of similar conduct seems to be met.

Whether the individual perpetrators had knowledge of the larger genocidal plan, must be determined in those particular cases.

### c.2.2. Intent

40. Most important is the intent of the perpetrators. The reference to intent in Article 6 of the Rome Statute indicates that this intent goes beyond what is required by Article 30 of the Rome Statute, namely that the perpetrator meant to engage in the conduct or meant to cause the consequence.<sup>298</sup> Perpetrators must also have special intent: the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>299</sup> To determine whether special intent exists, the following factors can be taken into account: the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group or the repetition of destructive and discriminatory acts.<sup>300</sup>

There are multiple indications that suggest that the violence against the Rohingya was committed with genocidal intent. A broad anti-Rohingya rhetoric exists in Myanmar, as the Burmese government still refuses to recognise the Muslim population as Rohingya and continues to use the degrading term ‘Bengali’.<sup>301</sup> Rakhine Buddhists feel that the Rohingya stole their land and have referred to them as ‘snakes’ and ‘worse than dogs’.<sup>302</sup> Specific occurrences of hate

<sup>298</sup> Art. 6 Rome Statute; art. 30 (2) Rome Statute; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 256-257.

<sup>299</sup> Art. 6 Rome Statute; art. 6 (a) (3), (b) (3), (c) (3), (d) (3) and (e) (3) ICC Elements of Crimes.

<sup>300</sup> *Prosecutor v. Goran Jelisić*, “Judgment”, ICTY (Appeals Chamber), 5 July 2001, IT-95-10-A, para. 47; *Prosecutor v. Laurent Semanza*, “Judgment and Sentence”, ICTR (Trial Chamber III), 15 May 2003, ICTR-97-20-T, para. 313; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, “Judgment”, ICTR (Appeals Chamber), 26 May 2003, ICTR-96-3-A, para. 525; *Prosecutor v. André Ntagerura et al.*, “Judgment and Sentence”, ICTR (Trial Chamber III), 25 February 2004, ICTR-99-46-T, para. 663; *Prosecutor v. Radislav Krstić*, “Judgment”, ICTY (Appeals Chamber), 19 April 2004, IT-98-33-A, para. 34-35; *Prosecutor v. Sylvestre Gacumbitsi*, “Judgment”, ICTR (Trial Chamber III), 17 June 2004, ICTR-2001-64-T, para. 253; *Prosecutor v. Emmanuel Ndindabahizi*, “Judgment”, ICTR (Trial Chamber I), 15 July 2004, ICTR-2001-71-I, para. 454; *Prosecutor v. Laurent Semanza*, “Judgment”, ICTR (Appeals Chamber), 20 May 2005, ICTR-97-20-A, para. 262; *Prosecutor v. Aloys Simba*, “Judgment and Sentence”, ICTR (Trial Chamber I), 13 December 2005, ICTR-01-76-T, para. 413; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, “Judgment”, ICTY (Appeals Chamber), 9 May 2007, IT-02-60-A, para. 123; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, 266.

<sup>301</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 23-25.

<sup>302</sup> “Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya”, *The New York Times*, 24 October 2017, <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html> (consulted on 1 May 2021).

speech are indicative in this respect. A Burmese colonel said in an interview: “Look at those women who are making these claims - would anyone want to rape them?”<sup>303</sup> Commander-in-Chief, Senior General Min Aung Hlaing stated in a Facebook post on 2 September 2018: “The Bengali problem was a longstanding one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem”.<sup>304</sup> On other occasions, the General stated that the Rohingya population “has never been an ethnic group in Myanmar”<sup>305</sup> and “Rohingya do not have any characteristics or culture in common with the ethnicities of Myanmar”<sup>306</sup>. Sexual violence survivors testify of anti-Rohingya utterances by the Tatmadaw before and after they were raped. One soldier said: “We are going to kill you this way, by raping. We are going to kill Rohingya. We will rape you.” According to another testimony, the perpetrator used insulting terms, such as ‘Kalar’, which is a racist insult for people who are Muslim and have darker skin.<sup>307</sup>

Other relevant factors are the scale, the brutality and the level of military organisation of the crimes that were committed. With the clear aim of destruction, the Tatmadaw systematically burned down hundreds of Rohingya villages.<sup>308</sup> Sexual violence was not incidental, but a well-planned war tactic.<sup>309</sup> Furthermore, general discriminatory practices against the Rohingya are multi-fold, as they are denied Burmese statehood, are forced to possess NVCs and are

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<sup>303</sup> “Rohingya Muslim Crisis: Burmese colonel dismisses ethnic cleansing claims, asking ‘who would want to rape them?’”, *Independent*, 11 September 2017, <https://www.independent.co.uk/news/world/asia/rohingya-muslim-myanmar-latest-aung-san-su-kyi-ethnic-cleansing-news-colonel-rape-a7941556.html> (consulted on 1 May 2021).

<sup>304</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8; “The Role of Social Media is Significant”: Facebook and the Fact Finding Mission on Myanmar”, *Opinio Juris*, 7 September 2018, <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar/> (consulted on 1 May 2021).

<sup>305</sup> “Myanmar Follows Global Pattern in How Ethnic Cleansing Begins”, *The New York Times*, 18 September 2017, <https://www.nytimes.com/2017/09/18/world/asia/myanmar-rohingya-ethnic-cleansing.html> (consulted on 1 May 2021).

<sup>306</sup> “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 31; “Exclusive: Myanmar rejects citizenship reform at private Rohingya talks”, *Reuters*, 27 June 2018, <https://www.reuters.com/article/us-myanmar-rohingya-meeting-exclusive-idUSKBN1JN0D7> (consulted on 1 May 2021).

<sup>307</sup> “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 23-24; “The ‘kalar’ controversy shows many in Myanmar aren’t listening”, *Frontier Myanmar*, 19 June 2020, <https://www.frontiermyanmar.net/en/the-kalar-controversy-shows-many-in-myanmar-arent-listening/> (consulted on 1 May 2021).

<sup>308</sup> “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 5.

<sup>309</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

subject to marriage and childbirth restrictions.<sup>310</sup> These considerations show the existence of a State policy of destruction, thus indicating genocidal intent.

Whether the individual perpetrators acted with genocidal intent, must be determined in those particular cases. It remains uncertain whether the ICC would follow a purpose-based approach or a knowledge-based approach.

#### d. Conclusion

41. The crime of genocide sets a high threshold and cannot be lightly decided upon. The sexual violence that the Rohingya have faced during the clearance operations, however, cannot be considered as isolated crimes. The analysis infers that the conditions of genocide in Article 6 of the Rome Statute are met.

Considering the material element, several acts of genocide have been committed against the Rohingya. By using sexual violence, the Tatmadaw have killed members of the group, they have caused serious bodily and mental harm to members of group, they have deliberately inflicted conditions of life on the group to bring about its physical destruction and they have imposed measures intended to prevent births within the group. The Rohingya population qualifies as an ethnical and religious group, as they are Muslim in a dominant Buddhist society, have a different physical appearance and speak a different language.

Considering the mental element, the sexual violence can be considered as part of a larger genocidal plan, aimed at the destruction of the Rohingya population. When soldiers raped Rohingya women, they followed a similar approach in different villages, thus indicating a manifest pattern of similar conduct. In addition, the sexual violence strongly seems to be committed with genocidal intent, considering the anti-Rohingya rhetoric of perpetrators and government alike, the scale and brutality of the crimes and the discriminatory measures against the Rohingya with regard to marriage and childbirth.

In conclusion, the suffering of the Rohingya is not just ‘a textbook example of ethnic cleansing’<sup>311</sup>, but amounts to genocide.

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<sup>310</sup> S. HUTCHINSON, “Gendered insecurity in the Rohingya crisis”, *Australian Journal of International Affairs*, 2018, Vol. 72 No. 1, 4; “Myanmar: The Rohingya minority: Fundamental rights denied”, *Amnesty International* report, 18 May 2004, 30-31; “Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar”, *Fortify Rights* report, 25 February 2014, 24; “Report of the Special Rapporteur on the situation of human rights in Myanmar”, *UN Human Rights Council* report, 9 March 2018, 12-13; “‘Tools of genocide’: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar”, *Fortify Rights* report, 3 September 2019, 44-45, 49; “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 20-26.

<sup>311</sup> “UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein highlights human rights concerns around the world in an address to the 36th session of the Human Rights Council in Geneva”, *UN Office of the High Commissioner for Human Rights*, 11 September 2017, 474

### 3.2.2. Crimes against humanity

#### a. Article 7 Rome Statute

42. Sexual violence is explicitly included in the provision of crimes against humanity. It enumerates several different crimes that involve sexual violence: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity.<sup>312</sup> These crimes against humanity are further elaborated by the EoC. Two elements are common to all these crimes. First, the conduct must have been committed as part of a widespread or systematic attack directed against a civilian population.<sup>313</sup> These two words have to be interpreted in a disjunctive way, so the attack must be either widespread or systematic.<sup>314</sup> Different definitions of ‘widespread’ can be found in case law, but generally it refers to the scale of the attack and the number of victims. No specific threshold has been set; it is decided on a case-by-case basis. Typically, an attack is considered ‘widespread’ if multiple prohibited acts were committed, but it is also possible that it refers to one single act of a very large magnitude.<sup>315</sup> ‘Systematic’ has also been defined in multiple ways. In the *Akayesu* case, the ICTR defined it as “*thoroughly organised, following a regular pattern, on the basis of a common policy and involving substantial public or private resources*”.<sup>316</sup> The ICTY required four different elements: a plan or objective, large-scale or continuous commission of linked crimes, significant resources and implication of high-level authorities.<sup>317</sup> Other cases emphasised more generally the existence of a pattern or the degree of

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<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E> (consulted on 1 May 2021).

<sup>312</sup> Art. 7 (1) (g) Rome Statute.

<sup>313</sup> Art. 7 (1) (g)-1 (3), (g)-2 (3), (g)-3 (3), (g)-4 (2), (g)-5 (3) and (g)-6 (4) ICC Elements of Crimes.

<sup>314</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 579; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 123; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, “Judgment and Sentence”, ICTR (Trial Chamber I), 6 December 1999, ICTR-96-3-T, para. 68; S. CHESTERMAN, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, *Duke Journal of Comparative and International Law*, 2000, Vol. 10 No. 2, 312-313; P. HWANG, “Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court”, *Fordham International Law Journal*, 1998, Vol. 22 No. 2, 502; R. O’KEEFE, *International Criminal Law*, Oxford University Press, Oxford, 2015, 143; D. ROBINSON, “The Context of Crimes Against Humanity” in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (61) 63.

<sup>315</sup> *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-I-T, para. 206; *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 580; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 123; *Prosecutor v. Alfred Musema*, “Judgment and Sentence”, ICTR (Trial Chamber I), 27 January 2000, ICTR-96-13-A, para. 204; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 428; M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 479; S. CHESTERMAN, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, *Duke Journal of Comparative and International Law*, 2000, Vol. 10 No. 2, 314-315.

<sup>316</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 580.

<sup>317</sup> *Prosecutor v. Tihomir Blaskic*, “Judgment”, ICTY (Trial Chamber), 3 March 2000, IT-95-14-T, para. 203.



organisation.<sup>318</sup> It is not required that the policy comes from the government. It can also be the policy of a private group.<sup>319</sup> ‘Attack’ is interpreted in a broad sense and does not require the use of armed force. The mistreatment of the civilian population can suffice.<sup>320</sup> Nonetheless, there must be multiple victims or multiple acts in order to be considered an attack. The acts can be of the same type or of a different type.<sup>321</sup> This is reflected in the Rome Statute, which defines ‘attack directed against any civilian population’ as follows: “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”.<sup>322</sup>

The second common element requires that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>323</sup> Although for crimes against humanity the mental element is required, like for genocide,<sup>324</sup> the EoC suggest that the standard is lower, as the perpetrator does not have to know the details or the characteristics of the attack.<sup>325</sup> This raises the question, however, which characteristics the perpetrator must have known.<sup>326</sup> In the *Tadić* case, the ICTY said that the connection between the attack and the crime must be proven by two elements: the crimes were related to the attack and the accused knew that

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<sup>318</sup> *Prosecutor v. Dusko Tadić*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-I-T, para. 648; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 429; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, “Judgment and Sentence”, ICTR (Trial Chamber I), 21 February 2003, ICTR-96-10 and ICTR-96-17-T, para. 804.

<sup>319</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 125-126; S. CHESTERMAN, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, *Duke Journal of Comparative and International Law*, 2000, Vol. 10 No. 2, 316.

<sup>320</sup> Art. 7, Introduction (3) ICC Elements of Crimes; *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 581; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 416; M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 477-478; S. CHESTERMAN, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, *Duke Journal of Comparative and International Law*, 2000, Vol. 10 No. 2, 315; D. ROBINSON, “The Context of Crimes Against Humanity” in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (61) 74.

<sup>321</sup> Art. 7 (2) (a) Rome Statute; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 122; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 233; D. ROBINSON, “The Context of Crimes Against Humanity” in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (61) 63.

<sup>322</sup> Art. 7 (2) (a) Rome Statute.

<sup>323</sup> Art. 7 (1) (g)-1 (4), (g)-2 (4), (g)-3 (4), (g)-4 (3), (g)-5 (4) and (g)-6 (5) ICC Elements of Crimes.

<sup>324</sup> Art. 30 Rome Statute.

<sup>325</sup> Art. 7, Introduction (2) ICC Elements of Crimes; *Prosecutor v. Tihomir Blaskić*, “Judgment”, ICTY (Trial Chamber), 3 March 2000, IT-95-14-T, para. 251; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 434.

<sup>326</sup> D. ROBINSON, “The Context of Crimes Against Humanity” in R.S. LEE (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley-on-Hudson, 2001, (61) 72.

his crimes were related in that way.<sup>327</sup> Whether the perpetrator shares the goal of the attack, is irrelevant.<sup>328</sup>

The crime of rape requires two more elements. First, the perpetrator must have invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.<sup>329</sup> Second, the invasion must have been committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>330</sup> In most national legal systems, however, the required element is much simpler: the lack of consent. Bearing in mind that the EoC are a guideline for the ICC judges, some authors argue that these elements do not reflect the correct interpretation of the Statute.<sup>331</sup>

The second crime relating to sexual violence is sexual slavery. This crime requires also two more elements. First, the perpetrator must have exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>332</sup> It includes situations in which women are forced into marriage, domestic servitude or forced labour.<sup>333</sup> The second element requires that the perpetrator has caused such person or persons to engage in one or more acts of a sexual nature.<sup>334</sup> The crime does not require a commercial transaction.<sup>335</sup>

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<sup>327</sup> *Prosecutor v. Dusko Tadić*, “Judgment”, ICTY (Appeals Chamber), 15 July 1999, IT-94-1-A, para. 271.

<sup>328</sup> *Prosecutor v. Dusko Tadić*, “Judgment”, ICTY (Appeals Chamber), 15 July 1999, IT-94-1-A, para. 272; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 103; *Prosecutor v. Tihomir Blaskić*, “Judgment”, ICTY (Appeals Chamber), 29 July 2004, IT-95-14-A, para. 124; R. O’KEEFE, *International Criminal Law*, Oxford University Press, Oxford, 2015, 145.

<sup>329</sup> Art. 7 (1) (g)-1 (1) ICC Elements of Crimes.

<sup>330</sup> Art. 7 (1) (g)-1 (2) ICC Elements of Crimes.

<sup>331</sup> R.K. BOON, “Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent”, *Columbia Human Rights Law Review*, 2001, Vol. 32 No. 3, 651-653; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 250.

<sup>332</sup> Art. 7 (1) (g)-2 (1) ICC Elements of Crimes.

<sup>333</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 30 September 2008, ICC-01/04-01/07, para. 431; D. LUPING, “Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court”, *American University Journal of Gender, Social Policy & the Law*, 2009, Vol. 17 No. 2, 477-478.

<sup>334</sup> Art. 7 (1) (g)-2 (2) ICC Elements of Crimes.

<sup>335</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, “Judgment”, SCSL (Trial Chamber II), 20 June 2007, SCSL-04-16-T, para. 709; *Prosecutor v. Charles Ghankay Taylor*, “Judgment”, SCSL (Trial Chamber II), 18 May 2012, SCSL-03-01-T, para. 420; *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 477

Enforced prostitution, the third crime of a sexual nature, requires the following two elements. First, the perpetrator must have caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.<sup>336</sup> The second element requires that the perpetrator or another person has obtained or has expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.<sup>337</sup>

Forced pregnancy requires only one more element, next to the two common elements mentioned above. It requires that the perpetrator has confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.<sup>338</sup> These other grave violations of international law refer, for example, to biological experiments.<sup>339</sup> This definition of forced pregnancy does not affect national laws relating to pregnancy.<sup>340</sup> Although the inclusion of forced pregnancy in the Rome Statute was revolutionary, some authors criticise the scope of the definition. The wording 'forcibly made pregnant' excludes situations where the sex was consensual, but where the woman was kidnapped afterwards to bear children for sale on the black market.<sup>341</sup>

Enforced sterilisation requires two other elements. The first element requires that the perpetrator has deprived one or more persons of biological reproductive capacity.<sup>342</sup> This does not include birth-control measures which do not have a permanent effect in practice.<sup>343</sup> The second element requires that the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.<sup>344</sup> The last crime is a residual provision that prohibits any other form of sexual violence. Three elements are required. First, the perpetrator must have committed an act of a sexual nature against one or more persons or must have caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or

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March 2014, ICC-01/04-01/07, para. 976; *Prosecutor v. Bosco Ntaganda*, "Judgment", ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 952.

<sup>336</sup> Art. 7 (1) (g)-3 (1) ICC Elements of Crimes.

<sup>337</sup> Art. 7 (1) (g)-3 (2) ICC Elements of Crimes.

<sup>338</sup> Art. 7 (1) (g)-4 (1) ICC Elements of Crimes.

<sup>339</sup> R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 251.

<sup>340</sup> Art. 7 (2) (f) Rome Statute.

<sup>341</sup> B. BEDONT, "Gender-Specific provisions in the Statute of the International Criminal Court" in F. LATTANZI and W.A. SCHABAS (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Il Sirente, Ripa Fagnano Alto, 1999, (183) 196-198.

<sup>342</sup> Art. 7 (1) (g)-5 (1) ICC Elements of Crimes.

<sup>343</sup> Art. 7 (1) (g)-5, footnote 19 ICC Elements of Crimes.

<sup>344</sup> Art. 7 (1) (g)-5 (2) ICC Elements of Crimes.

another person, or by taking advantage of a coercive environment or such person's incapacity to give genuine consent.<sup>345</sup> Second, such conduct must have been of a gravity comparable to the other offences in Article 7, paragraph 1 (g), of the Statute.<sup>346</sup> And third, the perpetrator must have been aware of the factual circumstances that established the gravity of the conduct.<sup>347</sup> The drafters of the Rome Statute had the intention that this provision would cover forced nudity, genital mutilation and other degrading sexual acts.<sup>348</sup>

The ICC has also used the crime against humanity of persecution to prosecute sexual violence.<sup>349</sup> This is a useful provision for acts that are in themselves not atrocious enough to reach the standard, but combined can be considered as a crime against humanity.<sup>350</sup> In addition to the two common elements, the EoC require the following elements. First, the perpetrator must have severely deprived, contrary to international law, one or more persons of fundamental rights.<sup>351</sup> Second, the perpetrator must have targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.<sup>352</sup> Third, such targeting must have been based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law.<sup>353</sup> And lastly, the conduct must have been committed in connection with any act referred to in Article 7, paragraph 1 of the Rome Statute or any crime within the jurisdiction of the ICC.<sup>354</sup>

The crime of torture can be used to prosecute sexual violence as well, if the conditions are met.<sup>355</sup> First, the perpetrator must have inflicted severe physical or mental pain or suffering upon one or more persons.<sup>356</sup> The severity

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<sup>345</sup> Art. 7 (1) (g)-6 (1) ICC Elements of Crimes.

<sup>346</sup> Art. 7 (1) (g)-6 (2) ICC Elements of Crimes.

<sup>347</sup> Art. 7 (1) (g)-6 (3) ICC Elements of Crimes.

<sup>348</sup> V. OOSTERVELD, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court", *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 124.

<sup>349</sup> *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, "Decision on the Prosecution Application under Article 58(7) of the Statute", ICC (Pre-Trial Chamber I), 27 April 2007, ICC-02/05-01/07, count 10, 21 and 39; *Prosecutor v. Abdel Raheem Muhammad Hussein*, "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein", ICC (Pre-Trial Chamber I), 1 March 2012, ICC-02/05-01/12, para. 11; R. GREY, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*, Cambridge University Press, Cambridge, 2019, 278-279; D. LUPING, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", *American University Journal of Gender, Social Policy & the Law*, 2009, Vol. 17 No. 2, 465-466.

<sup>350</sup> B. BEDONT, "Gender-Specific provisions in the Statute of the International Criminal Court" in F. LATTANZI and W.A. SCHABAS (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Il Sirente, Ripa Fagnano Alto, 1999, (183) 200-202.

<sup>351</sup> Art. 7 (1) (h) (1) ICC Elements of Crimes.

<sup>352</sup> Art. 7 (1) (h) (2) ICC Elements of Crimes.

<sup>353</sup> Art. 7 (1) (h) (3) ICC Elements of Crimes.

<sup>354</sup> Art. 7 (1) (h) (4) ICC Elements of Crimes.

<sup>355</sup> D. LUPING, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", *American University Journal of Gender, Social Policy & the Law*, 2009, Vol. 17 No. 2, 468.

<sup>356</sup> Art. 7 (1) (f) (1) ICC Elements of Crimes.

of the pain or suffering must be assessed on a case- by-case basis, in the light of all the circumstances of the case.<sup>357</sup> The consequences of torture do not have to be visible, nor need to be permanent.<sup>358</sup> Second, such person or persons must have been in the custody or under the control of the perpetrator.<sup>359</sup> And the third element requires that such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>360</sup> It is important to note that no specific purpose needs to be proven for a crime to constitute torture.<sup>361</sup>

## b. Case law

### b.1 ICC

43. In most of the cases before the ICC, rape was charged by the Prosecutor. Nevertheless, these charges have seldom led to convictions, indicating that the culture of impunity regarding sexual violence is still problematic. In the *Ngudjolo* case, the Trial Chamber acknowledged that multiple rapes had been committed in the attack, but still acquitted the accused of rape.<sup>362</sup> In the *Katanga* case, the Trial Chamber decided that there was not sufficient evidence to conclude that the sexual violence was part of the common purpose, even though it was established that rape and sexual violence had been committed. Thus, the accused was acquitted of the crime of rape.<sup>363</sup> A similar reasoning was followed by the Pre-Trial Chamber in the *Mbarushimana* case, as the majority argued that the policy element was not present.<sup>364</sup>

The *Bemba* case, the first case in which the accused was convicted of rape as a crime against humanity, seemed to be an important turning point.<sup>365</sup> In the judgment, the Trial Chamber clarified its view on the definition of rape. It used the description of rape as provided by the EoC and put the emphasis on the presence of coercive circumstances, rather than on the consent of the

<sup>357</sup> *Prosecutor v. Radoslav Brdjanin*, “Judgment”, ICTY (Appeals Chamber), 3 April 2007, IT-99-36-A, para. 251; *Prosecutor v. Guek Eav Kaing*, “Judgment”, ECCC (Trial Chamber), 26 July 2010, 001/18-07-2007/ECCC/TC, para. 355; *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, “Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud”, ICC (Pre-Trial Chamber I), 13 November 2019, ICC-01/12-01/18, para. 230; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2701.

<sup>358</sup> *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 148; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, “Judgment”, ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 150; *Prosecutor v. Guek Eav Kaing*, “Judgment”, ECCC (Trial Chamber), 26 July 2010, 001/18-07-2007/ECCC/TC, para. 355; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2701.

<sup>359</sup> Art. 7 (1) (f) (2) ICC Elements of Crimes.

<sup>360</sup> Art. 7 (1) (f) (3) ICC Elements of Crimes.

<sup>361</sup> Art. 7 (1) (f), footnote 14 ICC Elements of Crimes.

<sup>362</sup> *Prosecutor v. Mathieu Ngudjolo*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 18 December 2012, ICC-01/04-02/12, para. 338.

<sup>363</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1664.

<sup>364</sup> *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 16 December 2011, ICC-01/04-01/10, para. 267.

<sup>365</sup> J.N. CLARK, “The First Rape Conviction at the ICC: An Analysis of the Bemba Judgment”, *Journal of International Criminal Justice*, 2016, Vol. 14 No. 3, 667-668.

victim.<sup>366</sup> The Trial Chamber pointed out that the lack of consent of the victim is not a legal element of the crime of rape under the Rome Statute, as the requirement to prove non-consent would make it difficult to bring perpetrators to justice. Thus, if force, threat of force or coercion, or the taking advantage of a coercive environment is proven, it is not required to prove the lack of consent of the victim. The Trial Chamber took a broad view to what a coercive environment can entail. It found that several factors can be taken into account: the presence of a hostile military force, the number of people involved in the commission of the crime, whether the rape is committed during or immediately following a combat situation or is committed together with other crimes.<sup>367</sup> Nevertheless, the Appeals Chamber overturned the judgment of the Trial Chamber. The accused was acquitted on the ground that he was a remote commander and thus was not able to take all the necessary and reasonable measures to prevent the crimes.<sup>368</sup> Although the *Bemba* case seemed promising, the appeals judgment was a setback for the prosecution of sexual violence.

More recent cases before the ICC suggest an increasing willingness of the Court to effectively prosecute sexual violence. On 8 July 2019, the ICC convicted the accused of rape and sexual slavery in the *Ntaganda* case. The Trial Chamber confirmed the reasoning of the *Bemba* case, namely that the lack of consent of the victim does not need to be proven. It also reiterated the several factors that can be taken into account to determine the presence of a coercive environment.<sup>369</sup> Regarding the crime of sexual slavery, the Trial Chamber clarified that there is not an exhaustive list of situations or circumstances, indicating a power of ownership. The following factors can be taken into account: control of the victim's movement, the nature of the physical environment, psychological control, measures taken to prevent or deter escape, use of force or threats of use of force or other forms of physical or mental coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour, and the victim's vulnerability.<sup>370</sup>

A recent important milestone was the *Ongwen* case. On 4 February 2021, Ongwen was found guilty of the crimes against humanity of rape, sexual

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<sup>366</sup> J.N. CLARK, "The First Rape Conviction at the ICC: An Analysis of the Bemba Judgment", *Journal of International Criminal Justice*, 2016, Vol. 14 No. 3, 676-677.

<sup>367</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 104-106.

<sup>368</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'", ICC (Appeals Chamber), 8 June 2018, ICC-01/05-01/08 A, para. 194; "Analysis of Jean-Pierre Bemba's acquittal by the International Criminal Court", *Accord*, March 2018, <https://www.accord.org.za/conflict-trends/analysis-of-jean-pierre-bembas-acquittal-by-the-international-criminal-court/> (consulted on 1 May 2021).

<sup>369</sup> *Prosecutor v. Bosco Ntaganda*, "Judgment", ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 934-935.

<sup>370</sup> *Prosecutor v. Germain Katanga*, "Judgment pursuant to article 74 of the Statute", ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 975-976; *Prosecutor v. Bosco Ntaganda*, "Judgment", ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 952.

slavery, forced pregnancy, forced marriage and outrages on personal dignity.<sup>371</sup> This was the first time the charges of forced pregnancy and forced marriage led to a conviction.<sup>372</sup> Since forced marriage is not explicitly included in the Rome Statute, it was charged as other inhumane acts on the basis of Article 7 (1) (k) of the Rome Statute.<sup>373</sup> The Pre-Trial Chamber clarified that the imposition of marriage entails the imposition of duties that are associated with marriage and the social status of the perpetrator's 'wife'. The fact that the marriage is illegal, is irrelevant.<sup>374</sup> Concerning forced pregnancy, the Office of the Prosecutor argued that the special intent that is required, refers to the unlawful confinement and not to the impregnation itself. The Pre-Trial Chamber and Trial Chamber followed this view. The perpetrator does not need to be involved in the conception. It suffices that he is aware of the pregnancy and that the woman has been made pregnant forcibly.<sup>375</sup> Furthermore, the perpetrator does not need to have the special intent with regard to the outcome of the pregnancy and the pregnancy does not need to be causally linked to the confinement.<sup>376</sup>

#### b.2 Other international tribunals

44. Both the ICTR and the ICTY Statutes explicitly list rape as a crime against humanity, but the definition of rape was left for the ad hoc tribunals to define.<sup>377</sup> In their case law on these provisions, both courts have contributed to the prosecution of sexual violence in international criminal law.<sup>378</sup>

<sup>371</sup> *Prosecutor v. Dominic Ongwen*, "Trial Judgment", ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 3116.

<sup>372</sup> *Prosecutor v. Dominic Ongwen*, "Trial Judgment", ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2717; "LRA's Ongwen: A critical first ICC conviction", *Human Rights Watch*, 13 March 2021, <https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction> (consulted on 1 May 2021).

<sup>373</sup> *Prosecutor v. Dominic Ongwen*, "Decision on the confirmation of charges against Dominic Ongwen", ICC (Pre-Trial Chamber II), 23 March 2016, ICC-02/04-01/15, para. 87-88.

<sup>374</sup> *Prosecutor v. Dominic Ongwen*, "Decision on the confirmation of charges against Dominic Ongwen", ICC (Pre-Trial Chamber II), 23 March 2016, ICC-02/04-01/15, para. 93.

<sup>375</sup> *Prosecutor v. Dominic Ongwen*, "Decision on the confirmation of charges against Dominic Ongwen", ICC (Pre-Trial Chamber II), 23 March 2016, ICC-02/04-01/15, para. 99; *Prosecutor v. Dominic Ongwen*, "Trial Judgment", ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2723.

<sup>376</sup> *Prosecutor v. Dominic Ongwen*, "Decision on the confirmation of charges against Dominic Ongwen", ICC (Pre-Trial Chamber II), 23 March 2016, ICC-02/04-01/15, para. 100.

<sup>377</sup> Art. 3 (g) ICTR Statute; art. 5 (g) UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993.

<sup>378</sup> C. CHINKIN, "Gender-related violence and international criminal law and justice" in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, New York, (75) 78; U. KAITESI, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda's ordinary courts and gacaca courts*, Intersentia, Cambridge, 2014, 124; C. MACKINNON, "The Recognition of Rape as an act of Genocide - *Prosecutor v. Akayesu*", *New England Journal of International Law & Comparative Law*, 2008, Vol. 14 No. 2, 110; V. OOSTERVELD, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court", *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 120; V. OOSTERVELD, "The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence" in M. STERIO and M.P. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, 197; T.G. PHELPS, "The Symbolic and Communicative Function of International Criminal Tribunals" in M. FINEMAN and E. ZINSSTAG (eds.), *Feminist* 482

## b.2.1. ICTR

45. The *Akayesu* case did not only establish an important precedent for genocidal sexual violence, it also articulated an influential definition of rape and sexual violence in international criminal law. The Trial Chamber broadly defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”.<sup>379</sup> These definitions moved beyond the traditional description of objects and body parts and allowed for various forms of sexual violence to be included.<sup>380</sup>

In some cases, the ICTR prosecuted sexual violence as the crime against humanity of persecution. An important novelty in its case law was the consideration that the media can play a role in creating the broader context of persecution in which sexual violence is committed.<sup>381</sup> In the *Nahimana* case, the ICTR held that Tutsi women were portrayed in the media as “*femme fatales*” and “*seductive agents of the enemy*”.<sup>382</sup>

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*perspectives on transitional justice from international and criminal to alternative forms of justice*, Intersentia, Oxford, 2013, (171) 171-172.

<sup>379</sup> *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 598; K.D. ASKIN, “Gender crimes: jurisprudence in the ICTR: positive developments”, *Journal of International Criminal Justice*, 2005, Vol. 3 No. 4, 1010-1011; K. CAMPBELL, “The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia”, *International Journal of Transitional Justice*, 2007, Vol. 1 No. 3, 415; U. KAITESI, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and gacaca courts*, Intersentia, Cambridge, 2014, 135-136; V. OOSTERVELD, “Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court”, *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 124; T.G. PHELPS, “The Symbolic and Communicative Function of International Criminal Tribunals” in M. FINEMAN and E. ZINSSTAG (eds.), *Feminist perspectives on transitional justice from international and criminal to alternative forms of justice*, Intersentia, Oxford, 2013, (171) 175; S. ROGERS, “Sexual violence or rape as a constituent act of genocide: lessons from the *ad hoc* tribunals and a prescription for the International Criminal Court”, *George Washington International Law Review*, 2016, Vol. 48 No. 2, 278-279; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 104.

<sup>380</sup> U. KAITESI, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and gacaca courts*, Intersentia, Cambridge, 2014, 135-136; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 104; B. STERN and I. FOUCHARD, “Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law” in L. SADAT and P. SCHARF (eds.), *Theory and Practice of International Criminal Law*, Koninklijke Brill NV, Leiden, 2008, (285) 299-300.

<sup>381</sup> V. OOSTERVELD, “The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence” in M. STERIO and M.P. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, (197) 209.

<sup>382</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, “Judgment and Sentence”, ICTR (Trial Chamber I), 3 December 2003, ICTR-99-52-T, para. 1079.



## b.2.2. ICTY

46. In the *Furundzija* case, the ICTY departed from the definition of rape that was formulated by the ICTR and returned to a descriptive definition.<sup>383</sup> In this view, the crime of rape consists of two objective elements: a) the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; b) by coercion or force or threat of force against the victim or a third person.<sup>384</sup> The coercion factor is not limited to physical violence, as it suffices that threats are formulated or that the victim is put in a general coercive context, such as a detention camp.<sup>385</sup> This definition largely influenced the definition of rape in the EoC of the ICC.<sup>386</sup>

Another important contribution of the ICTY to the prosecution of sexual violence is that it established a link between rape and torture.<sup>387</sup> According to the ICTY, the crime of torture requires the following constitutive elements: a) infliction, by act or omission, of severe pain or suffering, whether physical or mental; b) the act or omission must be intentional; and c) the act or omission must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.<sup>388</sup> Some chambers have extended this last requirement to humiliation.<sup>389</sup> In multiple cases, the ICTY found that

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<sup>383</sup> C.E. ARRABAL WARD, *Wartime Sexual Violence at the International Level: A Legal Perspective*, Brill Nijhoff, Leiden, 2018, 72; C. CHINKIN, "Gender-related violence and international criminal law and justice" in A. CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, New York, (75) 79; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 104; B. STERN and I. FOUCHARD, "Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law" in L. SADAT and P. SCHARF (eds.), *Theory and Practice of International Criminal Law*, Koninklijke Brill NV, Leiden, 2008, (285) 300-301.

<sup>384</sup> *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 185.

<sup>385</sup> B. STERN and I. FOUCHARD, "Sexual Violence as Genocide: The Important Role Played by the Bassiouni Commission in the Recent Development of International Criminal Law" in L. SADAT and P. SCHARF (eds.), *Theory and Practice of International Criminal Law*, Koninklijke Brill NV, Leiden, 2008, (285) 301-302.

<sup>386</sup> Art. 7 (1) (g)-1 (1) and (2) ICC Elements of Crimes; C.E. ARRABAL WARD, *Wartime Sexual Violence at the International Level: A Legal Perspective*, Brill Nijhoff, Leiden, 2018, 78.

<sup>387</sup> C.B. COAN, "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia", *North Carolina Journal of International Law*, 2000, Vol 26. No. 1, 207; A.L.M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR*, Intersentia, Antwerp, 2005, 211.

<sup>388</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, "Judgment", ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 468; *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 162; *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Appeals Chamber), 21 July 2000, IT-95-17/1-A, para. 111; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, "Judgment", ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 497; *Prosecutor v. Milorad Krnojelac*, "Judgment", ICTY (Trial Chamber II), 15 March 2002, IT-97-25-T, para. 179, 186; *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, "Judgment", ICTY (Trial Chamber), 31 March 2003, IT-98-34-T, para. 337-338.

<sup>389</sup> *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 162; *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Appeals Chamber), 21 July 484

rape by definition meets the requirement of severe pain and suffering.<sup>390</sup> Considering the requirement of a prohibited purpose, both humiliation and discrimination have been found as prohibited purposes in situations of sexual violence.<sup>391</sup> In the *Kvočka* case, the Trial Chamber found that the perpetrator “*did not rape any of the male non-Serb detainees*”, thus discriminating on the basis of nationality and gender.<sup>392</sup> Moreover, the ICTY clarified that the prohibited purpose is not affected if it contains a sexual element.<sup>393</sup> In addition to rape, other forms of sexual violence can constitute torture as well, such as threatened rape, attempted rape, touching of sexual organs, being forced to watch sexual attacks on an acquaintance or family member, forced mutual masturbation and genital beatings.<sup>394</sup>

The prosecution of enslavement carried out through sexual means before the ICTY was influential as well.<sup>395</sup> In the *Kunarac* case, the ICTY held that it was “*a distinct offence from that of rape*”, as it must be proven that the accused intentionally exercised “*any or all of the powers attaching to a right of ownership*” over the victim.<sup>396</sup> The Trial Chamber formulated a number of factors that can be taken into account: control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or

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2000, IT-95-17/1-A, para. 111; *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 140.

<sup>390</sup> *Prosecutor v. Zeynil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, “Judgment”, ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 495-496; *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 163; *Prosecutor v. Radoslav Brdanin*, “Judgment”, ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 485; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, “Judgment”, ICTY (Trial Chamber II), 27 March 2013, IT-08-91-T, para. 48.

<sup>391</sup> *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 162; *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Appeals Chamber), 21 July 2000, IT-95-17/1-A, para. 111; *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 560.

<sup>392</sup> *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 560.

<sup>393</sup> L. BAIG, *et al.*, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 188.

<sup>394</sup> *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 267-268; *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 560-561; V. OOSTERVELD, “The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence” in M. STERIO and M.P. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, (197) 204-205.

<sup>395</sup> L. BAIG, *et al.*, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 194-195.

<sup>396</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 539-540; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 186.

deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.<sup>397</sup>

Like the ICTR, the ICTY prosecuted sexual violence as persecution, even though gender is not a prohibited ground of persecution under the ICTY Statute.<sup>398</sup> Nevertheless, it has successfully linked sexual violence to persecution on political, racial and religious grounds by situating sexual violence in its broader context of human rights violations.<sup>399</sup> In doing so, the ICTY refuted the persistent idea that sexual violence is “*personal in nature and separate from the main activity of war*”.<sup>400</sup> Even if the perpetrator has a personal motive, it is possible that he also has the discriminatory intent for persecution.<sup>401</sup> The crime of persecution has been used to prosecute a wide variety of crimes of a sexual nature, such as rape, sexual touching, genital mutilation, genital beatings, threats, forced nudity, enforced prostitution and rumours of rape as a means of terrorisation.<sup>402</sup>

<sup>397</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 543.

<sup>398</sup> Art. 5 (h) ICTY Statute; L. BAIG, *et al.*, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 202; V. OOSTERVELD, “The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence” in M. STERIO and M.P. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law*, Cambridge University Press, Cambridge, 2019, (197) 206-207.

<sup>399</sup> *Prosecutor v. Stevan Todorovic*, “Sentencing Judgment”, ICTY (Trial Chamber), 31 July 2001, IT-95-9/1-S, para. 38-40; *Prosecutor v. Radoslav Brdanin*, “Judgment”, ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 1008-1013; *Prosecutor v. Milan Milutinovic et al.*, “Judgment”, ICTY (Trial Chamber), 26 February 2009, IT-05-87-T, para. 201; *Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic*, “Judgment”, ICTY (Appeals Chamber), 23 January 2014, IT-05-87-A, para. 584-585, 591, 593, 597, 599; *Prosecutor v. Vlastimir Dordevic*, “Judgment”, ICTY (Appeals Chamber), 27 January 2014, IT-05-87/1-A, para. 886, 891-892; L. BAIG, *et al.*, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 202.

<sup>400</sup> M. JARVIS and E. MARTIN SALGADO, “Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice” in A. DE BROUWER, C. KU, R. ROMKENS and L. VAN DEN HERIK (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia, Cambridge, 2013, (101) 102.

<sup>401</sup> *Prosecutor v. Vlastimir Dordevic*, “Judgment”, ICTY (Appeals Chamber), 27 January 2014, IT-05-87/1-A, para. 887.

<sup>402</sup> *Prosecutor v. Radislav Krstic*, “Judgment”, ICTY (Trial Chamber), 2 August 2001, IT-98-33-T, para. 46; *Prosecutor v. Milomir Stakic*, “Judgment”, ICTY (Trial Chamber II), 31 July 2003, IT-97-24-T, para. 241; *Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric*, “Judgment”, ICTY (Trial Chamber II), 17 October 2003, IT-95-9-T, para. 697, 771; *Prosecutor v. Radoslav Brdanin*, “Judgment”, ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 1013; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, “Judgment”, ICTY (Trial Chamber I, Section A), 17 January 2005, IT-02-60-T, para. 167; *Prosecutor v. Momcilo Krajisnik*, “Judgment”, ICTY (Trial Chamber I), 27 September 2006, IT-00-39-T, para. 800, 805-806; *Prosecutor v. Milan Milutinovic et al.*, “Judgment”, ICTY (Trial Chamber), 26 February 2009, IT-05-87-T, para. 184; *Prosecutor v. Vujadin Popovic et al.*, “Judgment”, ICTY (Trial Chamber II), 10 June 2010, IT-05-88-T, para. 917, 994; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, “Judgment”, ICTY (Trial Chamber II), 27 March 2013, IT-08-91-T, para. 1235, 1663, 1220-1221, 1249-1250.

**c. Application to Rohingya case**

47. For the sexual violence against the Rohingya to amount to crimes against humanity, the definition of Article 7 of the Rome Statute must be met, accompanied by the different elements set out in the EoC.

*c.1. Widespread or systematic attack*

48. The essential characteristic of crimes against humanity is that the conduct must have been committed as part of a widespread or systematic attack directed against any civilian population.<sup>403</sup>

*c.1.1. Attack against any civilian population*

49. Article 7 (2) (a) of the Rome Statute defines ‘attack against any civilian population’ as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack”.<sup>404</sup> The requirement of a course of conduct implies that the crimes committed against the Rohingya were not isolated acts, but rather formed a pattern of similar behaviour.<sup>405</sup> According to human rights reports, the crimes committed during the clearance operations followed a well-established pattern. These crimes mainly included killing and injuring Rohingya, raping Rohingya women and setting on fire their villages and homes.<sup>406</sup> Such a pattern requires also a quantitative dimension, as multiple acts must have been committed.<sup>407</sup> Since more than 10,000 Rohingya were killed and more than two hundred settlements were destroyed, the quantitative threshold is definitely met.<sup>408</sup>

The primary target of the attack must be the civilian population collectively, not individual civilians.<sup>409</sup> There are multiple indications that the Rohingya as a civilian population were targeted. The Tatmadaw did not only

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<sup>403</sup> Art. 7 (1) Rome Statute.

<sup>404</sup> Art. 7 (2) (a) Rome Statute.

<sup>405</sup> *Prosecutor v. Laurent Gbagbo*, “Decision on the confirmation of charges against Laurent Gbagbo”, ICC (Pre-Trial Chamber I), 12 June 2014, ICC-02/11-01/11, para. 209; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 149; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 662; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2674.

<sup>406</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 207.

<sup>407</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 150; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 663.

<sup>408</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8; “Detailed findings on the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 16 September 2019, 5.

<sup>409</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1104; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 668; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2675.

burn houses, but also mosques. Moreover, when a Rohingya-populated area was targeted, the nearby Rakhine areas were left untouched.<sup>410</sup> Soldiers did not make a distinction between men, women and children; all of them were attacked.<sup>411</sup>

### c.1.2. Widespread or systematic

50. According to ICTY case law, the requirement of a widespread or systematic attack refers to the attack itself, not the individual acts that are part of it. Thus, the sexual violence itself does not need to be widespread or systematic. A limited number of acts of sexual violence can still constitute crimes against humanity, as long as they were part of the widespread or systematic attack.<sup>412</sup>

Whether an attack can be considered as widespread, depends on the scale of the attack and the number of victims.<sup>413</sup> Nevertheless, all relevant facts should be taken into account, not only quantitative and geographical factors.<sup>414</sup> Considering the scale of the attack, the destruction caused by the Tatmadaw was substantial, as more than forty percent of the villages in northern Rakhine State were destroyed.<sup>415</sup> The clearance operations were not limited to a couple of villages, but covered a broad geographical area. The UN Human Rights Council collected information about clearance operations in not less than seventy-six different locations.<sup>416</sup> Considering the number of victims, more than 10,000 Rohingya are estimated to be killed during the clearance operations and

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<sup>410</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9.

<sup>411</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 51.

<sup>412</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 431; L. BAIG, *et al.*, “Contextualizing Sexual Violence: Selection of Crimes” in S. BRAMMERTZ and M. JARVIS (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, (172) 182.

<sup>413</sup> *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-I-T, para. 206; *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 580; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, “Judgment”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, para. 123; *Prosecutor v. Alfred Musema*, “Judgment and Sentence”, ICTR (Trial Chamber I), 27 January 2000, ICTR-96-13-A, para. 204; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 428; S. CHESTERMAN, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, *Duke Journal of Comparative and International Law*, 2000, Vol. 10 No. 2, 314-315.

<sup>414</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 163; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 691; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2681.

<sup>415</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 180.

<sup>416</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 206.

approximately 880,000 Rohingya have fled their homes.<sup>417</sup> These figures indicate that the attack against the Rohingya was widespread.

The systematic nature of an attack is determined by the degree of organisation of the crimes that were committed and the existence of a pattern.<sup>418</sup> During the clearance operations, soldiers adhered to a very consistent *modus operandi* across the different townships of Rakhine State. Striking similarities can be found in the timing of the operations, the sequence of events, the types of weapons used, the assistance received from other security forces or ethnic Rakhine, the coordination and division of roles between perpetrators, the types of violations and the manner in which they were committed.<sup>419</sup> Such level of organisation indicates that the attack was systematic.

### c.1.3. Organizational policy

**51.** The course of conduct must be “*pursuant to or in furtherance of a State or organisational policy to commit such attack*”.<sup>420</sup> The EoC clarify that it is understood that a ‘policy to commit such attack’ requires that the State or organisation actively promotes or encourages such an attack against a civilian population.<sup>421</sup> In the *Katanga* case, the Trial Chamber held that the organisation must have sufficient resources, means and capacity to bring about the course of conduct meant in Article 7 (2) (a) of the Rome Statute. Thus, it suffices that the organisation has a set of structures or mechanisms that are sufficiently efficient to ensure the coordination necessary to carry out the attack.<sup>422</sup>

A variety of factors can be taken into account to determine the existence of an organisational policy: a recurrent pattern of violence, the existence of preparations or collective mobilisation orchestrated and coordinated by the organisation; the use of public or private resources to further the policy; the involvement of organisational forces in the commission of crimes; statements, instructions or documentation attributable to the organisation condoning or encouraging the commission of crimes and an underlying

<sup>417</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8; “Operational Update External”, *UNHCR Bangladesh*, March 2021, <https://data2.unhcr.org/en/documents/details/86333> (consulted on 1 May 2021).

<sup>418</sup> *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-1-T, para. 648; *Prosecutor v. Jean-Paul Akayesu*, “Judgment”, ICTR (Trial Chamber I), 2 September 1998, ICTR-96-4-T, para. 580; *Prosecutor v. Tihomir Blaskic*, “Judgment”, ICTY (Trial Chamber), 3 March 2000, IT-95-14-T, para. 203; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 429; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, “Judgment and Sentence”, ICTR (Trial Chamber I), 21 February 2003, ICTR-96-10 and ICTR-96-17-T, para. 804; *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1123; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 692; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2682.

<sup>419</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 363.

<sup>420</sup> Art. 7 (2) (a) Rome Statute.

<sup>421</sup> Art. 7, Introduction (3) ICC Elements of Crimes.

<sup>422</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1119.

motivation. But, in principle, the systematic nature of the attack already indicates the existence of an organisational policy.<sup>423</sup>

The main perpetrators of the atrocities committed against the Rohingya were the Tatmadaw. They were responsible for the majority of the killings and the rapes.<sup>424</sup> The UN Human Rights Council reported that eighty-two per cent of the gang rapes were committed by Tatmadaw soldiers.<sup>425</sup> As the Tatmadaw are the armed forces of Myanmar, the attack was committed by the Burmese State. The Burmese government authorised the clearance operations under the pretext that they were necessary to restore the security in Rakhine State after the terrorist attacks of ARSA.<sup>426</sup> A refugee in Bangladesh testified that a soldier told him: “*The central government sent us specially to kill you Bengali people.*”<sup>427</sup> Afterwards, the operations were condoned by the government, who continues to deny that human rights violations took place.<sup>428</sup> Several factors are hence indicative of an organisational policy. The underlying motivation of the Burmese government to attack the Rohingya population is apparent from general anti-Rohingya rhetoric. For instance, the government refers to the Rohingya as Bengali and Commander-in-Chief, Senior General Min Aung Hlaing stated that the government was solving the ‘Bengali problem’.<sup>429</sup> On 11 August 2017, lieutenant Kyi Nyan Lynn posted on his Facebook page: “*If they’re Bengali,*

<sup>423</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1108-1112; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 674.

<sup>424</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 309.

<sup>425</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348.

<sup>426</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 365; “Gallant efforts to defend the HQ against terrorist attacks and brilliant efforts to restore regional peace, security are honoured”, *Senior General Min Aung Hlaing*, 21 September 2017, <https://www.seniorgeneralminaunghlaing.com.mm/en/1346/gallant-efforts-to-defend-the-hq-against-terrorist-attacks-and-brilliant-efforts-to-restore-regional-peace-security-are-honoured/> (consulted on 1 May 2021).

<sup>427</sup> “Special report - The shock troops who expelled the Rohingya from Myanmar”, *Reuters*, 26 June 2018, <https://www.reuters.com/article/uk-myanmar-rohingya-battalions-specialreport/UKKBNJMIYA> (consulted on 1 May 2021).

<sup>428</sup> “Myanmar rejects ‘false allegations’ in U.N. genocide report”, *Reuters*, 29 August 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKCNILE0AC> (consulted on 1 May 2021); “Myanmar rejects ICC probe into alleged crimes against Rohingya”, *Al Jazeera*, 15 November 2019, <https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya> (consulted on 1 May 2021); “Aung San Suu Kyi Denies Burmese Genocide of Rohingya at ‘The Hague’”, *Human Rights Watch*, 17 December 2019, <https://www.hrw.org/news/2019/12/17/aung-san-suu-kyi-denies-burmese-genocide-rohingya-hague> (consulted on 1 May 2021).

<sup>429</sup> A. COWLEY and M. ZARNI, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 2014, Vol. 23 No. 3, 691; N. KIPGEN, “Conflict in Rakhine State in Myanmar: Rohingya Muslims’ Conundrum”, *Journal of Muslim Minority Affairs*, 2013, Vol. 33 No. 2, 300; A. WARE, *Myanmar’s ‘Rohingya’ Conflict*, Oxford University Press, New York, 2019, 23-25; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 8; “‘The Role of Social Media is Significant’: Facebook and the Fact Finding Mission on Myanmar”, *Opinio Juris*, 7 September 2018, <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar/> (consulted on 1 May 2021).

*they'll be killed.*<sup>430</sup> On 5 September 2017, the day that the military campaign officially ended, a soldier posted on his Facebook page: “*The Kalar are quiet now. Kalar villages have burned.*”<sup>431</sup> In addition to these indications, the systematic nature of the attack cannot be overlooked, thus proving the existence of an organisational policy.

#### c.1.4. Nexus requirement

**52.** The criminal acts must be committed as part of the systematic and widespread attack.<sup>432</sup> Such nexus must be determined objectively on the basis of the characteristics, aims, nature and consequences of those acts.<sup>433</sup> Considering the aim, rape was used as a tool by the Tatmadaw to terrorise the Rohingya and to make them flee.<sup>434</sup> Given the brutal nature of these rapes, many women were injured or died as a consequence.<sup>435</sup> Hence, there can be no doubt that these rapes were committed as part of the attack.

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<sup>430</sup> “Special report - The shock troops who expelled the Rohingya from Myanmar”, *Reuters*, 26 June 2018, <https://www.reuters.com/article/uk-myanmar-rohingya-battalions-specialreport/UKKBN1JMIYA> (consulted on 1 May 2021).

<sup>431</sup> “Special report - The shock troops who expelled the Rohingya from Myanmar”, *Reuters*, 26 June 2018, <https://www.reuters.com/article/uk-myanmar-rohingya-battalions-specialreport/UKKBN1JMIYA> (consulted on 1 May 2021).

<sup>432</sup> Art. 7 (1) (g)-1 (3), (g)-2 (3), (g)-3 (3), (g)-4 (2), (g)-5 (3) and (g)-6 (4) ICC Elements of Crimes.

<sup>433</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1124; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 165; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 696; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2688.

<sup>434</sup> “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>435</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7; “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.



## c.2. Criminal acts

### c.2.1. Rape

53. Rapes and gang rapes were committed on a massive scale. Often, they involved multiple perpetrators and victims at the same time.<sup>436</sup> Perpetrators did not only use their sexual organs to penetrate their victims, but sometimes also used objects, which meets the definition of rape in the EoC.<sup>437</sup> Women were raped by knives and sticks, which caused internal organ damage.<sup>438</sup> A witness testified: “*My friend was shot in the leg and he couldn’t walk. They found him and they put bamboo in his ass.*”<sup>439</sup>

54. Many witnesses testify that the perpetrators used force and threats to rape the Rohingya women against their will. One soldier threatened a girl before raping her: “We are going to kill you this way, by raping you.”<sup>440</sup> The perpetrators raped women in their homes, but also in public spaces to humiliate them and to instill fear among the population.<sup>441</sup> In general, the environment in which the women were raped must be considered as coercive, as a hostile military force was present, multiple people were involved in the rapes and other crimes were committed as well, such as beatings and killings.<sup>442</sup>

### c.2.2. Sexual slavery

55. Human rights reports signal that sexual slavery was common.<sup>443</sup> Women were systematically abducted and detained in military and police

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<sup>436</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the Special Rapporteur on the situation of human rights in Myanmar”, *UN Human Rights Council* report, 9 March 2018, 11; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>437</sup> Art. 7 (1) (g)-1 (1) ICC Elements of Crimes.

<sup>438</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 217.

<sup>439</sup> “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 17.

<sup>440</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9.

<sup>441</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4-5; “Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh”, *UN Office of the High Commissioner for Human Rights* report, 11 October 2017, 7-8; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the Special Rapporteur on the situation of human rights in Myanmar”, *UN Human Rights Council* report, 9 March 2018, 11; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>442</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 104; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 935; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15.

<sup>443</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Report of the detailed findings of the Independent

compounds, where they were raped and gang raped. A young woman testified that she was taken to a military compound along with twenty other women and girls, where they were locked in a room for three days. The two youngest girls were taken away to the next room and after a couple of hours, their dead bodies were carried out. They were stripped naked and had blood in their genital area.<sup>444</sup>

Since women were abducted and detained in military compounds from which they could not escape, it seems that the perpetrators could exercise the powers attached to a right of ownership.<sup>445</sup> There are no indications, however, that the victims were purchased, sold, lent or bartered. Nevertheless, they were certainly deprived of their liberty.<sup>446</sup> Considering the relevant factors, there was control of the movement of the victims, measures were taken to prevent that the victims would escape, force was used and they were subjected to cruel treatment. With regard to the duration, all victims described that they were locked up for several days.<sup>447</sup>

According to case law, sexual slavery can also entail practices such as the detention of women in ‘rape camps’.<sup>448</sup> These military compounds could well be considered as such rape camps. As the testimonies of rape in these compounds are numerous, there is no doubt that the perpetrators caused the victims to engage in acts of a sexual nature.<sup>449</sup>

### c.2.3. Enforced prostitution

**56.** There does not seem to be substantive evidence that Rohingya women were subjected to enforced prostitution.

### c.2.4. Forced pregnancy

**57.** The exact number is unknown, but many Rohingya women became pregnant from rape. Nine months after the clearance operations in August 2017, more than 16,000 Rohingya babies were born in the refugee camps in Cox’s

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International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 218; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 12.

<sup>444</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 218.

<sup>445</sup> Art. 7 (1) (g)-2 (1) ICC Elements of Crimes; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 539-540; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 186.

<sup>446</sup> Art. 7 (1) (g)-2 (1) ICC Elements of Crimes.

<sup>447</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 543.

<sup>448</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 30 September 2008, ICC-01/04-01/07, para. 431.

<sup>449</sup> Art. 7 (1) (g)-2 (2) ICC Elements of Crimes; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 218; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 12.

Bazar, Bangladesh.<sup>450</sup> Hospitals in Bangladesh have also reported an increase in the number of requests for late term pregnancy terminations.<sup>451</sup>

Although it is probable that the crime against humanity of forced pregnancy was committed, human rights organisations have not been able to collect testimonies with regard to forced pregnancy. Therefore, it cannot be ascertained that perpetrators confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of the population or carrying out other grave violations of international law.<sup>452</sup>

#### c.2.5. Enforced sterilization

**58.** There does not seem to be substantive evidence that Rohingya women were subjected to enforced sterilisation.

#### c.2.6. Any other form of sexual violence

**59.** Many Rohingya women were subjected to genital mutilation and suffered injuries to their reproductive organs.<sup>453</sup> Multiple witnesses report that women were bitten in their breasts and that their genitalia were mutilated by knives.<sup>454</sup> Another form of sexual violence of comparable gravity that was committed was forced nudity, which occasionally happened during invasive body searches by the Tatmadaw.<sup>455</sup> Genital mutilation and forced nudity are generally considered as crimes of comparable gravity to the other crimes under

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<sup>450</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 219; “UN mobilizes in Rohingya camps to support babies born of rape; young mothers face stigma”, *UN News*, 19 June 2018, <https://news.un.org/en/story/2018/06/1012372> (consulted on 1 May 2021); “More than 60 Rohingya babies born in Bangladesh refugee camps every day”, *UNICEF Press Release*, 17 May 2018, <https://www.unicef.org/press-releases/more-60-rohingya-babies-born-bangladesh-refugee-camps-every-day-unicef> (consulted on 1 May 2021).

<sup>451</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 219.

<sup>452</sup> Art. 7 (1) (g)-4 (1) ICC Elements of Crimes.

<sup>453</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; N. MESSNER, *et al.*, “Qualitative evidence of crimes against humanity: the August 2017 attacks on the Rohingya in northern Rakhine State, Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 41, 7; “They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>454</sup> R.J. HAAR, *et al.*, “Documentation of human rights abuses among Rohingya refugees from Myanmar”, *Conflict & Health*, 2019, Vol. 13 No. 42, 10; “They gave them long swords. Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 19 July 2018, 68-69; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>455</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 379.

Article 7 (g) of the Rome Statute.<sup>456</sup> Like the crime of rape, these acts of a sexual nature were committed by force and in a coercive environment.<sup>457</sup>

### c.2.7. Persecution

60. The above mentioned criminal acts can also be prosecuted as the crime against humanity of persecution, which is currently under investigation before the ICC.<sup>458</sup> The Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.<sup>459</sup> In the Ntaganda case, the ICC held that any act that is considered a crime against humanity, such as rape and sexual slavery, meets the severity threshold.<sup>460</sup> With respect to sexual violence, multiple fundamental rights are violated: the right to physical integrity, the prohibition of torture, the right to health and not in the least, the right to life, as laid down in multiple international treaties.<sup>461</sup> As the crime of persecution is not autonomous, it must be connected to another criminal act under Article 7 (1) of the Rome Statute.<sup>462</sup> In the case of the Rohingya, the crimes of rape and sexual slavery seem the most appropriate.

The Rohingya population was targeted on discriminatory grounds, more specifically on ethnical and religious grounds. Such discriminatory intent can be inferred from various factors, such as the use of derogatory language in relation to a particular group and the fact that the acts were only inflicted on the members of one group.<sup>463</sup> Multiple testimonies bear witness to the use of derogatory language. The Tatmadaw soldiers often referred to the women as ‘Kalar’ before raping them, which is a racist insult for people who are Muslim

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<sup>456</sup> Art. 7 (1) (g)-6 (2) ICC Elements of Crimes; V. OOSTERVELD, “Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court”, *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 124.

<sup>457</sup> Art. 7 (1) (g)-6 (1) ICC Elements of Crimes.

<sup>458</sup> “Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute””, ICC (Pre-Trial Chamber I), 6 September 2018, ICC-RoC46(3)-01/18, para. 74-76; “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar”, ICC (Pre-Trial Chamber III), 14 November 2019, ICC-01-19, para. 95-96.

<sup>459</sup> Art. 7 (2) (g) Rome Statute.

<sup>460</sup> *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 994.

<sup>461</sup> Art. 3, 5 and 25 (1) UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948; art. 6

(1) and 7 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966; art. 12

(1) UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966; art. 12 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979; art. 6, 19 and 34 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989; *Prosecutor v. Zoran Kupreskic et al.*, “Judgment”, ICTY (Trial Chamber), 14 January 2000, IT-95-16-T, para. 621; R. GREY, J. O’DONOHUE, I. ROSENTHAL, L. DAVIS and D. LLANTA, “Gender-based Persecution as a Crime Against Humanity: the Road Ahead”, *Journal of International Criminal Justice*, 2019, Vol. 17 No. 5, 972.

<sup>462</sup> Art. 7 (1) (h) Rome Statute; art. 7 (1) (h) (4) ICC Elements of Crimes.

<sup>463</sup> *Prosecutor v. Miroslav Kvocka et al.*, “Judgment”, ICTY (Appeals Chamber), 28 February 2005, IT-98-30/1-A, para. 366; *Prosecutor v. Vujadin Popovic et al.*, “Judgment”, ICTY (Appeals Chamber), 30 January 2015, IT-05-88-A, para. 713.

and have darker skin.<sup>464</sup> Furthermore, the Rohingya were specifically targeted. Nearby Rakhine areas were left untouched.<sup>465</sup>

### c.2.8. Torture

**61.** Sexual violence can also amount to torture as a crime against humanity, which is defined by the Rome Statute as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.<sup>466</sup> The physical and mental suffering caused by sexual violence cannot be underestimated. Therefore, the ICTY found that rape by definition meets this requirement.<sup>467</sup> Health care workers testify of the injuries and the psychological trauma that the Rohingya women have suffered.<sup>468</sup> Many women were raped and gang raped in military compounds in which they had been detained.<sup>469</sup> Thus, these women were in the custody of the perpetrators. In conclusion, multiple cases of sexual violence constituted torture.

### c.3. Mental element

**62.** As required for every crime under the Rome Statute, the perpetrator must have committed the crimes against humanity with knowledge and intent.<sup>470</sup> The perpetrator must have known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>471</sup> It is not required, however, that the perpetrator knew the details or characteristics of the attack.<sup>472</sup>

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<sup>464</sup> “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 23-24; “The ‘kalar’ controversy shows many in Myanmar aren’t listening”, *Frontier Myanmar*, 19 June 2020, <https://www.frontiermyanmar.net/en/the-kalar-controversy-shows-many-in-myanmar-arent-listening/> (consulted on 1 May 2021).

<sup>465</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 9.

<sup>466</sup> Art. 7 (2) (e) Rome Statute.

<sup>467</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, “Judgment”, ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 495-496; *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 163; *Prosecutor v. Radoslav Brdajin*, “Judgment”, ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 485; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, “Judgment”, ICTY (Trial Chamber II), 27 March 2013, IT-08-91-T, para. 48.

<sup>468</sup> “Accounts from health care professionals indicate widespread and long-lasting impacts of sexual violence against Rohingya”, *Physicians for Human Rights*, 22 October 2020, <https://phr.org/news/accounts-from-health-care-professionals-indicate-widespread-and-long-lasting-impacts-of-sexual-violence-against-rohingya/> (consulted on 1 May 2021).

<sup>469</sup> “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 218.

<sup>470</sup> Art. 30 Rome Statute.

<sup>471</sup> Art. 7 (1) (g)-1 (4), (g)-2 (4), (g)-3 (4), (g)-4 (3), (g)-5 (4) and (g)-6 (5) ICC Elements of Crimes.

<sup>472</sup> Art. 7, Introduction (2) ICC Elements of Crimes; *Prosecutor v. Tihomir Blaskic*, “Judgment”, ICTY (Trial Chamber), 3 March 2000, IT-95-14-T, para. 251; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 434.

Whether the individual perpetrators knew that the conduct was part of the widespread or systematic attack directed against the Rohingya population, must be determined in those particular cases.

#### d. Conclusion

**63.** From the analysis, it must be concluded that multiple crimes against humanity were committed by the Tatmadaw during the clearance operations in August 2017. For several crimes, the requirements of Article 7 of the Rome Statute and the accompanying elements set out in the EoC are met.

The attack against the Rohingya population can be considered as both a widespread and systematic attack directed against any civilian population, given the scale and the brutality of the violence and the number of victims. The violence had an organised nature, as the Tatmadaw soldiers followed a similar pattern across the different townships of northern Rakhine State. Moreover, there are many indications that an organisational policy of the Burmese government existed to attack the Rohingya community. The acts of sexual violence that were committed during these clearance operations, formed part of the attack.

Considering the different criminal acts, the main crime that was committed was rape. In addition to rape, other acts of sexual violence were committed as well, such as sexual slavery, genital mutilation and forced nudity. From the analysis, the commission of enforced prostitution, forced pregnancy and enforced sterilisation, however, could not be inferred. Some of the acts of sexual violence also constitute torture. Furthermore, the sexual violence can also be prosecuted as the crime against humanity of persecution, which is currently one of the crimes under investigation before the ICC. Sexual violence is a violation of several fundamental rights, such as the right to physical integrity, the right to health and the right to life. These fundamental rights were violated on discriminatory grounds, more specifically ethnic and religious grounds.

In conclusion, the sexual violence that the Rohingya were subjected to, amounts to crimes against humanity.

### 3.3. WAR CRIMES?

#### 3.3.1. *Article 8 Rome Statute*

**64.** Article 8 of the Rome Statute makes a distinction between war crimes committed in an international armed conflict (IAC) and war crimes committed in a non-international armed conflict (NIAC). With regard to IACs, the following forms of sexual violence are prohibited under international customary law: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence also constituting a grave

breach of the Geneva Conventions.<sup>473</sup> With regard to NIACs, the acts of sexual violence that are prohibited under international customary law, are essentially the same: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.<sup>474</sup>

The elements of these crimes are the same as the elements discussed with regard to crimes against humanity and will therefore not be further examined, except for the following two. First, the conduct must have taken place in the context of and must have been associated with an international or non-international armed conflict.<sup>475</sup> In an IAC, the objective existence of the armed conflict is decisive, not whether States made a declaration of war or not.<sup>476</sup> In case of a NIAC, there must be a certain level of intensity and organisation. There is some discussion whether this intensity is also required in case of an IAC.<sup>477</sup> Considering NIACs, the Rome Statute clarifies that this does not include situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It does include armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.<sup>478</sup> With regard to IACs, an armed conflict is not limited to the use of force between armed forces; it can also include an invasion without resistance, aerial bombing, etc.<sup>479</sup> An IAC only ends when there is a general close of military operations.<sup>480</sup> The term ‘in the context of’ refers to the geographic and temporal context, meaning that the crime must have been committed on a

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<sup>473</sup> Art. 8 (2) (b) (xxii) Rome Statute.

<sup>474</sup> Art. 8 (2) (e) (vi) Rome Statute.

<sup>475</sup> Art. 8 (2) (b) (xxii)-1 (3), (xxii)-2 (3), (xxii)-3 (3), (xxii)-4 (2), (xxii)-5 (3) and (xxii)-6 (4) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (3), (vi)-2 (3), (vi)-3 (3), (vi)-4 (2), (vi)-5 (3) and (vi)-6 (4) ICC Elements of Crimes.

<sup>476</sup> Common art. 2 International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949; International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949; International Committee of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949; International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949.

<sup>477</sup> *Prosecutor v. Dusko Tadic*, “Decision on the defence motion for interlocutory appeal on jurisdiction”, ICTY (Appeals Chamber), 2 October 1995, IT-94-1-A, para. 70; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 270; C. KRESS, “The 1999 crisis in East Timor and the threshold of the law on war crimes”, *Criminal Law Forum*, 2002, Vol. 13 No. 4, 412-413; R. O’KEEFE, *International Criminal Law*, Oxford University Press, Oxford, 2015, 132.

<sup>478</sup> Art. 8 (2) (f) Rome Statute.

<sup>479</sup> Common art. 2 GC; O. DÜRR, “Humanitarian Law of Armed Conflict: Problems of Applicability”, *Journal of Peace Research*, 1987, Vol. 24 No. 3, 265-266.

<sup>480</sup> Art. 6 GC IV.

territory where there is an armed conflict, at the time of that armed conflict.<sup>481</sup> The term ‘associated with’ means that the crime must be related to the conflict.<sup>482</sup>

The second element requires that the perpetrator is aware of the factual circumstances that established the existence of an armed conflict.<sup>483</sup> This must be interpreted in terms of ‘took place in the context of’ and ‘was associated with’. It is not required that the perpetrator makes a legal evaluation as to the existence of an armed conflict or the characterisation of the armed conflict as international or non-international. Neither does the perpetrator need to be aware of the factual circumstances that established the armed conflict as international or non-international.<sup>484</sup>

With regard to NIACs, the crimes of cruel treatment, torture and outrages on personal dignity are considered serious violations of Article 3 common to the four Geneva Conventions and can also be used to prosecute sexual violence.<sup>485</sup> In addition to the two elements discussed above, these crimes have the following two elements in common. First, the victims must have been either hors de combat, or must have been civilians, medical personnel, or religious personnel taking no active part in the hostilities.<sup>486</sup> Second, the perpetrator must have been aware of the factual circumstances that established this status.<sup>487</sup> Concerning torture and cruel treatment, the EoC require that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.<sup>488</sup> For torture, it is also required that the perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.<sup>489</sup> This is not a requirement for the crime of cruel treatment. Hence, torture as a war crime differs from torture as a crime against humanity in multiple

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<sup>481</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 552; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 274; E. LA HAYE, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, 112-113.

<sup>482</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 552; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 275; K. DÖRMANN, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, 19-20; E. LA HAYE, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, 112-113; R. O’KEEFE, *International Criminal Law*, Oxford University Press, Oxford, 2015, 133.

<sup>483</sup> Art. 8 (2) (b) (xxii)-1 (4), (xxii)-2 (4), (xxii)-3 (4), (xxii)-4 (3), (xxii)-5 (4) and (xxii)-6 (5) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (4), (vi)-2 (4), (vi)-3 (4), (vi)-4 (3), (vi)-5 (4) and (vi)-6 (5) ICC Elements of Crimes.

<sup>484</sup> Art. 8, Introduction ICC Elements of Crimes.

<sup>485</sup> Art. 8 (2) (c) (i) and (ii) Rome Statute; A.L.M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR*, Intersentia, Antwerp, 2005, 205-215; D. LUPING, “Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court”, *American University Journal of Gender, Social Policy & the Law*, 2009, Vol. 17 No. 2, 470-471.

<sup>486</sup> Art. 8 (2) (c) (i)-3 (2), (i)-4 (3) and (ii) (3) ICC Elements of Crimes.

<sup>487</sup> Art. 8 (2) (c) (i)-3 (3), (i)-4 (4) and (ii) (4) ICC Elements of Crimes.

<sup>488</sup> Art. 8 (2) (c) (i)-3 (1) and (i)-4 (1) ICC Elements of Crimes.

<sup>489</sup> Art. 8 (2) (c) (i)-4 (2) ICC Elements of Crimes.



respects, as there is no control or custody requirement and an additional mental element is required. Concerning outrages on personal dignity, the first element requires that the perpetrator humiliated, degraded, or otherwise violated the dignity of one or more persons.<sup>490</sup> And second, the severity of the humiliation, degradation or other violation must have been of such degree as to be generally recognised as an outrage upon personal dignity.<sup>491</sup>

Article 8 (1) of the Rome Statute states that the ICC shall have jurisdiction, when war crimes are committed as part of a plan or policy or as part of a large-scale commission of such crimes.<sup>492</sup> With regard to this provision, the Appeals Chamber held that these two requirements must be considered as alternatives and are not absolute.<sup>493</sup> It is important to clarify that this is not an element of crime, because one single crime can constitute a war crime. It is a mere guideline for the ICC to focus on the most serious situations and not on isolated war crimes. In practice, the ICC has generally ignored this provision.<sup>494</sup>

### 3.3.2 Case law

#### a. ICC

**65.** In the *Lubanga* case, the first case which was tried before the ICC, the accused was charged with war crimes.<sup>495</sup> The Court clarified the distinction between an international armed conflict and a non-international armed conflict. An IAC was defined by the Pre-Trial Chamber as an armed conflict that takes place between two or more States, extending to the partial or total occupation of the territory of another State.<sup>496</sup> A NIAC, on the other hand, is characterised by the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations.<sup>497</sup> This was confirmed

<sup>490</sup> Art. 8 (2) (c) (ii) (1) ICC Elements of Crimes.

<sup>491</sup> Art. 8 (2) (c) (ii) (2) ICC Elements of Crimes.

<sup>492</sup> Art. 8 (1) Rome Statute.

<sup>493</sup> *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58””, ICC (Appeals Chamber), 13 July 2006, ICC-01/04, para. 70-71.

<sup>494</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC (Pre-Trial Chamber II), 15 June 2009, ICC-01/05-01/08, para. 211; *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 896; M. BOOT, *Genocide, Crimes Against Humanity and War Crimes, Intersentia, Antwerp, 2002, 548*; R. CRYER, et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 277-278; R. O’KEEFE, *International Criminal Law*, Oxford University Press, Oxford, 2015, 135; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 116.

<sup>495</sup> K.O. SMITH, “Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo”, *Howard Law Journal*, 2011, Vol. 54 No. 2, 472.

<sup>496</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 209; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 541.

<sup>497</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 233; *Prosecutor v. Thomas Lubanga Dyilo*,

by the Trial Chamber, which further clarified that it is not a requirement that the armed groups exercise control over part of the territory of the State, nor that they are under responsible command. Hence, it suffices that armed groups have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence.<sup>498</sup>

To determine the organised nature of an armed group, the ICC has developed in its case law a multitude of factors that can be taken into account: the existence of a command structure, the existence of headquarters, the issuing of political statements, and the use of official spokespersons; the military capacity of the armed group, which may be shown by, for example, the ability to define a unified military strategy, the use of military tactics, the ability to carry out operations, the control of territory, and having a territorial division into zones of responsibility; the logistical capacity of the armed group, indicated, among others, by the existence of a supply chain for military equipment, as well as by the group's ability to move troops around and to recruit and train personnel; the existence of an internal disciplinary system and the ability to implement international humanitarian law and the group's ability to speak with one voice, indicated, for example, by the capacity of the leadership to act on behalf of its members in political negotiations and to conclude agreements, such as cease-fire or peace agreement.<sup>499</sup>

For the armed conflict to be protracted, the violence must also be characterised by a certain degree of intensity.<sup>500</sup> Such intensity can be determined by the following factors: the seriousness and frequency of attacks and armed clashes; the spread of clashes over territory and the group's ability to control territory over a period of time; whether any cease-fire orders had been issued or agreed to; the type and number of armed forces deployed, including any involvement of the government; the type of weapons used; whether the situation had attracted the attention of the UN Security Council or involvement of other international organisations; whether those fighting considered themselves bound by international humanitarian law and the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction and the number of persons killed.<sup>501</sup>

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"Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 535.

<sup>498</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 536.

<sup>499</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 537; *Prosecutor v. Germain Katanga*, "Judgment pursuant to article 74 of the Statute", ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1186; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 136; *Prosecutor v. Bosco Ntaganda*, "Judgment", ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 704; *Prosecutor v. Dominic Ongwen*, "Trial Judgment", ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2685.

<sup>500</sup> Art. 8 (f) Rome Statute; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 538.

<sup>501</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 538; *Prosecutor v. Germain Katanga*, 501

Furthermore, the Pre-Trial Chamber in the *Lubanga* case clarified what the element ‘associated with the armed conflict’ entails. There must be a sufficient and clear nexus between the crime and the armed conflict. Hence, the crimes must be closely related to the hostilities. It is not required that the armed conflict was the ultimate reason for the commission of the crime, nor that the crime took place in the middle of the battle. But the armed conflict must have played a substantial role in the decision of the perpetrator, in the purpose of the commission, in his ability to commit the crime or in the manner in which the crime was committed.<sup>502</sup> In its case law, the ICC developed following indicative factors: the status of the perpetrator and the victim; whether the act may be said to serve the ultimate goal of a military campaign and whether the crime is committed as part of, or in the context of, the perpetrator’s official duties.<sup>503</sup> This view was confirmed in the *Katanga* case, in which the war crime of rape was charged.<sup>504</sup> In this case, the Trial Chamber found that there was a sufficient nexus between the acts of rape and the armed conflict, as the perpetrators were combatants and the rapes took place during the fighting and immediately after. Moreover, the environment was generally coercive, considering the use and threat of weapons.<sup>505</sup> The Trial Chamber took the same position with regard to sexual slavery, since the women were detained in military camps and their abduction was closely linked to the fighting.<sup>506</sup>

## b. Other international tribunals

**66.** Rape as a war crime is enlisted in Article 4 of the ICTR Statute, whereas it is not explicitly included in the ICTY Statute.<sup>507</sup> Nevertheless, both tribunals have prosecuted rape and other forms of sexual violence as war crimes.<sup>508</sup>

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“Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1187; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 716; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2684.

<sup>502</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 287-288; *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1176; *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 142; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 731.

<sup>503</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, para. 143; *Prosecutor v. Bosco Ntaganda*, “Judgment”, ICC (Trial Chamber VI), 8 July 2019, ICC-01/04-02/06, para. 732; *Prosecutor v. Dominic Ongwen*, “Trial Judgment”, ICC (Trial Chamber IX), 4 February 2021, ICC-02/04-01/15, para. 2689.

<sup>504</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 30 September 2008, ICC-01/04-01/07, para. 380.

<sup>505</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1233.

<sup>506</sup> *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1234.

<sup>507</sup> Art. 4 (e) ICTR Statute; art. 2 and 3 ICTY Statute.

<sup>508</sup> C.E. ARRABAL WARD, *Wartime Sexual Violence at the International Level: A Legal Perspective*, Brill Nijhoff, Leiden, 2018, 71; D. LUPING, “Investigation and Prosecution of Sexual

*b.1. ICTR*

67. Article 4 (e) of the ICTR Statute gives the ICTR jurisdiction over the war crimes of outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.<sup>509</sup> This provision was used by the ICTR in several cases. In the *Semanza* case, the accused was charged with rape as a war crime, but the ICTR reasoned that the accused was already charged with rape as a crime against humanity for the same facts and therefore dismissed the charge of rape as a war crime. This suggests a preference of the ICTR to convict for crimes against humanity rather than for war crimes.<sup>510</sup> Nevertheless, in more recent cases, the ICTR seems to have changed its course. In the *Ndindiliyimana et al.* case, one of the accused was convicted of rape both as a crime against humanity and as a war crime.<sup>511</sup> Truly groundbreaking was the *Nyiramasuhuko et al.* case, in which a woman was convicted of outrages upon personal dignity, because she had set up roadblocks and had incited Hutus to rape Tutsi women.<sup>512</sup>

*b.2. ICTY*

68. In the former Yugoslavia, the use of rape as a weapon of war was an institutionalised practice.<sup>513</sup> When the ICTY was established, the UN had the clear intention to allow for the prosecution of rape as a war crime, although it was not explicitly included in the ICTY Statute.<sup>514</sup> In the *Tadic* case, the first case

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and Gender-Based Crimes before the International Criminal Court”, *American University Journal of Gender, Social Policy & the Law*, 2009, Vol. 17 No. 2, 462.

<sup>509</sup> Art. 4 (e) ICTR Statute.

<sup>510</sup> *Prosecutor v. Laurent Semanza*, “Judgment and Sentence”, ICTR (Trial Chamber III), 15 May 2003, ICTR-97-20-T, para. 551-552; H. TROUILLE, “How Far Has the International Criminal Tribunal for Rwanda Really Come since Akayesu in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of Ndindiliyimana et al.”, *International Criminal Law Review*, 2013, Vol. 13 No. 4, 761.

<sup>511</sup> *Prosecutor v. Augustin Ndindiliyimana et al.*, “Judgment and Sentence”, ICTR (Trial Chamber II), 17 May 2011, ICTR-00-56-T, para. 2162; H. TROUILLE, “How Far Has the International Criminal Tribunal for Rwanda Really Come since Akayesu in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of Ndindiliyimana et al.”, *International Criminal Law Review*, 2013, Vol. 13 No. 4, 766.

<sup>512</sup> *Prosecutor v. Pauline Nyiramasuhuko et al.*, “Judgment and Sentence”, ICTR (Trial Chamber II), 24 June 2011, ICTR-98-42-T, para. 6182-6183; *Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR (Appeals Chamber), 14 December 2015, ICTR-98-42-A, para. 520; J. CAMPANARO, “Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes”, *Georgetown Law Journal*, 2001, Vol. 89 No. 8, 2584-2585.

<sup>513</sup> K.D. ASKIN, *War Crimes Against Women: Prosecution in International Tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, 295-296; K.L. KING, “Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia”, *Social Science Quarterly*, 2007, Vol. 88 No. 5, 1052; C. MCDUGALL, “The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: the Silence Has Been Broken but There’s Still a Lot to Shout about” in U. DOLGOPOL and J. GARDAM (eds.), *The Challenge of Conflict: International Law Responds*, Nijhoff, Leiden, 2006, (331) 333; K.M. PRATT and L.E. FLETCHER, “Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia”, *Berkeley Women’s Law Journal*, 1994, Vol. 9 No. 1, 85-86.

<sup>514</sup> C.B. COAN, “Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia”, *North Carolina Journal of International Law* 503

in which rape was charged as a war crime, the prosecutor charged the acts of rape as causing great suffering and subjecting the victim to cruel treatment under Article 2 (b) and (c) of the ICTY Statute.<sup>515</sup> In the *Celebici* case and the *Furundžija* case, the accused were also charged with rape as a war crime. In these cases, the ICTY reasoned that there can be no doubt that rape and other forms of sexual violence are prohibited under international humanitarian law, hence confirming that rape is a grave breach under the ICTY Statute.<sup>516</sup>

In addition, the *Tadic* case was of great significance for the prosecution of war crimes in general. The Appeals Chamber developed a test to determine whether an armed conflict exists. According to this test, an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State.<sup>517</sup> This formulation became highly influential in case law and was the basis for the Rome Statute's definition of an non-international

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*Law and Commercial Regulation*, 2000, Vol. 26 No. 1, 188, 197; J. GREEN, R. COPELON, P. COTTER and B. STEPHENS, "Affecting the Rules

for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique", *Hastings Women's Law Journal*, 1994, Vol. 5 No. 2, 185;

H.N. HADDAD, "Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals", *Human Rights Review*, 2011, Vol. 12 No. 1, 119; K.M. PRATT and L.E. FLETCHER, "Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia", *Berkeley Women's Law Journal*, 1994, Vol. 9 No. 1, 88.

<sup>515</sup> *Prosecutor v. Dusko Tadic*, "Opinion and Judgment", ICTY (Trial Chamber), 7 May 1997, IT-94-I-T, para. 45, 722-726; J. CAMPANARO, "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes", *Georgetown Law Journal*, 2001, Vol. 89 No. 8, 2576; C.B. COAN, "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia", *North Carolina Journal of International Law and Commercial Regulation*, 2000, Vol. 26 No. 1, 189-190; A. PHELPS, "Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution", *William & Mary Journal of Women and the Law*, 2006, Vol. 12 No. 2, 508.

<sup>516</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, "Judgment", ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 476; *Prosecutor v. Anto Furundžija*, "Judgment", ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 168-169; C.B. COAN, "Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia", *North Carolina Journal of International Law and Commercial Regulation*, 2000, Vol. 26 No. 1, 188; C. MCDUGALL, "The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: the Silence Has Been Broken but Theres Still a Lot to Shout about" in U. DOLGOPOL and J. GARDAM (eds.), *The Challenge of Conflict: International Law Responds*, Nijhoff, Leiden, 2006, (331) 338-340.

<sup>517</sup> *Prosecutor v. Dusko Tadic*, "Decision on the defence motion for interlocutory appeal on jurisdiction", ICTY (Appeals Chamber), 2 October 1995, IT-94-I-A, para. 70.

armed conflict.<sup>518</sup> Hence, the ICTY established that two criteria are relevant for NIACs: the organisation of the parties and the intensity of the conflict.<sup>519</sup>

### 3.3.3. *Application to the Rohingya case*

69. It is now examined whether the acts of sexual violence committed against the Rohingya constitute war crimes, as defined in Article 8 of the Rome Statute.

#### a. Armed conflict

##### a.1. *International armed conflict*

70. The clearance operations in northern Rakhine State cannot be considered as an IAC, as the armed conflict did not take place between two or more States.<sup>520</sup> Only the State of Myanmar was involved.

##### a.2. *Non-international armed conflict*

71. Whether these clearance operations constitute a NIAC, depends on the intensity of the conflict and the organisation of the parties.<sup>521</sup>

The conflict has a sufficient degree of intensity, considering the seriousness of the attacks, the duration of the conflict and the spread over the

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<sup>518</sup> Art. 8 (2) (f) Rome Statute; *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-1-T, para. 561; *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, “Judgment”, ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 182-183; *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 59; *Prosecutor v. Zlatko Aleksovski*, “Judgment”, ICTY (Trial Chamber), 25 June 1999, IT-95-14/1-T, para. 43; *Prosecutor v. Tihomir Blaskic*, “Judgment”, ICTY (Trial Chamber), 3 March 2000, IT-95-14-T, para. 63; *Prosecutor v. Dario Kordic and Mario Cerkez*, “Judgment”, ICTY (Trial Chamber), 26 February 2001, IT-95-14/2-T, para. 24; *Prosecutor v. Radislav Krstic*, “Judgment”, ICTY (Trial Chamber), 2 August 2001, IT-98-33-T, para. 481; *Prosecutor v. Milorad Knojevac*, “Judgment”, ICTY (Trial Chamber II), 15 March 2002, IT-97-25-T, para. 51; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 56; *Prosecutor v. Milomir Stakic*, “Judgment”, ICTY (Trial Chamber II), 31 July 2003, IT-97-24-T, para. 568; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, “Judgment”, ICTY (Trial Chamber I), 3 April 2008, IT-04-84-T, para. 37; *Prosecutor v. Rasim Delic*, “Judgment”, ICTY (Trial Chamber I), 15 September 2008, IT-04-83-T, para. 40; E. LA HAYE, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, 10.

<sup>519</sup> *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-1-T, para. 562.

<sup>520</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the confirmation of charges”, ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 209; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment pursuant to Article 74 of the Statute”, ICC (Trial Chamber I), 14 March 2012, ICC-01/04-01/06, para. 541.

<sup>521</sup> *Prosecutor v. Dusko Tadic*, “Decision on the defence motion for interlocutory appeal on jurisdiction”, ICTY (Appeals Chamber), 2 October 1995, IT-94-1-A, para. 70; *Prosecutor v. Dusko Tadic*, “Opinion and Judgment”, ICTY (Trial Chamber), 7 May 1997, IT-94-1-T, para. 562; R. CRYER, *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, 273; C. KRESS, “The 1999 crisis in East Timor and the threshold of the law on war crimes”, *Criminal Law Forum*, 2002, Vol. 13 No. 4, 412-413.

territory.<sup>522</sup> The effects on the civilian population were severe, as approximately 880,000 Rohingya have fled the region, thousands of them died and more than two hundred settlements were destroyed.<sup>523</sup> The situation has also drawn the attention of international organisations, as the current investigation before the ICC indicates.

Despite the UN Security Council's inaction, the UN Human Rights Council established an independent international fact-finding mission.<sup>524</sup> Moreover, a genocide case is currently under investigation before the ICJ.<sup>525</sup>

The organisation requirement entails that the armed groups involved in the armed conflict must have an organised nature. For government forces, it is presumed that they satisfy this requirement. There is no doubt that the Tatmadaw qualifies as an organised armed force, as it is the military force of Myanmar.<sup>526</sup> The other armed force mainly involved in the conflict is the Arakan Rohingya Salvation Army (ARSA), a non-State armed group. According to the UN Human Rights Council and The Geneva Academy of International Humanitarian Law and Human Rights, ARSA qualifies as an organised armed force.<sup>527</sup> First of all, the group has a command structure, headquarters and disciplinary rules. ARSA is led by a committee of Rohingya that are currently based in Saudi Arabia. In Rakhine State itself, the military operations are commanded by a number of Rohingya, who received military training abroad. The leader of ARSA is known as Ata Ullah, who uses WhatsApp to command

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<sup>522</sup> M. OCHI and S. MATSUYAMA, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict" in S. LINTON, T. MCCORMACK and S. SIVAKUMARAN (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, (338) 349.

<sup>523</sup> "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 8; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 206; "Detailed findings on the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 16 September 2019, 5; "Operational Update External", *UNHCR Bangladesh*, March 2021, <https://data2.unhcr.org/en/documents/details/86333> (consulted on 1 May 2021).

<sup>524</sup> M. OCHI and S. MATSUYAMA, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict" in S. LINTON, *et al.* (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, (338) 350.

<sup>525</sup> The Republic of the Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures", *ICJ Press Release*, 11 November 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191111-PRE-01-00-EN.pdf> (consulted on 1 May 2021); "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) - Request for the indication of provisional measures - The Court to hold public hearings from Tuesday 10 to Thursday 12 December 2019", *ICJ Press Release*, 18 November 2019, <https://www.icj-cij.org/public/files/case-related/178/178-20191118-PRE-01-00-EN.pdf> (consulted on 1 May 2021).

<sup>526</sup> "The War Report: Armed Conflicts in 2017", The Geneva Academy of International Humanitarian Law and Human Rights report, March 2018, 95.

<sup>527</sup> "The War Report: Armed Conflicts in 2017", The Geneva Academy of International Humanitarian Law and Human Rights report, March 2018, 98-99; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 4.

the Rohingya fighters.<sup>528</sup> ARSA gains legitimacy from international and local fatwas, religious judicial opinions, that support the group's cause.<sup>529</sup> With regard to the group's military and logistical capacities, its military capability is shown by the multiple clashes with the Tatmadaw. The group uses tactics of guerrilla warfare and possesses different kinds of weapons. This indicates that ARSA is capable of buying, transporting and distributing weapons, recruiting fighters and organising military training on guerrilla warfare and military tactics.<sup>530</sup> Furthermore, ARSA speaks with one voice through Social Networking Service and has issued political statements in the past. For instance, in 2017, the group issued a statement that it does not have any link with al-Qaeda, the Islamic State of Iraq and the Levant or any other transnational jihadist group.<sup>531</sup>

**72.** For these reasons, the clearance operations cannot be considered just internal disturbances and tensions but qualify as a non-international armed conflict.

### *a.3. Nexus requirement*

**73.** The nexus requirement entails that the criminal acts must have taken place in the context of and must have been associated with the armed conflict.<sup>532</sup> With regard to the geographical context, most rapes and other acts of sexual violence were committed in Buthiduang, Maungdaw, Kyauktaw, Rathedaung, Mrauk-U, Kyaukpyu and Ponnagyun Townships in Rakhine State.<sup>533</sup> These

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<sup>528</sup> M. OCHI and S. MATSUYAMA, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict" in S. LINTON, et al. (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, (338) 350; "Myanmar: A New Muslim Insurgency in Rakhine State", International Crisis Group report, 15 December 2016, 12-13; "The War Report: Armed Conflicts in 2017", The Geneva Academy of International Humanitarian Law and Human Rights report, March 2018, 99.

<sup>529</sup> M. OCHI and S. MATSUYAMA, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict" in S. LINTON, et al. (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, (338) 350; "The War Report: Armed Conflicts in 2017", The Geneva Academy of International Humanitarian Law and Human Rights report, March 2018, 99.

<sup>530</sup> "The War Report: Armed Conflicts in 2017", The Geneva Academy of International Humanitarian Law and Human Rights report, March 2018, 99.

<sup>531</sup> M. OCHI and S. MATSUYAMA, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict" in S. LINTON, et al. (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, (338) 350-351; "The War Report: Armed Conflicts in 2017", *The Geneva Academy of International Humanitarian Law and Human Rights* report, March 2018, 98; "ARSA group denies links with al-Qaeda, ISIL and others", *Al Jazeera*, 14 September 2017, <https://www.aljazeera.com/news/2017/9/14/arsa-group-denies-links-with-al-qaeda-isil-and-others> (consulted on 1 May 2021).

<sup>532</sup> Art. 8 (2) (b) (xxii)-1 (3), (xxii)-2 (3), (xxii)-3 (3), (xxii)-4 (2), (xxii)-5 (3) and (xxii)-6 (4) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (3), (vi)-2 (3), (vi)-3 (3), (vi)-4 (2), (vi)-5 (3) and (vi)-6 (4) ICC Elements of Crimes.

<sup>533</sup> "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 15; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 8-9; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 108-109; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 20.



Townships were the main area where the clearance operations took place.<sup>534</sup> With regard to the temporal context, most acts of sexual violence were committed in the period after 25 August 2017. The Burmese government announced the end of the clearance operations on 5 September 2017, but in reality they continued for two more months.<sup>535</sup>

Not only did the sexual violence take place in the context of the armed conflict, it was also associated with it. Taking into account the factors developed by the ICC, it is clear that the armed conflict played a substantial role in the commission of the crimes by the perpetrators. First of all, the victims were non-combatants, as the sexual violence was committed against the civilian population.<sup>536</sup> On the other hand, the perpetrators were combatants acting in their official capacity. Numerous testimonies indicate that the perpetrators were wearing uniforms, which suggests that the crimes were committed in the context of the perpetrators' official duties.<sup>537</sup> Moreover, there is no doubt that the sexual violence served the ultimate goal of the military campaign, as rape was used by the Tatmadaw to terrorise the Rohingya and to make them flee.<sup>538</sup> The Tatmadaw soldiers often expressed their hatred towards the Rohingya community, while they sexually assaulted and raped the women. On multiple occasions, they threatened the victims or used the word 'Kalar', which is a racist insult for people who are Muslim and have darker skin.<sup>539</sup> With regard to the crime of sexual slavery, the reasoning of the Court in the *Katanga* case is indicative. The Trial Chamber held that a sufficient nexus existed, since the

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<sup>534</sup> "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 8; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 181-207.

<sup>535</sup> "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 180; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 19-20.

<sup>536</sup> "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 15; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 51.

<sup>537</sup> "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh", *UN Office of the High Commissioner for Human Rights* report, 11 October 2017, 7; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 16.

<sup>538</sup> "They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar", *Fortify Rights* report, 14 November 2017, 10; "All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma", *Human Rights Watch* report, 16 November 2017, 15; "Report of the independent international fact-finding mission on Myanmar", *UN Human Rights Council* report, 12 September 2018, 15; "Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar", *UN Human Rights Council* report, 17 September 2018, 348; "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>539</sup> "Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts", *UN Human Rights Council* report, 22 August 2019, 23-24; "The 'kalar' controversy shows many in Myanmar aren't listening", *Frontier Myanmar*, 19 June 2020, <https://www.frontiermyanmar.net/en/the-kalar-controversy-shows-many-in-myanmar-arent-listening/> (consulted on 1 May 2021).

women were detained in military camps and their abduction was closely linked to the fighting.<sup>540</sup> The same reasoning applies to the case of the Rohingya.

## b. Criminal acts

### *b.1. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence*

**74.** For this analysis, it suffices to refer to the analysis of criminal acts made under 2.3.2, A) - F).<sup>541</sup>

It must be noted that one element of the provision regarding any other form of sexual violence differs from the one under crimes against humanity. The second element requires that other forms of sexual violence are of a gravity comparable to that of a serious violation of Article 3 common to the four Geneva Conventions.<sup>542</sup> The genital mutilation and the forced nudity that the Rohingya women were subjected to, must be considered as crimes of such a comparable gravity.<sup>543</sup> Although sexual violence is not explicitly included in common Article 3 of the Geneva Conventions, it is generally accepted that rape and other forms of sexual violence amount to such a serious violation.<sup>544</sup>

### *b.2. Cruel treatment and torture*

**75.** The sexual violence that was committed can also be prosecuted as the war crimes of cruel treatment and torture. The material element entails that the perpetrator must have inflicted severe physical or mental pain or suffering.<sup>545</sup> It is undeniable that sexual violence meets this threshold of severity, as was confirmed by the ICTY.<sup>546</sup> For the crime of torture, the pain or suffering must have been inflicted for the purposes of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination

<sup>540</sup> *Prosecutor v. Germain Katanga*, "Judgment pursuant to article 74 of the Statute", ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1234.

<sup>541</sup> Note that the references to the EoC must be replaced by the elements relevant to war crimes, namely art. 8 (2) (e) (vi)-1 to (vi)-6 ICC Elements of Crimes.

<sup>542</sup> Art. 8 (2) (e) (vi)-6 (2) ICC Elements of Crimes.

<sup>543</sup> Art. 8 (2) (e) (vi)-6 (2) ICC Elements of Crimes; V. OOSTERVELD, "Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court", *New England Journal of International and Comparative Law*, 2005, Vol. 12 No. 1, 124.

<sup>544</sup> M. BOOT, *Genocide, Crimes Against Humanity and War Crimes*, Intersentia, Antwerp, 2002, 592; A.L.M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: the ICC and the Practice of the ICTY and the ICTR*, Intersentia, Antwerp, 2005, 204, 222; T. MERON, "Rape as a Crime under International Humanitarian Law", *American Journal of International Law*, 1993, Vol. 87 No. 3, 426-427; H. SPIEKER, "The International Criminal Court and Non-International Armed Conflicts", *Leiden Journal of International Law*, 2000, Vol. 13 No. 2, 419.

<sup>545</sup> Art. 8 (2) (c) (i)-3 (1) and (i)-4 (1) ICC Elements of Crimes.

<sup>546</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, "Judgment", ICTY (Trial Chamber), 16 November 1998, IT-96-21-T, para. 495-496; *Prosecutor v. Anto Furundzija*, "Judgment", ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 163; *Prosecutor v. Radoslav Brdanin*, "Judgment", ICTY (Trial Chamber II), 1 September 2004, IT-99-36-T, para. 485; *Prosecutor v. Mico Stanisic and Stojan Zupljanin*, "Judgment", ICTY (Trial Chamber II), 27 March 2013, IT-08-91-T, para. 48.

of any kind.<sup>547</sup> In its case law, the ICTY held that discrimination is a prohibited purpose that applies in situations of sexual violence.<sup>548</sup> In the case of the Rohingya, it could be argued that there is a discrimination on the basis of ethnicity and religion. Discrimination on the basis of gender seems to be more controversial, as Rohingya men were sometimes also targeted.<sup>549</sup> In addition, the purpose of intimidation applies, as rape was used to terrorise the Rohingya population.<sup>550</sup> If the ICC would rule that no prohibited purpose exists, however, the sexual violence could still be prosecuted as cruel treatment. Furthermore, there is no doubt that the victims were civilians who did not actively take part in the hostilities.<sup>551</sup> Whether the perpetrators concerned were aware of the factual circumstances that established this status, must be determined in those particular cases.

### *b.3. Outrages on personal dignity*

76. Lastly, the acts of sexual violence also constitute outrages on personal dignity. In raping the Rohingya women, the Tatmadaw humiliated, degraded and violated their dignity. Besides the severe physical suffering, the victims were often verbally harassed or laughed at.<sup>552</sup> The humiliation that accompanies rape, has such a degree of severity, that rape is generally recognised as an outrage upon personal dignity. Article 4 (2) (e) of Protocol II of the Geneva Conventions explicitly mentions rape as an outrage upon personal dignity.<sup>553</sup> In the *Furundzija* case, the ICTY held that this provision is part of international customary law and that rape hence constitutes an outrage upon personal dignity.<sup>554</sup> Once again, the

<sup>547</sup> Art. 8 (2) (c) (i)-4 (2) ICC Elements of Crimes.

<sup>548</sup> *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 162; *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Appeals Chamber), 21 July 2000, IT-95-17/1-A, para. 111; *Prosecutor v. Miraslov Kvočka et al.*, “Judgment”, ICTY (Trial Chamber), 2 November 2001, IT-98-30/1-T, para. 560.

<sup>549</sup> “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 37-41.

<sup>550</sup> They tried to kill us all: Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar”, *Fortify Rights* report, 14 November 2017, 10; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15; “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 348; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>551</sup> “Report of the independent international fact-finding mission on Myanmar”, *UN Human Rights Council* report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, *UN Human Rights Council* report, 17 September 2018, 51.

<sup>552</sup> A. BALA and G. BSMRSTU, “Rohingya Crisis: Sexual Violence against Women and Adolescent Girls in Myanmar”, October 2018, 4; “All of my body was pain. Sexual Violence against Rohingya Women and Girls in Burma”, *Human Rights Watch* report, 16 November 2017, 15-17; “Sexual and gender-based violence in Myanmar and the gendered impact of its ethnic conflicts”, *UN Human Rights Council* report, 22 August 2019, 20-21.

<sup>553</sup> Art. 4 (2) (e) International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

<sup>554</sup> *Prosecutor v. Anto Furundzija*, “Judgment”, ICTY (Trial Chamber), 10 December 1998, IT-95-17/1-T, para. 44; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, “Judgment”, ICTY (Trial Chamber), 22 February 2001, IT-96-23-T and IT-96-23/1-T, para. 436.

victims were civilians who did not actively take part in the hostilities<sup>555</sup> and the awareness of the individual perpetrators in this respect must be determined in those particular cases.

### c. Mental element

77. As required for every crime under the Rome Statute, the perpetrator must have committed the war crime with knowledge and intent.<sup>556</sup> The perpetrator must have been aware of the factual circumstances that established the existence of the armed conflict.<sup>557</sup> In other words, the perpetrator must have known that the sexual violence took place in the context of and was associated with the armed conflict.<sup>558</sup>

Whether the individual perpetrators were aware of the factual circumstances that established the existence of the armed conflict, must be determined in those particular cases.

#### 3.3.4. Conclusion

78. The sexual violence committed against the Rohingya during the clearance operations, must be considered as war crimes on behalf of the Tatmadaw, as it meets the conditions of Article 8 of the Rome Statute and its elements.

The analysis concludes that an international armed conflict does not exist, as Myanmar is the only State involved. Nevertheless, the situation amounts to a non-international armed conflict and thus triggers the application of international humanitarian law. On the one hand, the violence has a sufficient degree of intensity, considering the scale of the attacks and the massive destruction and suffering that was caused. On the other hand, both the armed forces involved, the Tatmadaw and ARSA, have a sufficiently organised nature.

Different acts of sexual violence that were committed amount to war crimes. The majority of these crimes were rapes, but other forms of sexual violence were committed as well, such as sexual slavery, genital mutilation and forced nudity. These acts of sexual violence can also be prosecuted as the war crimes of cruel treatment, torture and outrages on personal dignity.

Lastly, it is undeniable that a nexus exists between the armed conflict and the sexual violence that was committed. The atrocities took place in the

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<sup>555</sup> “Report of the independent international fact-finding mission on Myanmar”, UN Human Rights Council report, 12 September 2018, 15; “Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar”, UN Human Rights Council report, 17 September 2018, 51.

<sup>556</sup> Art. 30 Rome Statute.

<sup>557</sup> Art. 8 (2) (b) (xxii)-1 (4), (xxii)-2 (4), (xxii)-3 (4), (xxii)-4 (3), (xxii)-5 (4) and (xxii)-6 (5) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (4), (vi)-2 (4), (vi)-3 (4), (vi)-4 (3), (vi)-5 (4) and (vi)-6 (5) ICC Elements of Crimes.

<sup>558</sup> Art. 8, Introduction ICC Elements of Crimes.

context of the clearance operations and were related to them, as the Tatmadaw used sexual violence as a brutal war tactic to oppress the Rohingya community.

Therefore, the acts of sexual violence qualify as war crimes under Article 8 of the Rome Statute.

## CONCLUSION

79. During the clearance operations in August 2017, the Rohingya people in northern Rakhine State faced horrific atrocities, among which rapes and other forms of sexual violence. Myanmar has a culture of impunity regarding sexual violence, which makes that the perpetrators remain unpunished and therefore, the international community calls for international action. Currently, an investigation is ongoing before the ICC regarding the deportations of Rohingya from Myanmar to Bangladesh. In the current investigation, the focus lies on the crime against humanity of deportation, but it could potentially include any crime. This research has examined the possibility to prosecute the sexual violence before the ICC, either in the current investigation or in any future investigation.

As Myanmar is not a State Party to the Rome Statute, the territorial jurisdiction of the Court poses some problems. It is required that the crimes were at least partially committed on the territory of a State Party, which is not the case for most acts of sexual violence. In the current investigation, a possible solution would be to prosecute the sexual violence as part of the larger crime against humanity of persecution. Sexual violence was used as a tool to persecute the Rohingya population and drive them out of Myanmar to Bangladesh, which indicates the transboundary nature. Another, however unlikely, possibility would lie in the effects doctrine. The violence has caused a massive exodus of Rohingya refugees to Bangladesh, hence having effect on the territory of a State Party. But the effects doctrine is controversial in international criminal law and has not yet been used by the Court. If the sexual violence would be excluded from the current investigation, there are a number of possibilities to trigger a new investigation. A first possibility is that Myanmar accepts the jurisdiction of the ICC ad hoc. This is most unlikely, as the Burmese government continues to deny the allegations. The limits to the territorial jurisdiction of the Court can also be overcome by a UN Security Council referral. However, the permanent members have a veto and it is possible that China, as a close ally of Myanmar, would use its veto power. Therefore, the best possibility seems that the sexual violence is prosecuted as part of the larger crime of persecution.

For the sexual violence to be prosecuted by the Court, it must also fall under its jurisdiction *ratione materiae*. Thus, it was examined whether the conduct constitutes genocide, crimes against humanity and/or war crimes. This research agrees with the many human rights reports that argue that the alleged crimes do not just constitute ethnic cleansing, but amount to genocide. Sexual violence was used by the Tatmadaw to kill the Rohingya, to cause serious bodily and mental harm, to deliberately impose conditions of life to cause the physical destruction of the Rohingya population and to impose measures to prevent

births. As a Muslim minority with their own language and culture, the Rohingya are an ethnical and religious group. These acts of sexual violence were not sporadic or isolated incidents, but were part of a larger genocidal plan. The Tatmadaw followed a well-established pattern across Rakhine State. Moreover, genocidal intent does not only appear from the scale and the atrocious nature of the violence, but also from the hate speech used against the Rohingya by both the Burmese government and the perpetrators, as well as from the discriminatory measures imposed on them with regard to procreation. Thus, the material and the mental element of genocide are present.

In addition to genocide, the acts of sexual violence constitute crimes against humanity. These acts were not sporadic, but part of the widespread and systematic attack against the civilian Rohingya population. The attack can be considered as both widespread and systematic, given the scale, the brutality and the organised nature of the violence and the number of victims. The well-established pattern across northern Rakhine State indicates that there was an organisational policy of the Burmese government behind these crimes. Human rights reports provide testimonies of atrocities that amount to the crimes of rape, sexual slavery and other forms of sexual violence, such as genital mutilation and forced nudity. This research has not found sufficient evidence of the crimes of enforced prostitution, forced pregnancy and enforced sterilisation. The acts of sexual violence can also be prosecuted as the crimes against humanity of torture and of persecution. Sexual violence violates fundamental rights on discriminatory grounds, in particular on the grounds of religion and ethnicity, thus constituting the crime against humanity of persecution.

Lastly, the qualification as war crimes was analysed. The existence of an armed conflict creates the possibility to prosecute the acts of sexual violence as war crimes. Since there was only one State involved in the violence, namely Myanmar, the conflict cannot be considered an international armed conflict. Nevertheless, the situation amounts to a non-international armed conflict, given the intensity of the conflict and the organisation of the parties. There is a nexus between the different acts of sexual violence that were committed, namely rape, sexual slavery and other forms of sexual violence, such as genital mutilation and forced nudity, and the armed conflict. In addition, the acts of sexual violence can be prosecuted as cruel treatment, torture and outrages on personal dignity.

Hence, if the ICC would assume territorial jurisdiction over the sexual violence that was committed against the Rohingya, it can be prosecuted before the ICC as genocide, crimes against humanity and war crimes.