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Pledge of Honesty

“On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorised assistance on it.”

A handwritten signature in dark ink, appearing to read 'Clara Male', written in a cursive style.

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Abstract

The Muslim minority of the Rohingya has long suffered from discrimination by the Buddhist state of Myanmar. The latest wave of violence started in the summer of 2017, officially in response to attacks on border guards by ARSA, the Arakan Rohingya Salvation Army. For almost two years now the group has been victim to arson, rape, murder and other crimes that have seen a majority of its members fleeing to nearby Bangladesh and other countries. The violence committed against the group has been continuously called crimes against humanity and even genocide. The thesis discusses the concept of Genocide by outlining its historical evolution, its definition and the difficulties of applying the concept to a particular case. The paper further gives an understanding of who the Rohingya are, why they are being targeted and how discrimination against the group is manifested. In answering the question of how the crisis could be resolved, the thesis considers the role of the International Criminal Court (ICC). With Myanmar not being a member state to the Court, it has so far not acted. Two possibilities on how the ICC could engage are highlighted. First, in its ruling the Pre-Trial Chamber I argued in September 2018 that the transboundary effect obtained through the crime against humanity of deportation into Bangladesh, could serve as jurisdictional basis for the Court. Second, the UN Security Council possesses the possibility of referring a situation to the ICC. The thesis assesses the geopolitical situation that has made such a referral unlikely in the case of Myanmar. Finally the paper considers the possibility of the International Court of Justice stepping in. The thesis however argues that it mainly lies upon the ICC to engage in order to end the terrible suffering of the Rohingya, as especially the individuals responsible should be tried before a competent court.

Zusammenfassung

Die muslimische Minderheit der Rohingya leidet seit Jahren unter der Diskriminierung des buddhistischen Staates Myanmar. Die letzte Welle der Gewalt, offiziell ausgelöst durch Angriffe auf Grenzpolizisten durch die ARSA (Arakan Rohingya Salvation Army), startete im Sommer 2017. Seit nun fast zwei Jahren ist die Gruppe Opfer von Brandstiftung, Vergewaltigung, Mord und anderen Verbrechen die als Konsequenz zur Flucht eines Großteils der Mitglieder ins benachbarte Bangladesch und andere Länder führten. Die vorliegende Arbeit diskutiert das Konzept von Genozid und wendet es auf den Fall der Rohingya in Myanmar an. Des Weiteren beleuchtet sie die Rolle des Internationalen Strafgerichtshofes und diskutiert inwiefern der Gerichtshof die Möglichkeit hat einzuschreiten, um dem großen Leiden der Rohingya ein Ende zu setzen.

Disclaimer

The term Rohingya is very strongly debated. An analysis of this debate will be given in the thesis. I however still opted for the term instead of other proposed names such as “Muslim community of Northern Rakhine State”, which was adopted by the Advisory Commission on Rakhine State under Kofi Annan. I deliberately make use of the term Rohingya, as it is the name the group has chosen for itself. Taking away this chosen name would be a step in the opposite direction the thesis aims to argue, namely for the Rohingya and an end to their terrible struggle.

*Subject to which conditions may the International Criminal Court exercise jurisdiction
over the crime of Genocide committed against the Muslim minority of Northern Rakhine
State of Myanmar?*

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1 Introduction

There is a number of reasons why a paper about the Rohingya situation in Myanmar is very relevant. Not only is the crisis one of the greatest human rights violations of our time³, it is also, and that makes it even more striking, rarely talked about in the news. The Rohingya are a minority of about one million people living in Myanmar⁴, a country of roughly sixty million inhabitants.⁵ The duration and legality of their existence in Myanmar is an on-going topic of debate, which has made them subject to discrimination over a long period of time. The outbreak of the current crisis in the summer of 2017 was by no means the first round of violence. But it could arguably be described as the most drastic in recent times. Reports point out violence in the form of arson, rape and murder.

After a visit to Myanmar in July 2018 and talks with a number of locals, the relevance of the situation and the need to talk about the issue became even more important to myself. While Myanmar's de-facto leader, Nobel Peace Prize laureate Aung San Suu Kyi, has become subject to criticism in Western media in response to the Rohingya crisis⁶, all the locals I talked to during my trip stood very strong on defending her, often stating that the minority of the Rohingya in fact does live in Myanmar illegally without a right to stay, which in their opinion in turn makes it alright and even desirable for them to be thrown out and/or made an object of violence. Just these few talks can certainly not serve as evidence of the overall view and opinion of the population of Myanmar, however they got me curious in exploring and understanding the backgrounds and effects of the crisis better.

The aim of the thesis is to answer two connected questions. First, do the events in Myanmar amount to genocide? And second, if the answer to the first question is affirmative, does the ICC in The Hague have jurisdiction in respect to the crimes committed under Article 6 of the Rome Statute?

In the quest for finding an answer to the research questions posed, the first part will look at the concept of genocide. Before determining whether the legal elements of the crime fit

³ 'Myanmar's Refugee Problem among World's Worst Humanitarian, Human Rights Crises, Secretary-General Says in Briefing to Security Council' (2018); Ware and Laoutides (n 1) 5.

⁴ Leider (n 2); Ware and Laoutides (n 1) 27.

⁵ Wa Lone and others, 'Special Report: How Myanmar Forces Burned, Looted and Killed in a Remote Village' (*Reuters*, 8 February 2018).

⁶ Eleanor Albert and Andrew Chatzky, 'The Rohingya Crisis' (2018).

with the situation of the Rohingya in Myanmar, it is necessary to portray a concise definition of the concept itself, its history and the difficulties in establishing genocide in the respective cases. This part will be followed by a section exploring the political situation of Myanmar. In addition to focusing on the current situation, the paper will also look at the country's development from independence into military rule. With respect to the current situation the struggle between the "Tatmadaw", the Myanmar military, and the National League for Democracy (NLD), Aung San Suu Kyi's party, will be highlighted.

The next part will deal with the conflict in Rakhine State. While the media focuses only on the Rohingya crisis, the territory is in fact stuck in a three-tier conflict. Here, the paper will provide an understanding about the background, as well as the different poles and actors. This will be followed by a section about the minority of the Rohingya, discussing their role and history as well as their belonging in the Rakhine State of Myanmar. Focus will be laid on the relevance of the name "Rohingya", connected to the question of why they are being targeted and what measures are inflicted upon members of the group that can be considered early warning signs in the direction of genocide.

The second part of the thesis will focus on the legal concept of jurisdiction, with special focus on the ICC. An overview will be provided in which cases the Court enjoys jurisdiction. In this respect the relationship between Myanmar and the ICC plays an important role that will be assessed. As the Court's jurisdiction is limited the main issue of the chapter will be the much-debated question whether there is a possibility for the ICC to apply its jurisdiction to the case of the Rohingya. Here the paper will deal with potential opportunities on how to bring a case before the ICC. [This refers to the issue that Myanmar is not a State Party to the Court, while its jurisdiction is limited to members only.] Within this chapter the thesis will aim at answering the question whether the happenings can in fact be described as genocide. In this quest it will apply the earlier discussed legal concept of the crime to the events at stake. Here also a ruling by the Pre-Trial Chamber I of September 2018 will be discussed that apologetically ruled that the Court may have objective legal personality and in this respect jurisdiction over the crime against humanity of deportation.⁷ In answering the question of potential jurisdiction of the ICC also the

⁷ Pre-Trial Chamber I International Criminal Court, 'ICC Pre-Trial Chamber I Rules That the Court May Exercise Jurisdiction over the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh.' (2018).

strong geopolitical role of China as well as Russia and its consequences on Myanmar will be analysed. As the establishment of ICC jurisdiction in the case at hand is somewhat limited, the paper will shortly consider the potential of jurisdiction of the International Court of Justice (ICJ) in order to provide an alternative path to justice. If the finding is that the Court does have jurisdiction, the paper will briefly consider who could in turn be held responsible before the Court, referring back to the difficult and somewhat unclear political structure of Myanmar.

2 Genocide as a Concept

Before trying to find an answer to the first question, that is, whether the atrocities committed in Myanmar do in fact amount to genocide, it is necessary to have a clear picture about the concept itself and its evolution.

Genocide is a relatively new legal concept. While the crime itself has arguably been committed for centuries, the term was only coined in the 20th century by Raphael Lemkin.⁸ The neologism was first used in the indictment of the International Military Tribunal (IMT) after World War II.⁹ Lemkin, a Jewish lawyer and law professor originally from Poland, started the World Movement to Outlaw Genocide, working on promoting the adoption of legal norms that outlawed the crime specifically.¹⁰ Lemkin invented the concept of genocide in the quest for legally prohibiting destructive actions against population groups.¹¹ He later also served as consultant with the United Nations (UN) in the drafting of the Genocide Convention. The term genocide is made up of two words: *genos*, ancient Greek for nation or tribe, as well as *caedere*, to kill, in Latin.¹² Lemkin's definition of genocide has subsequently been criticised as both too narrow and too broad.¹³ Too narrow in the sense that it initially only included specific national groups.¹⁴ The concept was later extended to more groups; it however continues to be subject to criticism for still being too narrow.¹⁵ In Lemkin's view genocide is an organised, multifaceted social destruction.¹⁶ Here is where the criticism of being too broad comes in. Lemkin distinguished between "immediate destruction" and "physical destruction". In his view, physical destruction is only the form of genocide but not its essence.¹⁷ In his book *Axis Rule in Occupied Europe* he wrote that genocide, rather than being limited to physical destruction "is intended [...] to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups

⁸ William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 29; William A Schabas, 'The Law and Genocide' in Donald Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010) 123.

⁹ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 17.

¹⁰ *ibid* 29.

¹¹ Martin Shaw, 'The Concept of Genocide', *Genocide, Risk and Resilience* (Palgrave Macmillan 2013) 23.

¹² Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 29.

¹³ Shaw (n 11) 24.

¹⁴ Raphael Lemkin, *Axis Rule in Occupied Europe* (reprint, The Lawbook Exchange, Ltd 2008) 79.

¹⁵ Shaw (n 11) 24.

¹⁶ Lemkin (n 14) 79.

¹⁷ Shaw (n 11) 24; Lemkin (n 14) 79.

themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”¹⁸ This is to say that the essence of the crime of genocide goes beyond and is much broader than mere physical destruction of members of a specific group. Today the Convention and the Rome Statute, the ICC’s constituent treaty, list specific acts that may be considered as genocide.

The term genocide does not appear in the Charter of the IMT. In fact, the crime of genocide, as its denomination did not exist before the war, was grouped under crimes against humanity during the Nuremberg trials.¹⁹ As the legal prohibition of genocide did not exist until the adoption of the Genocide Convention in 1948, this was done to circumvent the principle of *nullum crimen sine lege*. The inclusion of crimes against peace under the IMT Charter proves controversial for these reasons until today.²⁰ During the Nuremberg trials the term was nonetheless used, however the final judgment did not spell out the word.²¹ As a consequence several states called for the crime to be regulated under international law as an international crime.²² In responding to this call the UN General Assembly adopted Resolution 96(I) in 1946, which was two years later followed up by the adoption of the Genocide Convention.²³

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 was the first international treaty that defined and prohibited genocide. On the basis of this document all state signatories are legally bound to “prevent and punish” the acts that have been defined as genocide.²⁴ The Preamble denounces genocide as “an international crime against humanity”.²⁵ Article II spells out the crime as follows: “The acts have to be committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Not any act committed with the intent is to be considered genocide. In fact,

¹⁸ Lemkin (n 14) 79.

¹⁹ HH Jescheck, ‘The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’ (2004) 2 Journal of International Criminal Justice 50.

²⁰ Christian Tomuschat, ‘The Legacy of Nuremberg’ (2006) 4 Journal of International Criminal Justice 834.

²¹ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 44.

²² *ibid* 52.

²³ *ibid* 53.

²⁴ Shaw (n 11) 23; Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260 1948.

²⁵ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 53; Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

the list is limited to killings, the causation of serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and finally, forcibly transferring children of the group to another group.²⁶

The *actus reus* and *mens rea* elements contained in the Convention were adopted verbatim by the Rome Statute of the ICC of 1998. In fact, Article 6 incorporates the exact same definition.²⁷ The Elements of Crime, the adoption of which is laid down in Article 9 of the Rome Statute, give guidance to the Statute. Their relevance will become striking at a later stage in the thesis when the factual circumstances of the Rohingya case will be assessed on the basis of the legal definition.

Notably the group definition has been broadened both in the Convention and the Statute since Lemkin's first proposal.²⁸ Since the adoption of the Genocide Convention, not only national groups are protected, but also racial, ethnical and religious ones. Whereas General Assembly Resolution 96(I) referred also to other groups, the Convention and the Statute only list the four respective groups. The exhaustive nature²⁹ of the list of groups has led to much criticism. Attempts have been made frequently to extend the definition of the crime of genocide.³⁰ In the *Akayesu* case before the International Criminal Tribunal for Rwanda (ICTR) it was also argued that the list was too restrictive.³¹ The Rome Statute attempted to circumvent this difficulty by declaring in Article 7 that crimes against humanity are not restricted to specific groups but may be committed against any civilian population.³² While this makes adjudication of perpetrators easier in cases where none of the respective groups is victim of genocide, other factors have to be taken into account in order to establish the perpetration of crimes against humanity. For instance, here it is necessary that they are committed as part of a "widespread and systematic attack" and also "pursuant to or in the furtherance of a state or organisational policy"³³, which is not required under the prohibition of genocide. Professor Verhoeven, Secretary-General of the Institute of

²⁶ UN, "1948 Convention,".

²⁷ Rome Statute of the International Criminal Court, A/CONF.183/9 1998.

²⁸ Shaw (n 11) 24.

²⁹ Payam Akhavan, *Reducing Genocide To Law: Definition, Meaning, and the Ultimate Crime*, vol 87 (Cambridge University Press 2012) 141; *Prosecutor v Radislav Krstic, Judgment* (2001) IT-98-33-T [554].

³⁰ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 117.

³¹ *ibid* 152.

³² Rome Statute of the International Criminal Court, A/CONF.183/9.

³³ *ibid*.

International Law, points out that the concepts of race, ethnic and national group are *a priori* imprecise.³⁴ The exact limitations of those groups are often impossible to define. For instance, in *Krstić* the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that “Bosnian Muslims” were a “national group”.³⁵ Academic discussion and case law point to a less restrictive approach to the exhaustive list under Article 6 of the Rome Statute and Article II of the Convention respectively. In fact, the perpetrator himself defines the victim’s status as a member of a specific group.³⁶ The ICTR held in *Rutaganda* that “membership of a group is, in essence, a subjective rather than an objective concept”. At the same time however, a subjective definition alone is not enough.³⁷ Genocide is always committed with the specific intent to destroy a precise group as such – defined by the perpetrator and protected under the Convention. If the individuals committing the crime of genocide lack the specific intent, the crime committed cannot be labelled as genocide. The group requirement is therefore relevant only as long as the specific intent is still in question. Without proof of specific intent the atrocities committed may therefore only be adjudicated as crimes against humanity or war crimes, if the required circumstances can be proven. If not, they may fall under crimes not prohibited under the Rome Statute of the ICC but by other treaties or national law.

Ethnic cleansing has not been recognised as independent crime under international law. In fact, the crime, which has been defined as “[...] a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas” by the UN Security Council, is often grouped under crimes against humanity or genocide.³⁸

The *actus reus* element of genocide overlaps with the crimes of homicide and assault, which are serious crimes under national law. Nonetheless the perpetrators of genocide have often managed to escape prosecution. This is due to the fact that genocide is often committed at the order of those in power who enjoy immunity in their respective states.³⁹ This is one of the reasons why the establishment of the ICC was such a huge and important

³⁴ Joe Verhoeven, ‘Le Grime De Génocide’ [1991] *Revue Belge de Droit International / Belgian Review of International Law* 5.

³⁵ ICTY - *Prosecutor v. Radislav Krstic, Judgment* (n 29) paras 559–60.

³⁶ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 125.

³⁷ ICTR - *Prosecutor v Rutaganda, Judgment and Sentence* (1999) ICTR-96-3-T [56].

³⁸ United Nations Security Council, ‘S/1994/674’ (1994).

³⁹ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 18.

achievement in the battle against impunity in international crimes. States are often reluctant or unable to prosecute high standing individuals and consequently many such crimes go unpunished. With the establishment of the ICC, victims' justice has become more likely. Before having a deeper look into the ICC's possibility to step in, it first has to be assessed to what the current atrocities amount to. In order to understand the events better, an overview of the country's situation historically and today will be provided, with special focus on the Rohingya minority itself.

3 Myanmar and the Rohingya

3.1 History and Current Situation

Myanmar's difficult past is the cause of a number of problems that exist today. Factors that play into the conflict of today are the country's colonial past, its on-going civil war, its religiously and ethnically diverse population, its history of military rule, its economic situation, as well as the strong power the military still plays in today's democracy.

For more than 100 years, from 1824 to 1948, the country that used to be called Burma, was subject to British colonial rule.⁴⁰ During this period it split from India in 1937.⁴¹ After gaining independence in 1948 the country slipped into a civil war that is still running today. This war is fuelled to a large extent by the state's religiously and ethnically diverse population.⁴² Burma has a religious landscape of about 88 percent Buddhists and only 4 percent Muslims.⁴³ Also the Rohingya crisis is sparked by religious tensions, as will be analysed later on, however the country has to tackle numerous other violent conflicts that are spread through its different regions.⁴⁴

When General Ne Win took power in 1962 through a military coup⁴⁵ he started a regime that shielded the country from the international scene and consequentially Burma degraded from a prosperous to a poor country. At the period Myanmar was ranked among the least developed nations worldwide.⁴⁶ In 1990 the country held its first free elections, which had a landslide victory of the NLD, the National League for Democracy of Aung San Suu Kyi, as a consequence. The result was however ignored by the ruling regime.⁴⁷ Suu Kyi was

⁴⁰ 'Myanmar Country Profile' (*BBC News*, 3 September 2018) <<https://www.bbc.com/news/world-asia-pacific-12990563>> accessed 5 April 2019.

⁴¹ Leider (n 2) 7.

⁴² Michael Kelly and others, 'Myanmar's Civil War and the Rohingya Tragedy' (*UCAnews*, 22 November 2017) <<https://www.ucanews.com/news/myanmars-civil-war-and-the-rohingya-tragedy/80860>> accessed 13 April 2019.

⁴³ Krishnadev Calamur, 'The Misunderstood Roots of Burma's Rohingya Crisis' (*The Atlantic*, 25 September 2017) <<https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>> accessed 3 January 2019.

⁴⁴ Joshua Kurlantzick, 'Myanmar's Conflicts Are Even Worse Than Often Discussed' (2018).

⁴⁵ Ware and Laoutides (n 1) 15.

⁴⁶ Kelly and others (n 42); David Steinberg, *Burma: The State of Myanmar* (Georgetown University Press 2001) 288; Azeem Ibrahim, *The Rohingyas: Inside Myanmar's Genocide* (Hurst 2018) 122.

⁴⁷ 'Myanmar Country Profile' (n 40).

confined to house arrest in 1995 and it was not until 2010 that she was released.⁴⁸ Five years after her release her party came to power.⁴⁹ In between, in 2011 military rule ended in accordance with the country's "Roadmap to Democracy" that saw the establishment of a democratic state. While today the military rule is officially a thing of the past, reality looks different.⁵⁰ General Min Aung Hlaing, the head of the Tatmadaw, Myanmar's army, is arguably the most powerful man in the country.⁵¹ The constitution of 2008, which was adopted as part of the roadmap, outlines that the military is to hold 25 percent of the seats of parliament as well as three key ministries.⁵² The ministries in the hands of the Tatmadaw are defence, interior and border affairs. All three of them are very relevant in respect to the Rohingya crisis flaring up in Rakhine State. The fact that the military holds control over these ministries means in turn that matters in the Rohingya's home territory are mainly beyond government control.⁵³

Myanmar is made up of seven states.⁵⁴ One of those is Rakhine. Located on the western coast, the territory, which used to be called Arakan until 1989 (the same year in which the country was renamed⁵⁵), has seen a long history of independence from Myanmar.⁵⁶ In 1784 the Burmese conquered Arakan, resulting in the first of at least four mass exoduses of Muslim inhabitants of the territory.⁵⁷ More recently, the state saw a separatist rebellion after World War II by the Rohingya population, which continued up into the 1990s.⁵⁸ The state of Rakhine is the poorest in comparison to the others.⁵⁹ According to World Bank estimates it suffers from a poverty rate of 78 percent, compared to 37.5 percent on national

⁴⁸ Tom Lasseter, 'Two Reuters Reporters Uncovered a Mass Killing in Myanmar. Their Journey Has Put Them at Odds with Their Own People.' (*Reuters*, 8 August 2018) <<https://www.reuters.com/investigates/special-report/myanmar-reporters-democracy/>> accessed 10 September 2018.

⁴⁹ Ware and Laoutides (n 1) xi.

⁵⁰ 'Myanmar Country Profile' (n 40); Ware and Laoutides (n 1) 11.

⁵¹ Bhavan Jaipragas, 'Here's the One Man in Myanmar Who Can End Rohingya Misery' (*South China Morning Post*, 16 September 2017).

⁵² *ibid*; Lasseter (n 48).

⁵³ Ware and Laoutides (n 1) 21.

⁵⁴ Kofi Annan and others, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Advisory Commission Final Report on Rakhine State' 6.

⁵⁵ William J Topich and Keith A Leitch, *The History of Myanmar* (Greenwood 2013) 9; Ware and Laoutides (n 1) xix.

⁵⁶ Ware and Laoutides (n 1) 26.

⁵⁷ Leider (n 2) 5; Ware and Laoutides (n 1) 14.

⁵⁸ Calamur (n 43).

⁵⁹ Annan and others (n 54) 6.

average.⁶⁰ A fact that may come as a surprise if one considers the state's strategic location for regional trade, its fertile soils and its abundance of natural resources.⁶¹

The numerous on-going conflicts the country has to tackle in combination with ethnic strife and the Rohingya crisis do not paint a picture of hope that a long time peace agreement between the different parties, the ethnic minority groups and the national government, is feasible in reality. At the beginning of the current government's term of office it often underlined lasting peace as its biggest priority. Such a tendency however does not seem to be given now.⁶² The government's inaction with respect to the Rohingya crisis show how the situation in reality looks.⁶³ The fact that the NLD performed poorly in Rakhine State in the elections of 1990, 2010 and 2015 adds another factor of instability as its position is challenged in the region.⁶⁴ What is even more problematic is that the military is making use of this instability by trying to position itself as the real power in Myanmar.⁶⁵ With the military regaining strength, the government, which likes to portray itself as neutral mediator, acts in a way that paints a different picture.⁶⁶ Aung San Suu Kyi's government has repeatedly denied that genocide or ethnic cleansing is being committed in the country and has failed to advocate on behalf of the Rohingya.⁶⁷ The fact that Rakhine State is scarred by deep ethnic and religious hatred between Buddhist Arakanese (inhabitants of Rakhine, formerly Arakan) and Muslim Rohingya makes the territory, subject to human rights and development issues, even more vulnerable today.⁶⁸

In 2016 the Advisory Commission on Rakhine State was established under the leadership of former UN Secretary General Kofi Annan. This establishment was internationally seen as positive development towards a solution of the issues in Rakhine State.⁶⁹ Only a short while before the report about Rakhine was published, ARSA attacked border controls

⁶⁰ Albert and Chatzky (n 6).

⁶¹ Annan and others (n 54) 9.

⁶² Kurlantzick (n 44).

⁶³ McCartan, 'Little Trust, Little Hope for Myanmar's Faltering Peace Try' (*Asia Times*, 30 November 2018) <<http://www.atimes.com/article/little-trust-little-hope-for-myanmars-faltering-peace-try/>> accessed 10 April 2019.

⁶⁴ Ware and Laoutides (n 1) 21.

⁶⁵ Kurlantzick (n 44).

⁶⁶ Ware and Laoutides (n 1) 21.

⁶⁷ Albert and Chatzky (n 6).

⁶⁸ Annan and others (n 54) 9; "Panic" Grips Rohingya as Myanmar Army Battles Buddhist Rebels' (*Al Jazeera*, 9 January 2019) <<https://www.aljazeera.com/news/2019/01/190109063636830.html>> accessed 27 March 2019.

⁶⁹ Albert and Chatzky (n 6); Annan and others (n 54).

prompting the violent response by the military in the summer of 2017. The attack by ARSA is seen by many as the starting point of today's alleged genocide and other human rights violations.⁷⁰

3.2 The Conflict

The fact that Myanmar has been stuck in a civil war for decades makes it even more unlikely that the current Rohingya crisis will be resolved anytime soon. This is to say that the genocide allegedly committed against the Rohingya population of Myanmar is only one of the issues the government and the military are concerned with at this moment. While reports generally focus only on the violence against the Rohingya, they leave out the fact that the situation in the territory is in fact a three-tier conflict and therefore much more complicated than what appears at first sight.⁷¹

The surrounding conflict is certainly very relevant and provides context to the Rohingya crisis, however it will only be very shortly discussed in this thesis as the focus only lies on one of the three tiers, namely the conflict between ARSA and the government. Even in this respect ARSA will only be considered as far as is relevant to the alleged genocide itself. While ARSA is often used by the Tatmadaw as justification for its violence against the Rohingya, they only encompass a small minority of the group.⁷²

The dominant narrative in Myanmar is that the Rohingya crisis is an inter-communal conflict, reducing the issue to Rakhine only. Tensions between local Rakhine Buddhists and Muslims escalated in 2012 as a reaction to a brutal rape and murder of an ethnic Rakhine woman by Muslim men. Responses were mobs by ethnic Rakhine against the Muslim population of the state and calls that all "Bengalis" be removed from the country. The second tier is the Arakan Army (AA) Insurgency. The AA was founded in 2015 with the aim of fighting for self-determination for the Rakhine people. The state of Rakhine has long struggled with what it perceives as Burman domination, and ethnic Rakhine see themselves systematically discriminated against by state agencies and institutions. They desire some form of self-rule within a federal union. The final tier, and the most relevant one with regard to the topic of the thesis, is ARSA. This group marks the first incident

⁷⁰ Calamur (n 43).

⁷¹ Ware and Laoutides (n 1) 36 ff.

⁷² *ibid.*

where the Muslims of Northern Rakhine acted particularly violent or religiously radicalised. The emergence of the group is seen as a result of the fact that since the 2012 violence against Muslims in Rakhine, most members of the Rohingya have been detained in IDP camps. The October 2016 attack on border guards by ARSA and the subsequent attack on 25th August 2017 are seen, as mentioned previously, as the starting point of the escalation of violence against the Rohingya. It has to be remembered that ARSA is not a highly trained force, further it also lacks central command and can therefore not realistically be seen as threat to the Myanmar army.⁷³

The intertwined conflicts of ethnic Rakhine versus alleged illegal immigrants into their territory, the combined struggle of ethnic Rakhine against the domination by Myanmar, and the strife between ARSA and the Tatmadaw show how complicated the situation in the region in fact is. The alleged genocide cannot be considered or understood in isolation. However, while this background provides a clearer picture on the emergence of violence against the Rohingya, it also shows that a solution to the struggle of the minority group can only be achieved if all factors are considered.

3.3 The Rohingya as a Minority

The minority of the Rohingya is a group of Muslims living primarily in the region close to the border with Bangladesh in northwest Myanmar. This paper focuses on the discrimination the group has been suffering from for years. However, the Rohingya were not always discriminated against. For example, the term “Rohingya” was used in journals and school textbooks until the late 1970s. Also, the first President of Burma, Sao Shwe Thaik, declared in 1959 that the “Muslims of Arakan certainly belong to the indigenous races of Burma. If they do not belong to the indigenous races, we also cannot be taken as indigenous races”.⁷⁴ This relative peace from discrimination was however short-lived.

The Muslim inhabitants of northern Rakhine State have used the name “Rohingya” to self-identify themselves as distinct ethnic group since the 1950s.⁷⁵ This claim gives them a common political identity.⁷⁶ However, as there is no internationally recognised “right to

⁷³ *ibid.*

⁷⁴ Penny Green, Thomas Macmanus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar* (2015) 28.

⁷⁵ Leider (n 2).

⁷⁶ Albert and Chatzky (n 6).

self-identification” in any human rights document, the Rohingya do not form a distinct ethnic group on the basis of their chosen name.⁷⁷ This links to the issue of the name “Rohingya”; more on that later. Also the government of Aung San Suu Kyi rejects the name “Rohingya”. In fact, Suu Kyi calls them “the Muslim community in Northern Rakhine State” with the aim of downplaying the element of ethnicity and portraying the conflict in the region as communal. Within Myanmar it is often claimed that there are no Rohingya, which does not deny the existence of the group, but points out that they are not to be considered an ethnicity, especially not one that is “indigenous to Myanmar”.⁷⁸

3.4 Early Warning Signs

Genocide is never the first step, it does not happen out of nowhere.⁷⁹ A coordinated plan of discrimination and prior forms of repression often serve as stepping-stones.⁸⁰ Professor Stanton of Genocide Watch provides a list of eight stages of genocide, the first six of which are early warning signs that a tension is likely to turn into genocide.⁸¹ Other scholars also indicate similar characteristics.⁸² The stages of early warnings include classification, symbolisation, dehumanisation, organisation, polarisation and preparation. The paper will now consider whether statements made by scholars such as Barbara Harff already in 2004 that “Myanmar was the state in the world most at risk of genocide”⁸³ fulfil the early warning signs for genocide.

With respect to **classification** there is a clear distinction between “us” and “them”. Already the term “Rohingya” is a very disputed one. The etymological root of the word is not widely accepted, however it is thought that *Rohang* derives from the word “Arakan” in the Rohingya dialect and *ga* or *gya* means “from”. With this definition the group tries to assert its ties to the state of Arakan, now Rakhine, claiming that it is in fact indigenous to Myanmar.⁸⁴ Others often call members of the group “Bengali” or “kala”, which is to be understood as “foreigner” or “stranger”. This is to signify that in fact they are not

⁷⁷ Ware and Laoutides (n 1) xvi.

⁷⁸ *ibid* xvii.

⁷⁹ Anton Weiss-Wendt, ‘The State and Genocide’ in Donald Bloxham and A Dirk Moses (eds), *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010) 81.

⁸⁰ Ibrahim (n 46) 101.

⁸¹ Gregory Stanton, ‘The Eight Stages of Genocide’ [1998] Yale Genocide Studies Series 6.

⁸² Ibrahim (n 46) 101.

⁸³ Barbara Harff, Monty G Marshall and Ted Robert Gurr, ‘Assessing Risks of Genocide and Politicide’ (2005) 1956.

⁸⁴ Albert and Chatzky (n 6).

indigenous to Myanmar but illegal immigrants from Bengal, stemming from Bangladesh or India.⁸⁵ While migration from Bengal occurred during British colonisation, this neglects the fact that a pre-existing community of Rohingya was already present in the region of Arakan before.⁸⁶

The issue around the name “Rohingya” is used to **symbolise** the group as foreign and not belonging to Myanmar. Buddhist nationalists have boycotted any right of the Muslim group to self-identify or register as Rohingya.⁸⁷ By prohibiting the term as self-identification for members, the government effectively limits their rights and status. This is linked to the question often posed in the country whether you can be a true Burmese if you just accept that “illegal Muslim immigrants” are living in Buddhist Myanmar?⁸⁸ Such symbolisation can be seen in the 1982 Citizenship Law, the main source of discrimination today.⁸⁹ With this document the Rohingya were stripped of their full citizenship, which they had been enjoying since Burmese independence from Great Britain in 1948.⁹⁰ The law of 1982 distinguishes between three categories of citizens. Those are: full, associate and naturalised.⁹¹ The first group encompasses members of 135 groups who are considered national race or “taing-yin-tha”⁹². Citizenship in Myanmar stems from the principle of *ius sanguinis* according to Article 7 of the 1982 Law.⁹³ This is to say that the parents’ nationality is decisive for the award of the citizenship, in contrast to the place of birth, which determines the right in some other countries. Pivotal for the inclusion in the “taing-yin-tha” is that members of the group were already living in Myanmar at the start of the British colonisation in 1823.⁹⁴ The claim that the Rohingya crisis is based on the problem that members of the group do not possess citizenship at all is consequentially wrong.⁹⁵ In fact, the problem that arises out of the tiered grant of citizenship is that all those who do not possess full citizenship, on the basis of belonging to the “taing-yin-tha”, are awarded lesser rights within the country and are often discriminated against, which is the case also

⁸⁵ Ware and Laoutides (n 1) xvii; Ibrahim (n 46) 99.

⁸⁶ Green, Macmanus and Venning (n 74) 28.

⁸⁷ Albert and Chatzky (n 6); Ibrahim (n 46) 116.

⁸⁸ Ibrahim (n 46) 103.

⁸⁹ Chris Lewa, ‘North Arakan: An Open Prison for the Rohingya in Burma’ [2009] Forced Migration Review 11.

⁹⁰ Calamur (n 43).

⁹¹ Burma Citizenship Law (Pyithu Hluttaw Law No 4) 1982.

⁹² Ware and Laoutides (n 1) 22.

⁹³ Burma Citizenship Law (Pyithu Hluttaw Law No 4).

⁹⁴ Lewa (n 89) 11; Burma Citizenship Law (Pyithu Hluttaw Law No 4).

⁹⁵ Ware and Laoutides (n 1) 23.

for the Rohingya. The limited citizenship granted to some members of the group has been the source of and excuse for numerous rounds of violence against its members.⁹⁶ As a consequence of the adoption of the 1982 Citizenship Law the ruling elite introduced colour-coded Citizens' Scrutiny Cards (CRCs) in 1989. These cards were awarded to the citizens based on their status of citizenship. Full citizens received pink cards, associate citizens were granted blue ones and naturalised ones green cards. The Rohingya in turn were not awarded any card at all. This meant that members of the group were not able to claim any citizenship rights. In responding to pressure from the UNHCR Rohingya were issued Temporary Registration Cards (white cards).⁹⁷ By holding these cards the Muslims could not claim citizenship, but they only granted them the right to register as temporary residents. For a short while these white cards offered them the right of political participation as cardholders were allowed to vote in Myanmar's 2008 constitutional referendum and in the 2010 general elections.⁹⁸ This privilege was however short-lived. Already in 2012, following the earlier mentioned alleged rape of a Buddhist woman by Muslims, religious violence erupted against the group. While international pressure ensuing the violence and discrimination against the Rohingya resulted in the issuance of a reduced form of citizenship, this right was subject to the limitation that they had to register as Bengali, not Rohingya. Registering as Bengali consequentially meant for the individual to acknowledge that he or she is of foreign origin, and thereby neglecting the claim by the Rohingya that they are the original inhabitants of Rakhine State, many therefore chose not to make use of that right.⁹⁹ Once again in 2014, when the country held its first UN-backed national census in thirty years, the Rohingya were discriminated against on the basis of their name. At first they were allowed to register in the census as Rohingya. This right was shortly after retracted by the government in response to a threat of a boycott of the census by Buddhist nationalists. If they wished to be accounted for they had to register as Bengali.¹⁰⁰ It is even more telling that the vicious circle continued by the fact that the Rohingya, if they wished to be accounted for in the national census, were forced to accept the loss of any right to live in the country of their birth. As they were only recorded if they accepted the state designation of "Bengali", they accepted to be considered illegal foreign immigrants at the same time.¹⁰¹

⁹⁶ *ibid*; Lewa (n 89) 12.

⁹⁷ Lewa (n 89) 11.

⁹⁸ Albert and Chatzky (n 6).

⁹⁹ Calamur (n 43); Ibrahim (n 46) 115.

¹⁰⁰ Albert and Chatzky (n 6); Ibrahim (n 46) 116.

¹⁰¹ Ibrahim (n 46) 116.

Pressure by Buddhist nationalists went even further in 2015 when President Thein Sein cancelled the Temporary Registration Cards in response thereof. With this he not only took away their possibility to register as temporary citizens but also their recently gained right to vote and participate in democratic processes. The elections of 2015, while they were regarded internationally as having been free and fair, did not see any parliamentary candidate of Muslim faith.¹⁰²

Citizenship in liberal democracies consists of three components: civil rights, political rights, and social rights.¹⁰³ The limited form of citizenship granted to the Rohingya denies them protection by the law. Even more, their limited legal status in the country facilitates the atrocities committed against the group. By denying the group full citizenship as “taing-yin-tha” the political elite makes sure to exclude them from rights, privileges and protection. Ware stresses the point that the Rohingya do not have no citizenship at all, a fact that is often misunderstood. However, the limited form of citizenship the Rohingya enjoy effectively makes them stateless in the sense that they do not enjoy any citizenship rights, or if any at all, in a very limited manner. While Myanmar officials often argue that Rohingya may in principle apply for the limited form of citizenship, this right is coupled with the requirement to furnish proof that their ancestors were living in Myanmar already before 1948 in accordance with Article 42 of the 1982 Citizenship Law.¹⁰⁴ However, with the confiscation of the white cards and other official documents by armed groups of security personnel, many Rohingya not only lost their right to travel or work outside the designated refugee camps, but also any possibility to provide proof of a right to citizenship.¹⁰⁵ This has as consequence that only a very limited amount of group members were and are in fact able to furnish proof of citizenship. Currently, one in seven stateless persons are Rohingya, making them the largest stateless community in the world according to UN figures. At the same time, Myanmar is neither party to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness.¹⁰⁶

¹⁰² Albert and Chatzky (n 6).

¹⁰³ TH Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) 20, 47, 74.

¹⁰⁴ Burma Citizenship Law (Pyithu Hluttaw Law No 4).

¹⁰⁵ Ibrahim (n 46) 117.

¹⁰⁶ Ken MacLean, ‘The Rohingya Crisis and the Practices of Erasure’ (2018) 21 *Journal of Genocide Research*.

Dehumanisation again relates to the claim that the Rohingya are illegal immigrants from the Bengal area.¹⁰⁷ In order not to repeat anything already said, simply put, the Buddhists are considered superior to any other religious group in the country, and this also includes Christians, Hindus and other groups.¹⁰⁸ Anti-Rohingya sentiment and the waves of violence resulting thereupon have often either been orchestrated by the state or saw state officials acting in close cooperation with other ethnic or religious groups that were implementing force against members of the group.¹⁰⁹ The group of the Rohingya is **polarised** and dehumanised through institutionalised discrimination by the Myanmar government. As outlined above, the state of Rakhine is the poorest in comparison to the others within the country, a fact that makes its population more susceptible to economic disadvantage and consequently worse life conditions.¹¹⁰ The group of the Rohingya is continuously identified as the “other”. This fortification of group differences has become a key feature in differentiating between different ethnic groups within Myanmar.¹¹¹ Rohingya suffer from discrimination in various fields. For instance they have to endure restrictions on religious freedom, family planning, freedom of movement, suffrage, marriage, employment, and education.¹¹² Prior to and outside of wedlock, cohabitation and sexual contact are strictly prohibited. No law clearly prohibits those acts, however practice shows that the breach of those rules will result in a prison sentence of up to ten years.¹¹³ In addition, in order to be granted the right to marry, couples have to apply for a marriage authorisation. Such a permission often has to be paid for in bribes and may take up to several years to obtain.¹¹⁴ Also family planning in itself is not left to the individuals themselves. Since 2005 married couples are not allowed to have more than two children. Before getting married they have to sign a promise to obey to this regulation. Otherwise they will not be granted the right to get married.¹¹⁵ This restriction has as a consequence a birth rate that is below the rate needed for demographic replacement. This rule, while it is also a preparatory step towards genocide, can also be considered to already fall under Article II(d) of the Genocide Convention that lists “imposing measures intended to prevent births within the group” as a

¹⁰⁷ Ware and Laoutides (n 1) xvii; Ibrahim (n 46) 99.

¹⁰⁸ Saitawut Yuthaworakoo, ‘The Politics of Buddhist Nationalism in Myanmar : History , Legitimacy and Democratic Transition **’ (2017) 47 Journal of Social Sciences 133, 145.

¹⁰⁹ Ibrahim (n 46) 113.

¹¹⁰ Annan and others (n 54) 6.

¹¹¹ Ibrahim (n 46) 102.

¹¹² Albert and Chatzky (n 6); Leider (n 2) 2.

¹¹³ Lewa (n 89) 12.

¹¹⁴ *ibid*; Ibrahim (n 46) 100.

¹¹⁵ Lewa (n 89) 12; Ibrahim (n 46) 100.

form of *actus reus* of genocide.¹¹⁶ With the signing of this promise the Rohingya effectively agree to a slow diminishment of their population.¹¹⁷

Restrictions go even further into daily life. When leaving their respective village, even if simply wanting to visit a neighbouring village, group members have to apply for, and, if granted, pay for a travel pass. Should they overstay the time limit allowed by their pass, their names will be deleted from their family list, which in turn means that they are not allowed to ever return home to their village and family.¹¹⁸ By restricting the freedom of movement of the Rohingya they are prevented from taking on employment or making use of services elsewhere than their home village. The report by the Advisory Commission on Rakhine State held that such restrictions do not only have detrimental effects on the direct addressees but in fact hurt the economy as a whole.¹¹⁹

Preparation is visible through practice of discrimination and classification. By being considered foreign the Rohingya are understood as not belonging to Myanmar, a view also the citizens of the country have adopted over time as I got to witness during my recent visit to Myanmar. With classification over such a long period of time, ethnic Burmese consider them an illegal burden they do not want to be concerned with, which is boosted also through hate speech.¹²⁰ In addition, according to Ibrahim the Camps for internally displaced people (IDP) can be seen as preparation for elimination of the group. The Rohingya have been interred in IDP camps since the outbreak of violence in 2012. In his book he analyses how these camps have the goal “to eliminate the group over time” by confining them to these restricted locations.¹²¹

Organisation and preparation can be deduced from the strong power of the military, especially in Rakhine.¹²² Notwithstanding the transition to democracy, the military remains extremely powerful in the country. As mentioned above, the constitution of 2008 provides for a share of 25 percent of the seats of parliament to the military. In addition to that the

¹¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

¹¹⁷ Ibrahim (n 46) 109.

¹¹⁸ Lewa (n 89) 12.

¹¹⁹ Annan and others (n 54) 9.

¹²⁰ Olivia Solon, ‘Facebook Struggling to End Hate Speech in Myanmar, Investigation Finds’ (*The Guardian*, 16 August 2018) <<https://www.theguardian.com/technology/2018/aug/15/facebook-myanmar-rohingya-hate-speech-investigation>> accessed 17 April 2019.

¹²¹ Ibrahim (n 46) 100.

¹²² *ibid* 121.

military enjoys control over three key ministries.¹²³ According to Ware and Laoutides this goes as far as the issues of Rakhine State being outside of the control of the government.¹²⁴

If the criteria of the early warning stages are met, genocide often follows by consequence. The six stages outlined do not by necessity lead to genocide, but they provide for an understanding why genocide may erupt in a situation such as Myanmar finds itself in. Applied to the case of Myanmar, policy and discriminatory practice show that the preconditions for genocide were certainly given. The following chapter will discuss the issues of jurisdiction and thereby assess the situation and current events in Myanmar in order to find an answer to the question whether genocide is being committed in the country today.

¹²³ Jaipragas (n 51); Lasseter (n 48).

¹²⁴ Ware and Laoutides (n 1) 21.

4 Issues of Jurisdiction

4.1 Myanmar Jurisdiction

Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide holds that the persons charged should be tried by a competent tribunal. The charge is to be brought either before a tribunal in the state in which the act was committed, or before an international tribunal with respect to those parties that have accepted its jurisdiction.¹²⁵ Myanmar is neither a party to the court nor has it accepted its jurisdiction as a non-party.¹²⁶ As mentioned earlier, the ICC only has complementary jurisdiction. This means that it can only act if the state in question is unwilling or unable to exercise its jurisdiction.¹²⁷ In fact, before considering whether the ICC or any other international tribunal has jurisdiction over the case it has to be judged whether Myanmar itself can or is willing to adjudicate the case. Myanmar certainly has jurisdiction over the crimes committed as they are taking place within the country and are committed by nationals of the state. However, the difficult political situation in the country and the denial of genocide by the government make a trial unlikely.¹²⁸ The fact that journalists and UN officials are denied access to the area of alleged crimes show an unwillingness of Myanmar officials to bring a case against those responsible.¹²⁹ According to UN reports the country's government has shown itself unwilling to investigate into ethnic attacks. This is especially the case in instances where the military is involved.¹³⁰

Even if Myanmar is unable and unwilling to try those responsible, the logical consequence is not necessarily jurisdiction of the ICC in the case at hand. ICC jurisdiction is limited, as will be explained later on. In accordance with Article 11 of the Vienna Convention on the Law of Treaties, to which Myanmar is a State Party, the country has not expressed its intent to be bound by the Rome Statute of the ICC.¹³¹ Consequently and in accordance with

¹²⁵ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

¹²⁶ Rome Statute of the International Criminal Court, A/CONF.183/9.

¹²⁷ *ibid.*

¹²⁸ Albert and Chatzky (n 6).

¹²⁹ *ibid*; Jacob Goldberg, "'No One Wants the Terrorists Back': Signs of Rohingya Erased in Rakhine State' (*The Guardian*, 30 October 2018) <<https://www.theguardian.com/world/2018/oct/30/no-one-wants-the-terrorists-back-signs-of-rohingya-erased-in-rakhine-state>> accessed 23 December 2018.

¹³⁰ Ibrahim (n 46) 110.

¹³¹ Vienna Convention on the Law of Treaties 1969 (United Nations - Treaty Series).

Article 12 of the Rome Statute the ICC does not automatically have jurisdiction over Myanmar.¹³²

4.2 ICC Jurisdiction and its Limits

The crisis in Myanmar calls for a solution. Action has to be taken to hold those culpable accountable.¹³³ The international community, and especially all signatories of the Genocide Convention need to work together to bring those culpable to justice. A trial at the ICC would be one possibility to achieve this. So far however no case has been brought before the Court. The following chapter will examine the jurisdiction of the ICC and apply it to the case facts of Myanmar.

4.2.1 Ratione Materiae

Article 5 of the Rome Statute lists the ICC's jurisdiction *ratione materiae* that encompasses "the most serious crimes of concern to the international community as a whole": the crime of genocide, war crimes, crimes against humanity, and the crime of aggression.¹³⁴ The focus in this thesis on the question of the Court's jurisdiction over the crimes will focus on genocide, the reason being that genocide is considered the "crime of crimes".¹³⁵ Collecting and presenting evidence to hold someone accountable for genocide may be more difficult than for other crimes, however this thesis will follow reports that have concluded that the crimes committed in Myanmar amount to genocide. Discussion of this will be provided in the following paragraphs. By fulfilling the legal definition of the crime its adjudication is necessary to provide for a suitable penalty for the perpetrators.

4.2.1.1 Genocide

The definition in Art II of the Genocide Convention requires consideration of whether there is a protected group, whether acts in one or more of the specified categories have been committed, and whether the acts were committed with genocidal intent.¹³⁶

¹³² Rome Statute of the International Criminal Court, A/CONF.183/9.

¹³³ "'Panic' Grips Rohingya as Myanmar Army Battles Buddhist Rebels' (n 68).

¹³⁴ Rome Statute of the International Criminal Court, A/CONF.183/9.

¹³⁵ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8).

¹³⁶ Human Rights Council, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', vol 15350 (2018) 351.

Certainly the physical element of *actus reus* is decisive in proving genocide, and as high numbers of reports point to evidence in this respect, it will not prove very difficult to establish this. The mental element in return is much harder to prove and has to be considered in respect of actions committed, policies adopted as well as official responses. While the *actus reus* element of genocide may appear somewhat straight forward, the acts have to be committed against a defined protected group. Not any group definition will suffice. In fact, only ethnic, religious, racial or national groups fall under the definition of genocide.¹³⁷ It is therefore necessary to prove that the Rohingya may be considered as one of the groups of this exhaustive list before determining further whether the mental element can be met.¹³⁸

Consequently, the two main questions that have to be considered are: Do the Rohingya fall under one of the four protected groups, and can the mental element of double intent be proven? The *actus reus* element will certainly also be assessed.

4.2.1.1.1 Group definition

As outlined earlier, in order to commit genocide, the perpetrator has to engage in violence against a specific group of either ethnic, religious, racial, or national definition. In the case of *Akayesu* the ICTR gave definitions for the four accepted groups within genocide. This case marks the first incident in which an international tribunal convicted a person for the crime of genocide.¹³⁹

With respect to ethnic groups it held that “an ethnic group is generally defined as a group whose members share a common language or culture”.¹⁴⁰ As the name “Rohingya” is disputed and not officially recognised, the limitations of the group are not sufficiently clear. The group concerned has identified itself as Rohingya, however its members do not form an ethnic group under this name.¹⁴¹ Still, newspapers and reports continuously refer to the Rohingya as an ethnic group. For a legal analysis a more precise denomination is however necessary. More accurately they could be considered as a Muslim minority in Myanmar. Here again it is however decisive to point out that the Rohingya are not the only Muslim

¹³⁷ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

¹³⁸ Akhavan (n 29) 141; *Prosecutor v. Radislav Krstic, Judgment* (n 29) para 554.

¹³⁹ Carola Lingaas, ‘Defining the Protected Groups of Genocide Through the Case Law of International Courts’ 4.

¹⁴⁰ ICTR - *The Prosecutor v Jean-Paul Akayesu, Judgment* (1998) ICTR-96-4-T [512].

¹⁴¹ Ware and Laoutides (n 1) xvi.

minority in the country.¹⁴² A term that could therefore be considered the ethnic definition of the group, which shares a common language and culture, is “Muslim community in Northern Rakhine State”, a term initially proposed by Aung San Suu Kyi and later used by the Advisory Commission on Rakhine State under former UN Secretary-General Kofi Annan. It is important to point out that in this context, “Muslim” is not to be understood in terms of religion but as an identity group.¹⁴³

In terms of religion, the ICTR in *Akayesu* defined a group as “one whose members share the same religion, denomination or mode of worship”.¹⁴⁴ The Rohingya are a group of Muslims living in Myanmar.¹⁴⁵ Within the Buddhist country they form a religious minority, however they are not the only worshippers of *Allah* living in the country, such as for instance the ethnic group of the Kaman.¹⁴⁶ Simply considering them as Muslim religious minority is therefore not enough. While other Muslims in Myanmar are also subject to violence or discrimination, the alleged genocide is committed only against those Muslims who consider themselves part of the Rohingya, or more precisely, the Muslims living in Northern Rakhine State. An accurate denomination is therefore necessary to establish clear limits in a potential situation being referred to the ICC.

The notion of racial group was defined as follows in *Akayesu*: “The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”.¹⁴⁷ Today the use of the term racial group is very contested. Already the Rwanda Tribunal did not classify the Tutsi as a racial group.¹⁴⁸ A broader approach ascribing a social dimension to the concept of “race” that looks at common cultural, lingual or religious traits is rather supported today.¹⁴⁹ If this approach is adopted for Myanmar, the Rohingya could be considered a racial group with reference to aforementioned arguments.

¹⁴² *ibid* xviii.

¹⁴³ *ibid* xvii.

¹⁴⁴ ICTR - *The Prosecutor v. Jean-Paul Akayesu, Judgment* (n 140) para 515.

¹⁴⁵ Leider (n 2).

¹⁴⁶ Ware and Laoutides (n 1) xviii.

¹⁴⁷ ICTR - *The Prosecutor v. Jean-Paul Akayesu, Judgment* (n 140) paras 514, 516.

¹⁴⁸ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 140.

¹⁴⁹ Christian Tams, Lars Christian Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck, Hart Publishing, Nomos Verlagsgesellschaft 2014) 111.

The ICTR in *Akayesu* defined a national group as follows: “Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”¹⁵⁰ The problem that arises here is that most members of the group, due to lack of documentation and as a result of discrimination do not possess any citizenship and can therefore not legally be grouped as such.¹⁵¹ If one considers a subjective approach, it can be presumed that the perpetrator considers the Rohingya to be Bengali or Bangladeshi, as they deem them illegal immigrants from that region.¹⁵² Referring to the definition in *Akayesu* it must be pointed out that they also do not possess citizenship from any other country, if the ICC or any other court or tribunal were to judge on this, an approach less objective than the one used in *Akayesu* would have to be adopted in order to group them under the definition of national group.

In summary, the Rohingya do comprise a group that falls under the definition of the crime of genocide, whether as an ethnic, religious, racial, or potentially also national group. Whatever group definition is used, it is necessary to specify that within the Muslim minority, not all members are targeted, but only those who call themselves “Rohingya” and consider themselves part of this specific group. A further point that has to be underlined is that the issue applies only to the geographical limitation of Northern Rakhine State within Myanmar. Today, as held in *Jelisić* for the first time, a more subjective approach to the group criteria is applied.¹⁵³ In fact the judgment of *Kayishema and Ruzindana*, which combines objective and subjective criteria, provides for the most useful analysis for the case at hand. In this case the ICTR held that “An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others).”¹⁵⁴ In our case, all three requirements, even though they are not cumulative, are met: The Rohingya share a common language, they distinguish themselves by self-identifying as Rohingya, and they are identified as “the other” by the perpetrator.¹⁵⁵

¹⁵⁰ ICTR - *The Prosecutor v. Jean-Paul Akayesu, Judgment* (n 140) para 512.

¹⁵¹ Ibrahim (n 46) 116 ff.; Ware and Laoutides (n 1) 23.

¹⁵² Ware and Laoutides (n 1) xvii; Ibrahim (n 46) 99.

¹⁵³ ICTY - *The Prosecutor v. Goran Jelisić, Judgment* (1999) IT-95-10-T [70]; Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 125.

¹⁵⁴ ICTY - *The Prosecutor versus Clément Kayishema and Obed Ruzindana, Judgment* (1999) ICTR-95-1-T [98].

¹⁵⁵ Ware and Laoutides (n 1) xvii; Ibrahim (n 46) 99.

For that matter, defining the group as ethnic group seems to be the most useful direction. The term “Rohingya” however has to be used with caution.

4.2.1.1.2 Actus Reus

The *actus reus* of the crime is relatively easily proven. In order to commit genocide the perpetrator has to kill members of the group, cause serious bodily or mental harm, or deliberately inflict conditions of life on the group, which are intended to result in the physical destruction of the community. In addition to that, measures calculated to prevent births or the forceful transfer of children to another group fall under the definition of Article II of the Genocide Convention and Article 6 of the Rome Statute respectively.¹⁵⁶

The acts committed against the Muslim population of Northern Rakhine clearly fall under the *actus reus* definition of genocide. For instance, in the first 31 days after the 25th August 2017 attacks, between 9,430 and 13,750 Muslims were killed, with this number most likely still being an underestimate. Forms of murder include shooting, burning alive in houses set on fire, and other atrocities.¹⁵⁷ The precise number of deaths is not known, the numbers provided by the Myanmar government however differ substantially from independent reports. In March 2018 the government published an official count of 400 deaths, while the Fact-Finding Mission to Bangladesh already talked of at least 6,700 deaths at the time. The exact number of deaths up to this day is unclear due to the circumstantial impossibility to access the region. Reports however talk of numbers of potentially more than 40,000 victims.¹⁵⁸ The number of victims is not relevant to establish the perpetration of genocide, however its size emphasises the severity of the situation.

Reports also give account of numerous cases of rape – allegations that are denied by the military. However, statements by hundreds of girls and women, supported by evidence compiled by Human Rights Watch and other human rights organisations, the media, and the UN, corroborate the claims that such forms of serious bodily and mental harm are being

¹⁵⁶ Rome Statute of the International Criminal Court, A/CONF.183/9; Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

¹⁵⁷ Ware and Laoutides (n 1) 55.

¹⁵⁸ Laignee Barron, ‘More Than 43,000 Rohingya Parents May Be Missing. Experts Fear They Are Dead’ (*Time*, 8 March 2018) <<https://time.com/5187292/rohingya-crisis-missing-parents-refugees-bangladesh/>> accessed 17 March 2019; Fact-Finding Mission to Bangladesh, ‘The Rohingya Crisis: Past, Present, and Future’ (2018) 2.

committed by the military.¹⁵⁹ Furthermore, the prohibition of Rohingya to marry without an authorisation and the ban on sexual cohabitation and sexual contact outside wedlock, as well as the duty of Rohingya couples to promise not to have more than two children in order to be granted a marriage licence¹⁶⁰, can all be considered measures intended to prevent births within the group.¹⁶¹ Striking in this respect is especially the fact that with the legal ban on more than two children, the Rohingya population is declining by consequence.¹⁶²

While discrimination is clearly visible in practice as in the law, the question whether genocide is in fact being committed is much harder to answer. The criteria to establish a case of genocide are laid down very strictly in the Rome Statute of the ICC. Genocide is considered one of the most serious crimes and bringing someone to justice for having committed such crime is a lengthy process that requires bulletproof evidence.¹⁶³ Article 66(3) of the Rome Statute holds that “in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.¹⁶⁴

At the same time as western media are portraying the Rohingya as innocent victims, the government of Myanmar and a vast majority of its inhabitants see the group as having a separatist agenda, fuelled by Islam and funded from overseas.¹⁶⁵ Violence against Rohingya has erupted various times in the past, however provoked in many cases, as the alleged rape of a Buddhist woman in 2012 mentioned earlier. In the end, 140,000 Rohingya fled into IDP camps.¹⁶⁶ The starting point always named for the current wave of violence was the attack on border guards in the summer of 2017 committed by ARSA.¹⁶⁷ As a consequence of the attack, the government declared ARSA a terrorist organisation.¹⁶⁸ While this is the picture officially painted, doubts have been raised whether the government’s action was in fact a response to ARSA attacks. The military in reality began

¹⁵⁹ Skye Wheeler, ‘No 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>> accessed 20 February 2019.

¹⁶⁰ Lewa (n 89) 12; Albert and Chatzky (n 6); Leider (n 2) 2; Ibrahim (n 46) 109.

¹⁶¹ Rome Statute of the International Criminal Court, A/CONF.183/9.

¹⁶² Ibrahim (n 46) 109.

¹⁶³ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8).

¹⁶⁴ Rome Statute of the International Criminal Court, A/CONF.183/9.

¹⁶⁵ Calamur (n 43).

¹⁶⁶ *ibid.*

¹⁶⁷ Albert and Chatzky (n 6); Ware and Laoutides (n 1) xiii, 7, 19.

¹⁶⁸ Albert and Chatzky (n 6).

implementing restrictive policies on the Rohingya as early as in the summer 2016, one year before the attack on the border guards occurred.¹⁶⁹

In response to the atrocities committed by the Tatmadaw close to one million people, amounting to almost 90 percent of the Muslim population of Rakhine State, have fled Myanmar for Bangladesh and other countries.¹⁷⁰ Due to arson and other crimes that affect not only the Rohingya directly but the population of the region in general, also about half of the Buddhist inhabitants of Rakhine have been displaced from their homes. Consequently only a small number of Rohingya is still left in Myanmar and it is becoming less every day.¹⁷¹ While the country has signed a repatriation agreement with Bangladesh, the actual repatriation has repeatedly been delayed.¹⁷² Further, evidence showing that Myanmar is trying to destroy traces of any violence, and especially traces of the people who used to live there, gives doubt to the sincerity of the government of Myanmar to actually follow through with the repatriation.¹⁷³

4.2.1.1.3 Genocidal Intent

Article 6 of the Statute states that the *actus reus* has to be committed with a double intent. This entails that the perpetrator not only needs to commit the crime with intent, meaning that he must have knowledge of and accept the consequence of his act, but he must also have intent to destroy the group, in whole or in part, as such. This form of intent is “specific intent” or *dolus specialis*.¹⁷⁴ This so-called “purpose-based-approach” means that the intent to destroy is composed of both a volitional and a cognitive element.¹⁷⁵ The perpetrator not only needs to willingly commit the crime by directly targeting members of a specific group and understanding the consequences of his actions. In addition he must be aware of the surrounding situation and be willing to destroy the group as such, not simply individual members. Knowledge of an on-going genocide as such is however not required, as opposed to crimes against humanity and war crimes where the contextual element plays a significant

¹⁶⁹ *ibid*; Annan and others (n 54).

¹⁷⁰ Albert and Chatzky (n 6); Ware and Laoutides (n 1) 6. At the time of writing in December 2018.

¹⁷¹ Ware and Laoutides (n 1) 6.

¹⁷² Albert and Chatzky (n 6).

¹⁷³ Goldberg (n 129).

¹⁷⁴ Rome Statute of the International Criminal Court, A/CONF.183/9; Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 253, 257.

¹⁷⁵ Tams, Berster and Schiffbauer (n 149) 136.

role.¹⁷⁶ In certain cases recklessness to the consequences may be enough to prove someone had genocidal intent.¹⁷⁷ In cases where *dolus specialis* cannot be proven, the crimes still remain punishable, however not under the crime of genocide, but they may fulfil the requirements of crimes against humanity or crimes under ordinary criminal law.¹⁷⁸

Soon after the start of the violence the UN High Commissioner for Human Rights, Zeid bin Ra'ad al-Husseini, declared in September 2017 "Myanmar's treatment of the Rohingya appears to be a textbook example of ethnic cleansing".¹⁷⁹ This declaration was also reiterated by a UN investigative report published by the Independent International Fact-Finding Mission on Myanmar in August 2018, which held that the mass killings and gang rapes carried out by the Myanmar army were committed with "genocidal intent".¹⁸⁰ This was deduced from the acts by the military together with public statements given by the military and civilian officials in the country.¹⁸¹ The report further claimed that the commander-in-chief and five high-ranking generals should be held accountable under international law.¹⁸² Western states, such as the United States, also called the actions ethnic cleansing.¹⁸³ While ethnic cleansing is not punishable in itself under the Genocide Convention, the effect it has on the members of the group may lead to criminal responsibility of the perpetrators under Article II of the Convention.¹⁸⁴ South East Asian countries on the other hand remained largely silent on the issue. ASEAN countries are bound by their commitment to non-interference in each other's internal affairs, which is a key principle of the group.¹⁸⁵ Bangladesh on the other hand, which is not a member of ASEAN but Myanmar's direct neighbour, called the violence in Rakhine State "genocide" already in the fall of 2017.¹⁸⁶ Amnesty International even took the step of stripping Aung San Suu Kyi of the Ambassador of Conscience Award she had received during her house

¹⁷⁶ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 243; Tams, Berster and Schiffbauer (n 149) 138; *Prosecutor v Goran Jelisić* (2001) IT-95-10-A [48, 77]; *Prosecutor v. Radislav Krstić, Judgment* (n 29) para 223.

¹⁷⁷ Schabas, *Genocide in International Law: The Crime of Crimes* (n 8) 254.

¹⁷⁸ *ibid* 257.

¹⁷⁹ Ware and Laoutides (n 1) 7.

¹⁸⁰ Human Rights Council (n 136).

¹⁸¹ Max Pensky and Nadia Rubaii, 'UN Report Documents Genocide against Rohingya: What Now?' (*The Conversation*, 5 September 2018) <<http://theconversation.com/un-report-documents-genocide-against-rohingya-what-now-102555>> accessed 23 October 2018.

¹⁸² "'Panic' Grips Rohingya as Myanmar Army Battles Buddhist Rebels' (n 68).

¹⁸³ Lone and others (n 5).

¹⁸⁴ Tams, Berster and Schiffbauer (n 149) 132.

¹⁸⁵ Albert and Chatzky (n 6); Kevin Ponniah, 'Who Will Help Myanmar's Rohingya?' (*BBC*, 10 January 2017) <<https://www.bbc.com/news/world-asia-38168917>> accessed 23 December 2018.

¹⁸⁶ Albert and Chatzky (n 6).

arrest.¹⁸⁷ Voices have even called for the removal of the de-facto leader's Nobel Peace Prize.¹⁸⁸

Establishing whether the requirement of double intent is met is a challenge. Proof of this is even made harder due to the fact that visitors are not allowed into the region affected. Genocidal intent cannot be considered separately from the actions. In order to get a clearer picture, the facts have to be considered in respect to government or military policies and regulations.¹⁸⁹ According to Doctors Without Borders, at least 6,700 Rohingya were killed in the first month of attacks in 2017.¹⁹⁰ The massacre of Inn Din on September 2nd 2017 marks the first instance where the Myanmar military admitted involvement in extrajudicial killings of Rohingya. In the case at hand villagers were slaughtered because they were accused of being members of ARSA.¹⁹¹ When two Reuters journalists, Wa Lone and Kyaw Soe Oo, investigated into the case, they were arrested, charged and imprisoned under the Official Secrets Act.¹⁹² (In April 2019 the two journalists were awarded the prestigious Pulitzer Prize, they however remained in custody.¹⁹³ They were finally freed in May by a presidential pardon.¹⁹⁴) The military has also been accused of opening fire on fleeing civilians as well as planting land mines in the border regions to Bangladesh.¹⁹⁵ The early warning signs mentioned earlier furnish further proof that the Rohingya are targeted volitionally.¹⁹⁶ The discrimination imposed upon them also in the form of legal constraints portrays a clear picture of a policy against the group as such.¹⁹⁷ Further, the report of the Fact-Finding Mission on Myanmar concluded “on reasonable grounds that the patterns of

¹⁸⁷ *ibid.*

¹⁸⁸ Gwladys Fouche, ‘Aung San Suu Kyi Won’t Be Stripped of Nobel Peace Prize: Committee’ (*Reuters*, 29 August 2018) <<https://www.reuters.com/article/us-myanmar-rohingya-nobelpeaceprize/aung-san-suu-kyi-wont-be-stripped-of-nobel-peace-prize-committee-idUSKCN1LE1X7>> accessed 15 April 2019.

¹⁸⁹ Tams, Berster and Schiffbauer (n 149) 136.

¹⁹⁰ Ware and Laoutides (n 1) 6; Albert and Chatzky (n 6).

¹⁹¹ Lone and others (n 5); Ware and Laoutides (n 1) 8.

¹⁹² Lasseter (n 48); Ware and Laoutides (n 1) 8.

¹⁹³ Daniel Trotta, ‘Jailed Reuters Reporters, U.S. Border Photographers Win Pulitzer Prizes’ (*Reuters*, 15 April 2019) <<https://www.reuters.com/article/us-usa-pulitzer/jailed-reuters-reporters-u-s-border-photographers-win-pulitzer-prizes-idUSKCN1RR22H>> accessed 20 April 2019.

¹⁹⁴ Simon Lewis and Shoon Naing, ‘Two Reuters Reporters Freed in Myanmar after More than 500 Days in Jail’ (*Reuters*, 6 May 2019) <<https://www.reuters.com/article/us-myanmar-journalists/two-reuters-reporters-freed-in-myanmar-after-more-than-500-days-in-jail-idUSKCN1SD056>> accessed 6 May 2019.

¹⁹⁵ Albert and Chatzky (n 6).

¹⁹⁶ Michael Safi, ‘ICC Says It Can Prosecute Myanmar for Alleged Rohingya Crimes’ (*The Guardian*, 6 September 2018).

¹⁹⁷ Albert and Chatzky (n 6); Leider (n 2) 2.

gross human rights violations and serious violations of international humanitarian law that it is found, amount to the gravest crime under international law”.¹⁹⁸

The volitional element seems to be given as the Myanmar military clearly targets members of the Rohingya minority group. The question however remains whether the cognitive element is also given. As far as former Yugoslavia is concerned, the ICTY Appeal Chamber understood the perpetrator’s knowledge of participating in an organised or extensive attack against civilians as evidence.¹⁹⁹ In Myanmar, the attacks are being committed by the military under control of General Min Aung Hlaing. The sheer volume of reports by journalists, researchers, NGOs and the UN portray a picture that makes it seem very unlikely that anyone involved could be completely unaware of the situation. Certainly high-ranking officials in the government as well in the army, but also lower military personnel must be aware of the facts. This can be deduced from the number of refugees having fled Myanmar for Bangladesh and other countries²⁰⁰, from the images of burning houses that are visible also across the border²⁰¹, as well as from reports of victims.²⁰² Further, the fact that journalists and even UN personnel is not allowed into the territory speaks for itself. When talking to locals, they always acknowledged that “something was going on” in Rakhine State. This is to say that if even non-involved citizens are aware of some sort of military operation in the region of Rakhine, those actually engaged cannot rely on a pretext of ignorance.

The facts suggest that genocide is in fact going on. In order to bring those responsible to justice, a case has to be brought before the ICC, the only permanent international court dealing with the crime of genocide. So why has this not been done?

4.2.1.2 Crimes against Humanity

While the thesis focuses primarily on genocide, a short side note on the concept of crimes against humanity is very relevant as well. This is the case especially with the ruling of the

¹⁹⁸ ‘Myanmar Military Leaders Must Face Genocide Charges - UN Report’ (*UN News*, 27 August 2018) <<https://news.un.org/en/story/2018/08/1017802>> accessed 15 January 2019; Human Rights Council (n 136).

¹⁹⁹ Tams, Berster and Schiffbauer (n 149) 138; *Prosecutor v. Goran Jelisić* (n 176) paras 48, 77; *Prosecutor v. Radislav Krstić, Judgment* (n 29) para 223.

²⁰⁰ Albert and Chatzky (n 6); Ware and Laoutides (n 1) 6.

²⁰¹ Ware and Laoutides (n 1) 55.

²⁰² Human Rights Council (n 136).

Pre-Trial Chamber I of the ICC that was issued in September 2018. Holding someone accountable for genocide is often more difficult than for crimes against humanity, due to the political connotation of the former.

4.2.1.2.1 Definition

Crimes against humanity are defined in the Rome Statute under Article 7. The individual crimes listed under Article 7 constitute serious crimes in all legal systems around the world. They are considered as crimes against humanity however only in the case where they are committed as part of a widespread or systematic attack, which is directed against a civilian population in furtherance of or pursuant to a policy. Further, knowledge of the attack is also required.²⁰³ The paper argued in the prior chapter that knowledge of the circumstances is to be considered given, and this applies in the present context as well. Further, the fact that the acts were committed against a civilian population is clear from reports and accounts of surviving victims, as also already outlined above.²⁰⁴ The disjunctive nature of the requirement of attack makes its proof easier.²⁰⁵ A widespread nature of attacks can be deduced from the factual element of the number of refugees and claims of victimhood brought forward.²⁰⁶ Also a systematic nature of the attacks is visible. The military's response to fleeing civilians and their planting of landmines in the border region paint a clear picture of that.²⁰⁷

Crimes against humanity are easier to prove than genocide, as the requirement of intent is less strict. This means that intent is only required for the action as such, but there does not have to be intent to reach a specific goal. Further the group element is not necessary, this means that a crime may fall under the definition irrespective of the demarcation of the civilian population that is targeted.²⁰⁸

²⁰³ Rome Statute of the International Criminal Court, A/CONF.183/9; Wiebke Rückert and Georg Witschel, 'Genocide and Crimes Against Humanity in the Elements of Crimes' in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (2nd edn, Berliner Wissenschafts-Verlag 2004) 70.

²⁰⁴ Human Rights Council (n 136).

²⁰⁵ Rückert and Witschel (n 203) 71.

²⁰⁶ Human Rights Council (n 136); Albert and Chatzky (n 6); Ware and Laoutides (n 1) 6.

²⁰⁷ Albert and Chatzky (n 6).

²⁰⁸ Rome Statute of the International Criminal Court, A/CONF.183/9; Rückert and Witschel (n 203) 70.

4.2.1.2.2 Pre-Trial Chamber Decision

In September 2018 the Pre-Trial Chamber I of the ICC issued a decision providing an affirmative answer to the question “whether the Court may exercise jurisdiction under Article 12(2)(a) over the alleged deportation of the Rohingya people from Myanmar to Bangladesh”.²⁰⁹ The Prosecutor had filed a request pursuant to Article 19(3) of the Rome Statute on the question of admissibility and jurisdiction.²¹⁰ According to Article 119(1) of the Statute, “[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”. This provision has been interpreted to include also questions pertaining to the Court’s jurisdiction.²¹¹ The case of *Nottebohm* before the ICJ recognised that “in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction”.²¹² Numerous international courts and tribunals have accepted this principle of *la compétence de la compétence*.²¹³

Further, the chamber apologetically ruled that the Court may be considered having objective legal personality. This decision is striking.²¹⁴ So far this has only been ruled in the *Reparations* Case with regards to the UN.²¹⁵ No other international organisation enjoys such ample powers. Objective legal personality means that the Court would have to be recognised by all states, also Myanmar and other states not party to the Rome Statute. While this does not mean that the Court would have jurisdiction over Myanmar as a consequence, the recognition of objective legal personality of the ICC would have as a consequence a substantial increase in international standing. This decision by the Pre-Trial Chamber I is based on the fact that more than 120 states, thereby representing the majority of members of the international community, brought the Court into being.²¹⁶ The Chamber further argued in favour of objective legal personality due to the fact that during the adoption of the Rome Statute, even those opposing only cast their negative vote due to alleged flaws,

²⁰⁹ *Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’* [2018] ICC-RoC46(3)-01/18 10.

²¹⁰ Pre-Trial Chamber I International Criminal Court (n 7).

²¹¹ *Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’* (n 209) 11.

²¹² *Nottebohm case (Liechtenstein v Guatemala)* (1953) ICJ Rep. 1 119.

²¹³ *Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’* (n 209) 12.

²¹⁴ Pre-Trial Chamber I International Criminal Court (n 7).

²¹⁵ *Reparation for Injuries Suffered in the Service of the United Nations* (1949) Rep. 174 185.

²¹⁶ *Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’* (n 209) 29.

missing crimes or certain formulations.²¹⁷ According to the Chamber “they fully recognized in 1998-2002 the necessity of an international criminal court and supported its establishment”.²¹⁸

The Chamber further underlined the relationship between the Court and the UN. Article 2 of the Rome Statute spells out “that the drafters of the Statute intended to bring the Court into relationship with the UN”.²¹⁹ Several provisions of the Rome Statute are considered customary international law and therefore apply also to non-State Parties.²²⁰

According to the Pre-Trial Chamber I the Court shall have jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. The Chamber based its decision on the fact that at least part of the crime is being committed in Bangladesh, which is a signatory to the Rome Treaty.²²¹ Deportation is listed under Article 7(1)(d) of the Rome Statute as falling under the jurisdiction *ratione materiae* of crimes against humanity.²²² According to the Chamber the crime of deportation requires a displacement across a border.²²³ The issue of the decision that deserves most attention is the argument by the Chamber that Article 12(2)(a) may apply also if only part of the crime occurred on the territory of a State Party. The Chamber held that the reference to “conduct” “means only that ‘at least one legal element of an article 5 crime’ must occur on the territory of a State Party”.²²⁴ The Chamber hereby also makes reference to Paragraph 3 of the Penal Code of the Union of Myanmar of 1861 that holds “[a]ny person liable, by any law in force in the Union of Burma, to be tried for an offence committed beyond the limits of the Union of Burma shall be death [sic] with according to the provisions of this Code for any act committed beyond the Union of Burma in the same manner as if such act had been committed within the Union of Burma”.²²⁵

²¹⁷ *ibid* 22.

²¹⁸ *ibid* 24.

²¹⁹ *ibid* 25.

²²⁰ *ibid* 26.

²²¹ *ibid* 41.

²²² Rome Statute of the International Criminal Court, A/CONF.183/9.

²²³ *Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’* (n 209) 35.

²²⁴ *ibid* 36.

²²⁵ Penal Code of the Union of Myanmar 1861.

Finally the Chamber concluded that the Court may exercise jurisdiction also over other crimes under the Statute where at least an element or part of the crime are committed in the territory or upon the hands of individuals of a State Party. The two examples listed by the Chamber were persecution under Article 7(1)(h) as well as other inhumane acts under Article 7(1)(k).²²⁶

The main aim of the thesis is to establish arguments on why those responsible should be brought to justice. While focus is generally laid on genocide, reference to crimes against humanity is relevant in the sense that here, due to aforementioned arguments, and in that context especially with respect to the element of intent, establishment of ICC jurisdiction and consequently adjudication are more likely. Reference to crimes against humanity therefore serves as an in the alternative argument. This is not to say that holding individuals responsible for crimes against humanity is a failure, rather it refers to the sentiment that genocide is often considered more serious and a ruling thereof delivers a much stronger political response.

4.2.2 Ratione Temporis

Ratione temporis refers to the temporal limitation of the ICC's jurisdiction. According to Article 11 of the Rome Statute "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute". Paragraph two holds that if a state becomes a party to the Statute after its entry into force, jurisdiction is limited to cases that were committed after the entry into force of the Statute for the particular state.²²⁷ In cases of a UN Security Council referral the Court may establish jurisdiction retroactively up to the entry into force of the Rome Statute in 2002.²²⁸ If jurisdiction is to be established based on the crime of deportation from Myanmar to Bangladesh, fulfilling the jurisdiction *ratione materiae* would not pose a problem as Bangladesh ratified the Rome Statute in 2010.²²⁹

²²⁶ *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'* (n 209) 42.

²²⁷ Rome Statute of the International Criminal Court, A/CONF.183/9.

²²⁸ Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 110.

²²⁹ 'States Parties to the Rome Statute' (*International Criminal Court*) <[https://asp.icc-cpi.int/en_menus/asp/states parties/asian states/Pages/bangladesh.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx)> accessed 5 June 2019.

4.2.3 Ratione Loci and Ratione Personae

Article 12 of the Rome Statute further holds that the Court shall have jurisdiction over crimes committed within the territory of a State Party as well as over nationals of State Parties.²³⁰ As already outlined, Myanmar is not a State Party to the ICC.²³¹ With reference to genocide, establishing jurisdiction *ratione loci* and *personae* is therefore not possible. Here again the ruling of the Pre-Trial Chamber I provides a valuable alternative. With its ruling that the Court may exercise jurisdiction over crimes against humanity in cases where at least an element or part of the crime was committed on the territory of a State Party, in the case at hand Bangladesh, it holds that the jurisdiction *ratione loci* can be deemed fulfilled. The same conditions apply to the jurisdiction *ratione personae*.²³²

As mentioned above the ICC only has complementary jurisdiction, entailing that only if the country itself fails to hold the perpetrators accountable is the Court able to step in.²³³ The fact that Myanmar is, at this point, unwilling to prosecute those responsible, takes away a hindrance to the ICC's jurisdiction.²³⁴

²³⁰ Rome Statute of the International Criminal Court, A/CONF.183/9.

²³¹ *ibid.*

²³² *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'* (n 209) 41.

²³³ Rome Statute of the International Criminal Court, A/CONF.183/9.

²³⁴ Ibrahim (n 46) 110.

5 Avoiding the ICC's Jurisdiction Gap

After having concluded that the Court does not have jurisdiction over the crime of genocide committed in Myanmar, mainly for the reason that the country is not a State Party to the Rome Statute, the thesis will now assess the possibility of establishing jurisdiction via the UN. Article 2 of the Rome Statute underlines the relationship between the Court and the UN.²³⁵ As the Court is concerned with “the most serious crimes of concern to the international community as a whole”, their adjudication should have the highest priority in international law. The recent ruling by the Appeals Chamber in its judgment in the *Jordan Referral re Al-Bashir Appeal* held that there is “a *ius puniendi* that transcends state sovereignty and resides in the international community itself”.²³⁶ The thesis has argued that the crimes being committed in Myanmar come within the legal definition of genocide. With evidence showing that Myanmar is unwilling or unable to prosecute those responsible, the duty lies on the international community to bring them to justice.

As at least the jurisdiction *ratione materiae* is fulfilled, the thesis will now explore how this may aid in establishing jurisdiction of the ICC. Article 13 of the Rome Statute points out the possibility of bringing a case before the Court through a Security Council referral under Chapter VII of the UN Charter.

5.1 UN Security Council Referral – Geopolitical Situation

Myanmar seems to be in no hurry to bring anyone to trial for the crimes committed. Further, as the country is not a member state to the ICC, the ICC's jurisdiction is limited.²³⁷ In concrete terms, the ICC cannot act against Myanmar without a referral.²³⁸ Neither member states nor the Prosecutor do in reality possess the possibility of referring a case concerning genocide in Myanmar to the Court. At this point, in accordance with the ruling of the Pre-Trial Chamber I, discussed earlier, the Court may only establish jurisdiction over crimes against humanity committed in Myanmar that had transboundary effect. As the thesis'

²³⁵ Rome Statute of the International Criminal Court, A/CONF.183/9.

²³⁶ *Judgment in the Jordan Referral re Al-Bashir Appeal* (2019) ICC-02/05-01/09-397-Corr [89].

²³⁷ Rome Statute of the International Criminal Court, A/CONF.183/9.

²³⁸ Hyonhee Shin, 'U.N. Rights Investigator Calls for Pressure on China, Russia over Myanmar Abuses' (*Reuters*, 28 December 2017) <<https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-rights-investigator-calls-for-pressure-on-china-russia-over-myanmar-abuses-idUSKBN1EM00J>> accessed 2 May 2019.

focus is on the crime of genocide, the possibility of establishing jurisdiction through a Security Council resolution would be the best scenario.

5.1.1 Establishing Jurisdiction through a Security Council Resolution

According to Article 13(b) of the Rome Statute, the UN Security Council may refer a situation to the Court. Only situations falling under Chapter VII of the Charter of the UN may be referred. The relevant chapter deals with actions constituting threats to the peace, breaches of the peace, and acts of aggression.²³⁹ In fact, the ICC may only exercise its jurisdiction in respect to non-State Parties through the binding nature of Security Council referrals.²⁴⁰ Article 25 of the UN Charter states that “Members of the United Nations agree to accept and carry out the decisions of the Security Council [...]”.²⁴¹ This is to signify that also Myanmar, as a member of the UN, must accept such a potential referral. As the states concerned have primary jurisdiction and the ICC’s role is only complementary, they may in practice oppose a referral of a decision to the Court by the Security Council. Art 25 of the UN Charter however rules out the possibility for states to take such a position. A referral of a situation by the UN Security Council to the ICC is to be understood as a delegation of criminal jurisdiction by states, which have primary jurisdiction, to the ICC.²⁴² The Court ruled in the *Jordan Referral re Al-Bashir Appeal* “Article 27 [...] ‘exceptionally’ governs relations between the Court and a non-State Party ‘if the latter is a [UN Security Council] Situation-Referral State’”.²⁴³ This means that in a case of referral on the basis of a resolution adopted under Article 27 UN Charter, the jurisdiction of the ICC is understood as given also in respect to non-State Parties. As under international law states are generally only bound by treaties they have ratified in accordance with Article 11 of the Vienna Convention on the Law of Treaties,²⁴⁴ a referral by the Security Council to the ICC has to be understood as binding a non-State Party to the Rome Statute, in order not to come into conflict with issues of state sovereignty.²⁴⁵

²³⁹ Charter of the United Nations, 1 UNTS XVI 1945.

²⁴⁰ Rome Statute of the International Criminal Court, A/CONF.183/9; Gabriel M Lentner, ‘The Legal Nature of UN Security Council Referrals to the International Criminal Court Involving Non-States Parties to the Rome Statute in Theory and Practice’ (University of Vienna 2016) 72.

²⁴¹ Charter of the United Nations, 1 UNTS XVI.

²⁴² Lentner (n 240) 70.

²⁴³ *Judgment in the Jordan Referral re Al-Bashir Appeal* (n 236) para 69.

²⁴⁴ Vienna Convention on the Law of Treaties.

²⁴⁵ Lentner (n 240) 74.

In 2005 the UN Security Council for the first time made use of its power of referral to the ICC. Through Resolution 1593 it referred the situation in Darfur, Sudan to the ICC, as Sudan is not a State Party to the Rome Statute.²⁴⁶ The case was referred to the ICC under Chapter VII of the UN Charter as “the situation in Sudan continues to constitute a threat to international peace and security [...]”.²⁴⁷ An abstention by the United States and China did not hinder the Resolution from being drafted. The Resolution however did not confer any obligations on non-State Parties.²⁴⁸ It is within the mandate of the Security Council to follow up with measures making sure that the non-State Party cooperates. The failure of the Security Council to adopt measures against Sudan for its non-compliance in issues of cooperation was criticised.²⁴⁹

With a referral by the Security Council to the ICC the requirements for jurisdiction are considered given. A Security Council Resolution has to clearly state the jurisdictional authority for a specific situation. For instance, Security Council Resolution 1593, which served as referral of the events in Darfur to the ICC, held that the Court’s jurisdiction over the situation of 2005 were to fulfil the jurisdiction *ratione temporis*. The resolution clearly laid out that the temporal jurisdiction since 1st July 2002 is therefore given.²⁵⁰ If the UN Security Council would adopt a resolution referring the situation in Myanmar to the ICC the jurisdictional authority *ratione loci* would have to be confined to the region of Northern Rakhine State, jurisdiction *ratione personae* to the government and especially the military of Myanmar, and jurisdiction *ratione temporis* should be considered as applying as of 1st July 2002, in accordance with the starting date of application of the Rome Statute.²⁵¹

5.1.2 Chapter VII UN Charter

Under Article 39 of the UN Charter, the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...]”.²⁵² In 2011 the UN Security Council adopted Resolution 1970 referring the situation in Libya to the ICC.²⁵³

²⁴⁶ S/RES/1593 (2005) concerning the situation in Darfur.

²⁴⁷ *ibid.*

²⁴⁸ Lentner (n 240) 181.

²⁴⁹ *ibid* 185.

²⁵⁰ S/RES/1593 (2005) concerning the situation in Darfur.

²⁵¹ Rome Statute of the International Criminal Court, A/CONF.183/9.

²⁵² Charter of the United Nations, 1 UNTS XVI.

²⁵³ S/RES/1970 concerning Libya 2011.

Here an explicit mention of Article 39 of the UN Charter is missing. This however does not mean that due to the failure to mention reference to threats to the peace the Resolution is not legally binding. In fact, the references to serious human rights violations in the Preamble of the Resolution suffice to establish jurisdiction under Chapter VII of the UN Charter.²⁵⁴ The Security Council must first assess whether the situation in Myanmar merits a referral under Chapter VII. This thesis argues that the circumstances in Myanmar, and especially in Northern Rakhine State, do pose a threat to the peace. The continued discrimination and the crimes committed against the Rohingya population make the area an unstable one that is in need of international involvement to bring justice and peace to the region.

5.1.3 Geopolitics and Veto Power

Under Chapter VII of the UN Charter, the members of the Security Council have to agree on a referral of a specific case to the ICC.²⁵⁵ This is where China comes into the picture. With its veto right in the Security Council the country has immense power over the issue of a potential referral to the Court.²⁵⁶ In accordance with Article 27(3) UN Charter for a resolution to be adopted a majority of nine votes pro is required and no veto may be recorded. The nine affirmative votes need to encompass the concurring votes of all permanent members.²⁵⁷ According to case law an abstention by a permanent member is not to be considered a veto.²⁵⁸

China has consistently argued that putting pressure on Myanmar would have a detrimental effect on the state, which since its transition to democracy has been working on restoring its stability.²⁵⁹ These arguments brought forward by China are influenced by its strong economic involvement in the country. With the redrawing of borders after World War II, China and Myanmar now share a geopolitically strategic border with a total length of 2,185

²⁵⁴ Lentner (n 240) 189.

²⁵⁵ Charter of the United Nations, 1 UNTS XVI.

²⁵⁶ Lau Seng Yap, 'UN's Futile Effort to Engage Myanmar on the Rohingya Crisis' (*The Diplomat*, 9 November 2017) <<https://thediplomat.com/2017/11/uns-futile-effort-to-engage-myanmar-on-the-rohingya-crisis/>> accessed 3 January 2019.

²⁵⁷ Charter of the United Nations, 1 UNTS XVI.

²⁵⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) I.C.J. Rep 16 [22].

²⁵⁹ Albert and Chatzky (n 6).

kilometres.²⁶⁰ China therefore not only has great influence due to its economic position but also strong political leverage due to a number of ethnic conflicts within Myanmar in regions close to the shared border.²⁶¹ With regards to economic investment and structural involvement, China argues that its role in the country is supporting Myanmar in its peace process.²⁶² In fact, the relationship of the two countries has changed over the past years. During the Socialist Military Regime, that followed the coup d'état of Ne Win in 1962²⁶³, the two countries cooperated, but in a lesser amicable fashion than before. The transition to democracy in 2011 evoked a decline of good relations. Under President U Thein Sein, who served until 2016, the Myitsone dam and the initial plan to build a China-Myanmar high-speed railroad were scrapped.²⁶⁴ The current government under Aung San Suu Kyi again has a more positive standpoint towards Chinese involvement.²⁶⁵ China's economic investment is especially strong in Rakhine State, the region where the genocide is taking place. For example, China funded the Kyauk Phyu port in Rakhine. The port provides an alternate route for energy imports from the Middle East, with the advantage of avoiding the Malacca Strait between the Indian and the Pacific Ocean, a choke point subject to instability. The port will also serve as a pivot for further cooperation and connectivity between the two countries as it will provide the starting point of a new oil-gas pipeline and railroad link connecting China and Myanmar.²⁶⁶ Meanwhile, concerns have been raised that China may be becoming too influential and powerful in the country. As a response, the Chinese CITIC Group, which used to hold a share of 85 percent in the project, agreed to drop it to 70 percent.²⁶⁷

The most probable reason why China tenaciously obstructs a referral to the ICC is that Myanmar is key to the country's Belt and Road Initiative.²⁶⁸ The provinces in the Chinese

²⁶⁰ Naing Ko Ko, 'What's next for Myanmar-China Relations?' (*Myanmar Times*, 31 August 2016) <<https://www.mmtimes.com/opinion/22241-what-s-next-for-myanmar-china-relations.html>> accessed 12 January 2019.

²⁶¹ Kurlantzick (n 44).

²⁶² Ben Blanchard, 'China Offers Myanmar Support over Rohingya after U.S. Rebuke' (*Reuters*, 16 November 2018) <<https://www.reuters.com/article/us-asean-summit-myanmar-china/china-offers-myanmar-support-over-rohingya-issue-after-us-rebuke-idUSKCN1NL02W>> accessed 7 January 2019.

²⁶³ Ware and Laoutides (n 1) 15.

²⁶⁴ Lintner, 'As West Recoils, China Surges South in Myanmar' (*Asia Times*, 24 September 2018) <<http://www.atimes.com/article/as-west-recoils-china-surges-south-in-myanmar/>> accessed 30 April 2019.

²⁶⁵ Ko Ko (n 260).

²⁶⁶ Subir Bhaumik, 'Why Do China, India Back Myanmar over the Rohingya Crisis?' (*South China Morning Post*, 18 October 2017) <<https://www.scmp.com/week-asia/geopolitics/article/2115839/why-do-china-india-back-myanmar-over-rohingya-crisis>> accessed 3 January 2019.

²⁶⁷ Lintner (n 264).

²⁶⁸ Bhaumik (n 266).

southwest are landlocked. Access to the Indian Ocean could be provided through Myanmar. China has even made use of the renewed pariah status of Myanmar. It has asserted its power over the country by requiring it to sign a Memorandum of Understanding on the so-called “China-Myanmar Economic Corridor”.²⁶⁹

A referral to the ICC could also prove critical to China as it has provided the country with massive development aid and has even supplied military hardware to the Tatmadaw.²⁷⁰ China’s involvement in the state and the importance of the geopolitical situation of Myanmar to China are stakes too high for the country to agree to a referral to the ICC. If China were to agree with other UN members on the alleged culpability of Myanmar, it would lose an important business partner and potential ally in the further growth of its country.

While China is the biggest economic and military player in Myanmar, countries such as Russia have been following suit.²⁷¹ In response to the huge offshore gas findings along the coast of Myanmar numerous oil and gas companies from a number of states including Russia have reached agreements with the government of Myanmar to explore the resources.²⁷² Russia is also engaged in Myanmar in the military sector. Military cooperation started in the 1990s and gained momentum in the 2000s with weapons deals between the two countries. The weapons purchased by Myanmar originate almost exclusively from Russia and China, whereby the two countries provide for about the same amount.²⁷³

China and also Russia, both permanent members of the UN Security Council, have so far blocked all efforts in discussing the Rohingya crisis in the Council.²⁷⁴ Already earlier, in 2007, the two countries vetoed a resolution sponsored by the United States that criticised Myanmar’s human rights record and called for the release of all political prisoners.²⁷⁵ A draft resolution mapped out by the British that outlined and warned of further steps, including sanctions, against Myanmar, was recently blocked by the two countries. That is

²⁶⁹ Lintner (n 264).

²⁷⁰ Bhaumik (n 266).

²⁷¹ Åshild Kolås, ‘Burma in the Balance : The Geopolitics of Gas Burma in the Balance : The Geopolitics of Gas *’ (2007) 31 Strategic Analysis 632.

²⁷² *ibid* 629.

²⁷³ Ludmila Lutz-Auras, ‘Russia and Myanmar – Friends in Need?’ (2015) 34 Journal of Current Southeast Asian Affairs 182.

²⁷⁴ Safi (n 196).

²⁷⁵ Lutz-Auras (n 273) 174.

even though the draft resolution did not include a referral of the case to the ICC.²⁷⁶ So far no resolution for a referral to the ICC has been brought up in the Security Council, however China's and Russia's geopolitical interests and their boycott on the topic so far make a vote in favour of such a resolution very unlikely. In the ICJ's *Namibia Advisory Opinion* the Court held that a resolution is considered passed if no veto is recorded. In the wording of the Court "by abstaining, a member does not signify its objection to the approval of what is being proposed".²⁷⁷ That means that mere abstention by China and/or Russia would not pose a hindrance to the passing of a resolution. It remains to be seen whether the two countries could potentially change their minds with the ever-increasing rate of murders and lootings and growing number of calls to bring those culpable to justice. At this point however, the setup of the Security Council is an impediment to a solution of the crisis.

²⁷⁶ Michelle Nichols, 'U.N. Security Council Mulls Myanmar Action; Russia, China Boycott Talks' (*Reuters*, 17 December 2018) <<https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ>> accessed 12 January 2019.

²⁷⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion* (n 258) para 22.

6 An Alternative for Justice

The crimes outlined above lie within the jurisdiction *ratione materiae* of the ICC. Due to the fact that Myanmar is not a State Party to the Court and on the basis of the setup of the Security Council, a case before the ICC seems relatively unlikely at this point. Save for the possibility of bringing those responsible to justice on the basis of crimes against humanity, a possibility that has to be further considered by the Court. The question therefore remains how the international community could step in to bring an end to the crisis.

6.1 The International Court of Justice

While genocide is generally considered as a crime incurring the responsibility of individuals, the Genocide Convention in its Article 1 establishes a duty of states to prevent the commission of the crime.²⁷⁸ States can in principle not be held accountable for crimes but only for internationally wrongful acts.²⁷⁹ Case law has provided for the possibility of holding states liable for failing to prevent the commission of genocide. In the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the Court ruled that Serbia was liable for such failure to prevent the commission of genocide. In its judgment the ICJ did not consider the question on whether genocide only falls under crimes or also under internationally wrongful acts.²⁸⁰

Any contracting party to the Genocide Convention could bring a case against Myanmar before the ICJ.²⁸¹ The problem arising from this possibility is the simple fact that one state would have to openly accuse Myanmar of failing to prevent genocide, a step that bears a lot of political risk. Myanmar has ratified the Genocide Convention. The Convention's Article IX provides that disputes arising in the context of the Convention, concerning its interpretation, application or fulfilment shall be submitted to the ICJ.²⁸² Myanmar has not made a reservation to this article. The country has however made reservations to Articles

²⁷⁸ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

²⁷⁹ Schabas, 'The Law and Genocide' (n 8) 139.

²⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (2007) I.C.J. Rep 43 [210].

²⁸¹ Michael Becker, 'The Situation of the Rohingya: Is There a Role for the International Court of Justice?' [2018] European Journal of International Law 3; *Barcelona Traction, Light and Power Company, Limited, Judgment* (1970) I.C.J. Rep 3.

²⁸² Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

VI and VIII of the Convention.²⁸³ Article VI outlines that persons charged under the Convention shall be tried by a competent tribunal of the state in whose territory the act was committed or by an international criminal tribunal, the jurisdiction of which has been accepted by the contracting parties.²⁸⁴ Myanmar's reservation to this article is to be understood as to mean that its own courts and tribunals have exclusive jurisdiction. The reservation does not pose a hindrance to the ICJ's jurisdiction; it could however prove problematic in future cases. If, for instance, a case is brought before the ICC, Myanmar could refuse to surrender alleged perpetrators to the Court on the basis of this reservation. With respect to Article VIII Myanmar is the only country that has made a reservation.²⁸⁵ The article holds that "any contracting party may call upon the competent organs of the United Nations to take such action [...] as they consider appropriate for the prevention and suppression of acts of genocide [...]".²⁸⁶ Myanmar's reservation is, according to numerous scholars, not a rejection of the ICJ's jurisdiction. In fact, they interpret it as Myanmar accepting the Court's jurisdiction, as the country has not made a reservation to Article IX. The exact legal effects of the reservation to Article VIII are however somewhat unclear.²⁸⁷

On the one hand, a case before the ICJ would require Myanmar to respond to genocide allegations in a formal and judicial setting and could afford some dignity to the victims. On the other hand, a consequence of a case being brought before the ICJ would be the imposition of sanctions on Myanmar if state responsibility were established. Due to the complicated political situation in Myanmar it remains questionable if this would provide for a welcome outcome. As analysed earlier, the crimes are being committed mainly by the Myanmar military, the Tatmadaw. Imposing sanctions on the country would not necessarily lead to the intended outcome. In fact, the sanctions could have the exact opposite effect of the one intended. If the sanctions are not very clearly targeted against the military its role and power might even rise higher and in turn could lead to reversing the country's democratic transition. In such a case the government's role would further decline and the citizens who are already suffering from an (economically) unstable situation would again come out on the short end. This is a mere hypothesis, but its consideration makes a strong argument that a case should be brought before the ICC, rather than the ICJ, in order to try

²⁸³ Becker (n 281) 2.

²⁸⁴ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

²⁸⁵ Becker (n 281) 2.

²⁸⁶ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

²⁸⁷ Becker (n 281) 2.

the actual individual perpetrators. Lastly, the Court could potentially find that Myanmar bears no responsibility or there may be a finding of “no genocide”. Such a ruling could provide a “propaganda victory” for Myanmar.²⁸⁸

A case before the ICJ bears some risks, but so does a case before the ICC or any other court. If the international community does not manage to convince China and Russia of the necessity of referring the situation of the Rohingya to the ICC, it lies upon individual states to bring a case before the ICJ. While the risks and political consequences may be very high, a legal ruling upon Myanmar at this point may be the only option of bringing an end to the serious human rights violations against the Rohingya.

²⁸⁸ *ibid* 4.

7 Responsibility

Discussing who should be held responsible for the crimes committed in Myanmar as well as in the border region with Bangladesh could fill the pages of an entire paper in itself. The complicated structure of Myanmar politics and the strong role the military still plays in the country are just some of the reasons for this. While the country is officially a democracy, the military's power remains very strong, as has been outlined before. The three ministries that can most easily be related to the Rohingya crisis are still in the hands of the military. In fact, the government does not even enjoy oversight over these ministries.²⁸⁹ Moreover, the conflict has shifted the balance from the civilian government to the military even further.²⁹⁰ Aung San Suu Kyi, the de-facto head of state, enjoys rather limited power in the country. However, this does not mean that she bears no responsibility at all, as it is, in the least, in her power to publicly condemn the atrocities committed against the minority.

According to numerous reports, the Tatmadaw, the Myanmar military under the control of General Min Aung Hlaing, is to be considered the main perpetrator.²⁹¹ The massacre of Inn Din of September 2017 can be used as a reference point for this. Here the military for the first time admitted its involvement in extrajudicial killings of Rohingya, however only on the basis of accusing the victims of membership in ARSA.²⁹² The military has so far never confessed to claims of targeted killings of Rohingya civilians but always argued with clearance operations against the terrorist-branded ARSA group.²⁹³

While the physical acts were and are committed by the army, the ruling party of Myanmar, Aung San Suu Kyi's National League for Democracy, shares some political responsibility as well. As UN Rapporteur on Human Rights in Myanmar Yanghee Lee suggests, also the government "may be trying to expel the Rohingya population from the country".²⁹⁴ Mere expulsion does not suffice in order to establish genocidal intent, however the fact that journalists as well as the UN Rapporteur on Human Rights himself were denied access to the affected region shows some form of attempt to cover up traces of grave human rights

²⁸⁹ Ware and Laoutides (n 1) 21.

²⁹⁰ *ibid* 5, 60.

²⁹¹ Jaipragas (n 51).

²⁹² Lone and others (n 5); Ware and Laoutides (n 1) 8.

²⁹³ Albert and Chatzky (n 6).

²⁹⁴ Ware and Laoutides (n 1) 9.

violations also by the government.²⁹⁵ Aung San Suu Kyi has increasingly been subject to criticism due to the fact that the Nobel Peace Prize laureate has continuously denied any accusation that ethnic cleansing or genocide is in fact taking place in her country.²⁹⁶ Her spokesperson also made use of the word “Bengali” to refer to the Rohingya. Using the term is in itself certainly not a crime, it however points in the direction of where the government stands.²⁹⁷ Article III of the Convention on the Prevention and Punishment of the Crime of Genocide holds that not only the act of genocide itself is punishable, but also complicity in it.²⁹⁸

While the physical perpetration is clearly committed by the military, with some civilian aid, the government has so far not done anything to prevent or stop the genocide. It remains to be seen whether members of the government, such as Aung San Suu Kyi, will in fact ever be held responsible for the atrocities before a national or international court.

²⁹⁵ Albert and Chatzky (n 6); Goldberg (n 129).

²⁹⁶ Albert and Chatzky (n 6).

²⁹⁷ Ibrahim (n 46) 119.

²⁹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260.

8 Conclusion

The perpetration of genocide is visible by the acts committed by the military in combination with the policies adopted by the government. The early warning signs serve as evidence that the discrimination and the crimes committed against the Rohingya did not appear out of nowhere. In fact, for years the minority group has been subject to restrictions on their daily and private life that have now turned into such severe intrusions that they can be grouped under the *actus reus* of the legal definitions of both crimes against humanity and genocide. This perpetration of the most serious crimes against the Muslims of Northern Rakhine calls for a legal adjudication of the situation.

Bringing a case before the ICC does not necessarily mean that individuals will be held responsible for the crime of genocide. It is possible that the Court would argue only in relation to crimes against humanity since the threshold of proving genocide and here especially the requirement of double intent is very high. Arguing in theory, as done here, the facts seem to convincingly suggest the perpetration of genocide; to actually hold someone accountable for this crime of crimes before an international court is much more difficult. Not only do the facts have to be proven in much more detail, the question of international response also becomes an issue. The ICC is certainly independent, however the sincerity of cases brought before it needs strong consideration. This is not to say, however, that a case should not be brought. The ICC's task is to adjudicate the most serious crimes committed within the international community. As this thesis argued the crimes committed against the Rohingya minority of Myanmar amount to such serious crimes, which is why the ICC should be entrusted with adjudicating them.

While it is unlikely that China or Russia will simply back down, it is the task of the international community to convince the two countries of the importance of bringing a case before the Court. At this point however the constellation of the UN Security Council provides for a hindrance to justice. The thesis has argued that in order to bring the case before the ICC a Security Council referral is necessary due to the fact that Myanmar is not a State Party to the Rome Statute. A solution to this problem provided by the ruling of the Pre-Trial Chamber I of the Court could be the assessment of jurisdiction on the basis of the transboundary effect of crimes against humanity committed against the Rohingya. The ruling of the Pre-Trial Chamber I provides for a first step in the direction of bringing a case

before the Court. A further possibility that was outlined was the opening of a case against Myanmar before the ICJ. While certain advantages can be seen, especially the fact that there is no apparent jurisdictional hindrance to a case before the ICJ, the thesis continues to underline that preference is to be put on a referral of the situation to the ICC.

In closing and in answering the two questions posed at the beginning, the main arguments the thesis aims to establish is that, first, the crimes committed against the Rohingya of Myanmar do fulfil the strict legal requirements of the crime of genocide. And, second, the ICC in principle possesses jurisdiction, even if it has to be asserted in a roundabout way.

Acronyms

AA	Arakan Army
ARSA	Arakan Rohingya Salvation Army
ASEAN	Association of South East Asian Nations
NLD	National League for Democracy, Party of Aung San Suu Kyi
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
IMT	International Military Tribunal
NGO	Non Governmental Organisation
UN	United Nations

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