

# THE ROHINGYA CRISIS: UNDERSTANDING THE PERSPECTIVES FROM INTERNATIONAL CRIMINAL COURT

Upal ADITYA OIKYA  
PhD student (University of Pécs)

## 1. Context and Background

On 25 August 2017, the authorities in Myanmar started clearance operations against the entire Rohingya population.<sup>1</sup> As a result of these operations, nearly 725,000 Rohingya, who are a Muslim minority, had fled from Rakhine, Myanmar, to Bangladesh by mid-August 2018.<sup>2</sup> The operations included raping and sexually assaulting women, burning villages, killing, depriving the civilians of food and water, and blocking medicine from reaching victims.<sup>3</sup> The government of Myanmar justified the operations of Myanmar's security forces against the Rohingya by claiming that these acts constitute a lawful counterterrorism measure taken against the Arakan Rohingya Salvation Army (ARSA), an insurgency group, as a response to their attacks on a military base.<sup>4</sup>

The UN Fact-Finding Mission on Myanmar urged that the situation in Myanmar be referred to the International Criminal Court.<sup>5</sup> In a statement, the ICC Prosecutor Mrs. Fatou Bensouda disclosed that her Office has received several communications and reports concerning the deportation of the Rohingya people to Bangladesh as well as

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<sup>1</sup> Report of the independent international fact-finding mission on Myanmar. *OHCHR*, 12 September 2018. at 8, paras. 32–33. [https://www.ohchr.org/Pages/PageNotFound.aspx?requestUrl=https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_](https://www.ohchr.org/Pages/PageNotFound.aspx?requestUrl=https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_)

<sup>2</sup> *Ibid.*

<sup>3</sup> Engy ABDELKADER: Are Myanmar's Rohingya Facing Genocide? *Columbia Journal of Transnational Law*, <https://www.jtl.columbia.edu/are-myanmars-rohingya-facing-genocide/>

<sup>4</sup> *Ibid.* See also, Report of the independent international fact-finding mission on Myanmar. *Supra* note 4, at 8 paras. 32–33.

<sup>5</sup> UN report, Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes. *OHCHR*, 27 August 2018. <https://bit.ly/3zubmBb>

crimes committed against them inside Myanmar.<sup>6</sup> Accordingly, the Prosecutor filed her request to the Pre-Trial Chamber, seeking a ruling on the question of whether the court may exercise jurisdiction under Article 12(2)(a) of the Rome Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.<sup>7</sup>

The Pre-Trial Chamber, while preparing the Decision on the Prosecutor's Request for a Ruling on Jurisdiction,<sup>8</sup> invited both the governments of Myanmar<sup>9</sup> and Bangladesh<sup>10</sup> to file submissions regarding their opinions on the Prosecutor's Request. Diplomatic and consular representatives of Myanmar declined the servicing of that invitation.<sup>11</sup> However, on 9 August 2018, the Myanmar authorities published a Statement addressing the proceedings of the ICC.<sup>12</sup> In this Statement, Myanmar authorities emphasized that "Myanmar is not a party to the Rome Statute and the Court has no jurisdiction on Myanmar whatsoever".<sup>13</sup> Also, the Statement acknowledged that "Myanmar has declined to engage with the ICC by way of a formal reply".<sup>14</sup> After that, the Prosecutor filed a "Notice of the Public Statement Issued by the Government of Myanmar".<sup>15</sup> In this notice, the Prosecutor asked the judges of the Pre-Trial Chamber not to take Myanmar's public Statement into their consideration when deciding the jurisdiction of the court over the Rohingya crisis.<sup>16</sup> The Prosecutor described Myanmar's Public Statement as "inaccurate in its understanding of these proceedings, and in the legal conclusions it purports to draw".<sup>17</sup>

<sup>6</sup> Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh, ICC-OTP, 18 September 2018. <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>

<sup>7</sup> Application under regulation 46(3), Prosecution's request for a ruling on jurisdiction under article 19(3) of the Statute, ICC, 9 April 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_02057.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF)

<sup>8</sup> Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 6 September 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF)

<sup>9</sup> Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 21 June 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_03206.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03206.PDF)

<sup>10</sup> Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 7 May 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_02487.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02487.PDF)

<sup>11</sup> Registry's Report on the implementation of the Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 5 July 2018. [https://www.icc-cpi.int/CourtRecords/CR2018\\_03571.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03571.PDF)

<sup>12</sup> Press Release, Government of Myanmar, Ministry of the Office of the State Counsellor, 9 August 2018. <http://www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2018/08/09/>

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Notice of the Public Statement Issued by the Government of Myanmar, ICC, 10 June 2010. [https://www.icc-cpi.int/CourtRecords/CR2018\\_04048.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04048.PDF)

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

The Pre-Trial Chamber I of the ICC decided, on 6 September 2018, that the court may exercise jurisdiction over the deportation under article 12(2) (a) of the Statute “if at least one element of a crime within the jurisdiction of the Court [...] is committed on the territory of a State Party to the Statute”.<sup>18</sup> Furthermore, the ICC elaborates on the potential to try other crimes that have been perpetrated against the Rohingya people and that constitute crimes against humanity under article 7 of the Rome Statute.<sup>19</sup>

In addition, under Article 12 (2) (a) of the Statute, the Prosecutor argued that court has jurisdiction over the circumstances where “persons are directly deported from the territory of a state that is not a party to the Statute into the territory of a state that is a party to the Statute.”<sup>20</sup> While looking at the Article 7(1)(d) of the Statute regarding deportation or forcible transfer of population<sup>21</sup>, the elements indeed fit in the frame, thus the Rohingyas’ deportation constitute a crime against humanity and the ICC may extend its jurisdiction over the crime as well.<sup>22</sup> ICC might not have [territorial] jurisdiction over Myanmar for [systematic] killing occurred within the borders, however from [objective] territoriality, ICC has its jurisdiction over Myanmar because for their conduct towards Rohingya population, Bangladesh had to face risks and consequences of the irregular movement [from Rakhine State of Myanmar to Bangladesh].<sup>23</sup> Therefore, criminal jurisdiction can be exercised upon Myanmar by relying upon the objective territoriality principle and ICC can claim its jurisdiction over the Rohingya deportation.<sup>24</sup>

After this, the ICC Prosecutor Mrs. Bensouda, on 18 September 2018, announced the opening of a preliminary examination regarding the issue, so that she could decide the merit of proceeding to the investigation phase.<sup>25</sup> The preliminary examination requires examining the available information.<sup>26</sup> Therefore, an informed determination can be made regarding whether there is a reasonable basis to proceed with an investigation under the criteria established by the Rome Statute<sup>27</sup>, specifically under Article 53(1)

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<sup>18</sup> Decision on the “Prosecution’s Request, supra note 11, at 42 para. 72.

<sup>19</sup> Statement of ICC Prosecutor, supra note 9.

<sup>20</sup> Prosecutor’s request for a ruling on jurisdiction, supra note 12, at 3 para. 4. See more: Dr. Sharefah A. ALMUHANA: The International Criminal Court (ICC) and the Rohingya Crisis – Jurisdiction and Future Perspectives. *KILAW Journal*, Vol 7, Issue 4. 62. Retrieved from <https://journal.kilaw.edu.kw/wp-content/uploads/2020/06/45-88-Dr.-Sherifa-Almuhana.pdf>

<sup>21</sup> Elements of Crimes, Article 7(1)(d) of the Statute are as follows: “1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts; 2. Such a person or persons were lawfully present in the area from which they were so deported or transferred; 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 5. The perpetrator knew that the conduct was a part of, or intended the conduct to be a part of, a widespread or systematic attack directed against a civilian population.”

<sup>22</sup> Ibid. note 2.,, 66.

<sup>23</sup> Ibid. 67.

<sup>24</sup> Ibid. 68.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

of the Rome Statute.<sup>28</sup> Issues of jurisdiction, admissibility and the interests of justice are focal in deciding whether to proceed with an investigation.<sup>29</sup> On 4 July 2019, the ICC Prosecutor Mrs. Bensouda requested the Pre-Trial Chamber III to authorize the commencement of an investigation into the situation in Bangladesh/Myanmar.<sup>30</sup>

The Prosecutor justified the ICC jurisdiction over the Rohingya crisis on several grounds, including the international law *jus cogens*, such as the violation of the Rohingyas' right to return to Myanmar, a customary international law principle that guarantees the right of displaced persons to return safely to their state of origin with which they preserve a close connection.<sup>31</sup>

However, this paper will only be concerned with the territorial principle, since the ICC built its jurisdiction over the deportation of the Rohingya upon the principle of territoriality and particularly in accordance with article 12(2) (a) of the Statute and since the Statute is silent on the question of the ICC's territorial jurisdiction under article 12(2)(a.) The ICC also observed that it had not previously interpreted this provision contained in article 12(2)(a).<sup>32</sup> Thus, the court, in its interpretation of the provision of Article 12(2)(a) and any relevant provisions of the Statute, should consider the application of public international law rules and principles, including general principles of law [for example, the principle from the *Lotus Case* is very crucial in this case in terms of resolving whether the "conduct" encompasses the effects of a crime or not].<sup>33</sup> However, this paper is explicitly limited only to territorial principle while analyzing, and will not discuss about other elements which court argued, as well as the trans-border jurisdictions or extra-territorial jurisdiction over the concerned issue.<sup>34</sup> However, before proceeding with our analysis of the main subject matter of this paper, an informed understanding of the ICC system is required because the provisions contained in the Statute are essential for explaining later how the interplay between these provisions and the facts or the circumstances of the contested issue may affect the extent of the ICC jurisdiction over the transnational crimes in general and the crime of the deportation of the Rohingya in particular.<sup>35</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Request for authorisation of an investigation pursuant to article 15, ICC-OTP, 4 July 2019. [https://www.icc-cpi.int/CourtRecords/CR2018\\_04048.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04048.PDF)

<sup>31</sup> Ibid., at para 40, 75 and 71, 139.

<sup>32</sup> Michail VAGIAS: Case No. ICC-RoC46(3)-01/18. *American Journal of International Law*, volume 113, issue 2, (2019) 368–375, at 371.

<sup>33</sup> Michail VAGIAS: *The Territorial Jurisdiction of the International Criminal Court*. Ph.D. Thesis. Bynkers Hoek, Leiden University, 2011. certain contested issues, at 22 para. 2.1.

<sup>34</sup> Bangladeshi laws (Penal Code and ICTA 1973) allow jurisdiction over extra-territorial [international] crimes. Moreover, Myanmar has been a signatory party to many international treaties, such as International Convention for the suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances. These treaties allow extra-territorial measures. So even though Myanmar denies court's jurisdiction but they implicitly allow the same thing.

<sup>35</sup> Ibid., supra note 3.

## 2. Perspectives from International Criminal Court

After 11 November, several developments have taken place in various parts of the world in just one week that has highlighted Myanmar's alleged mistreatment of the Rohingya Muslim minority in the northern Rakhine State.<sup>36</sup> The state of Myanmar, its civil government headed by Nobel laureate Aung San Suu Kyi, and its military, accused of perpetrating 'genocidal abuse' against the Rohingya, are all facing charges in separate courts.<sup>37</sup>

The first was brought before the International Court of Justice (ICJ) by the Gambia,<sup>38</sup> on behalf of the Organization for Islamic Cooperation (OIC), which accused Myanmar of violating the 1948 Genocide Convention. Two days later, a second lawsuit against the senior government and military officials, including Suu Kyi, was brought before a court in Argentina under the "universal jurisdiction" principle.<sup>39</sup> One day later, the International Criminal Court (ICC) authorized a full-scale investigation into the alleged crimes against humanity committed by the Myanmar Army against the Rohingya.<sup>40</sup> Reed Brody, Commissioner of the International Commission of Jurists, referred to this triad of cases as a "hat-trick of responsibility".<sup>41</sup>

### 2.1. Parallel Processes

The cases of the ICJ and the ICC are particularly significant since they are both high-level courts within the prevailing international system. The crucial distinction between the two is that while the former hears lawsuits against Governments, the latter deals with real people guilty of war crimes and crimes against humanity.<sup>42</sup>

The complaint against Myanmar by the ICJ only requires a set public hearing in The Hague on 12 December. The "tangible practical value" of a decision, as argues one legal expert in *The Diplomat*, although it would be difficult for Myanmar to argue contrary to the Court's jurisdiction.<sup>43</sup> Suu Kyi, de facto head of state, of Myanmar, declared on

<sup>36</sup> Angshuman CHOUDHURY: Understanding the Rohingya Case at the International Criminal Court. *Law School Policy Review*, published on 22 November 2019. <https://bit.ly/3ktLFFr>

<sup>37</sup> Angshuman CHOUDHURY: A deeper look at Myanmar's genocidal intent. (Published on September 25, 2018.) <https://asiatimes.com/2018/09/a-deeper-look-at-myanmars-genocidal-intent/>

<sup>38</sup> Owen BOWCOTT: Gambia files Rohingya genocide case against Myanmar at UN court. (Published on 11 November 2019.) <https://bit.ly/2Z8N5E7>

<sup>39</sup> Myanmar's Aung San Suu Kyi faces first legal action over Rohingya crisis. (*Agence France-Presse*, published on 14 November 2019.) <https://bit.ly/3lJqRQJ>

<sup>40</sup> ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar. (*Press release*, on November 14, 2019.) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>

<sup>41</sup> Mia SWART: Will cases brought against Myanmar deliver justice to Rohingya? (On 19 November 2019.) <https://bit.ly/3zFzeSB>

<sup>42</sup> VAGIAS op. cit.

<sup>43</sup> Md. Rizwanul ISLAM: Gambia's Genocide Case Against Myanmar: A Legal Review. (November 19, 2019.) <https://thediplomat.com/2019/11/gambias-genocide-case-against-myanmar-a-legal-review/>

20 November that, at the ICJ, she was directly leading her country's defense when the hearings commenced next month.<sup>44</sup>

The International Fact-Finding Mission on Myanmar (FFM), founded by the United Nations Human Rights Commission in March 2017, has so far been the only global body to gather proof of Rohingya crimes.<sup>45</sup> In September 2018, the mandate of the FFM lapsed a year after it submitted its full report.<sup>46</sup>

The ICC process is currently the only international independent investigation process on the Rohingya issue that has been judicially authorized. The Independent Investigative Mechanism on Myanmar (IIMM)<sup>47</sup> has been initiated and approved last year by the Human Rights Council of the United Nations (UNHRC) which also visited the refugee camps in South-East Bangladesh for their first time officially<sup>48</sup>, and the Independent Commission of Inquiry (ICoE), which is appointed by and run by the Government of Myanmar. Two other parallel inquiries are pending.<sup>49</sup>

The IIMM is simply required to gather and collect evidence in "national, regional or international tribunals or courts," which have jurisdictions over crimes perpetrated against Rohingya, "to facilitate and speed up fair and independent criminal proceedings."<sup>50</sup>

The four-member ICoE, on the other hand, which consists of two foreign members, has already been marked as toothless. The UN FFM, in its final report, pointed out that the Commission was favored, lacked experience and did not wish to grant individuals special obligations and concluded: "will, even with some international involvement, not offer any real avenue of accountability."<sup>51</sup>

Thus, at the moment, the ICC appears to be the only mechanism that could lead to any tangible prosecutions.

## 2.2. A Unique Premise

Through reviewing the first document submitted before the court, the ICC process can be better understood. "The case started when, under Article 19(3) of the Rome Statute<sup>52</sup>, the founding treaty of the ICC, the Chief Prosecutor, Fatou Bensouda, submitted a "motion for jurisdiction over the suspected deportation of the Rohingya people from

<sup>44</sup> Michael SAFI: Aung San Suu Kyi to defend Myanmar against genocide charge at The Hague. (20 November 2019.) <https://bit.ly/3hWIKeV>

<sup>45</sup> Independent International Fact-Finding Mission on Myanmar. <https://bit.ly/3hSBNue>

<sup>46</sup> UNHRC, Myanmar: UN Fact-Finding Mission releases its full account of massive violations by military in Rakhine, Kachin and Shan States. <https://bit.ly/3hXfLqf>

<sup>47</sup> Independent Investigative Mechanism for Myanmar. <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>

<sup>48</sup> Myanmar Mechanism Conducts First Official Mission to Bangladesh. <https://bit.ly/3EAIIdYV>

<sup>49</sup> Retrieved from <https://www.icoe-myanmar.org/>

<sup>50</sup> Independent Investigative Mechanism for Myanmar. <https://bit.ly/3kttB5v>

<sup>51</sup> VAGIAS (2011) op. cit.

<sup>52</sup> Retrieved from <https://bit.ly/3hVSg0H>

Myanmar to Bangladesh” on 9 April 2018 before the Pre-Trial Division.<sup>53</sup> Article 19(3) states that ‘the Prosecutor can seek the Court’s decision on a matter of jurisdiction or admissibility.’<sup>54</sup>

The source of the present statement is the power bestowed upon the Public Prosecutor in accordance with Article 15 of the Law, which enables him or her to ‘initiate an inquiry *Proprio motu* based on knowledge regarding crimes within the mutual jurisdiction of the Court.’ The other two ways in which the Court is allowed to exercise jurisdiction over a person or offense, as laid down in Article 13 of the Law, is the direct reference by a specific State Party or a resolution of the United Nations Security Council in Chapter VII of the UN Charter.

Myanmar is not a party to the Rome Statute, and it remains outside the exclusive jurisdiction of the ICC. Therefore, the Court cannot ideally convict the people of Myanmar. However, Bangladesh – where some 800,000 Rohingya refugees are now located in Myanmar’s Rakhine State who escaped the violence after August 2017 – is a state party to the Statute.

Accordingly, the prosecutors argued that the Court had jurisdiction over those who committed crimes against Rohingya under Article 12(2)(a) of the Statute “because an essential legal element of the crime – crossing the international border – occurred in the territory of a State party to the Rome Statute (Bangladesh).”

The essence of Article 12(2)(a) is that, if it occurred within the territory of a State Party, the Court may exercise jurisdiction over an offense (and the crime).<sup>55</sup> The prosecutors used this clause to argue that, because the Rohingya were forced to flee to Bangladesh by violent coercive action by the Myanmar Army, it is punishable under Article 7(1)(d) of the Law, which classifies “deportation or forced transfer of population” as one of the many “crimes against humanity.” The prosecution is careful to acknowledge that since the Rohingya crossed the international border, the action can be represented as “deportation”.<sup>56</sup>

It argues “in the circumstances where the enforced border crossing brings the victim directly onto another State’s territory, such legal element is completed in this second State,” to support its argument that the deportation is also in Bangladesh’s territory. It contrasts here with a ‘cross-border shooting,’ in which a bullet is shot at the border but received by the victim at the border. It argues that the reading of Article 12(2)(a) can be extended to certain criminal cases in multi-territory.<sup>57</sup>

While the prosecution did not assert jurisdiction over the key crime in question, i.e. genocide or ethnic cleansing, it is seeking to approach the Myanmar military leadership – the popular criminal party, which allegedly committed both genocidal violence and forced deportation. It is a longer path to go through the latter crime, but it is the only

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<sup>53</sup> Retrieved from [https://www.icc-cpi.int/CourtRecords/CR2018\\_02057.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF)

<sup>54</sup> VAGIAS (2011) op. cit.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

legally legitimate route to circumvent the non-party status of Myanmar to the Rome Statute and keep its military officers responsible for their suspected crimes.

The request was assigned to the Pre-Trial Chamber for further assessment on 11 April 2018. After several rounds of stakeholder consultations and expert field visits, the Chamber agreed on 6 September 2018 that the Court will exercise jurisdiction over the forced deportation of Rohingya to Bangladesh.<sup>58</sup> Later, on 4 July 2019, Chief Prosecutor Bensouda requested that the Court allow an investigation into the crime of forced deportation “which occurred in the context of two waves of violence in the Rakhine State on the territory of [Myanmar], as well as any other crimes sufficiently related to these events.”<sup>59</sup>

Interestingly, in its request for an investigation, the prosecutor demanded a mandate to cover crimes committed on 9 October 2016, when the Myanmar military launched the first wave<sup>60</sup> of violent clearance operations in Rohingya-dominated villages in northern Rakhine following a local insurgency attack on border outposts. In its first request for jurisdiction, the Prosecutor referred only to incidents following the attack of 25 August 2017.<sup>61</sup>

On 14 November, the Pre-Trial Chamber opened investigations not only into “the crimes on the humanity of deportation,” but also of “persecution for ethnicity and/or religion” as classified in the sense of the waves of violence of both October and August 2016 in compliance with Article 7(1)(h) of the Statute as well as other crimes. In short, the Prosecution has authorized by the Chamber to investigate any crime, including a future crime, committed against the Rohingya community which meets the following four requirements irrespective of the nationality of the criminals:

- 1) it comes under the jurisdiction of the Court<sup>62</sup>,
- 2) it has committed, on its territory or on the territory of any other State Party which accepts the jurisdiction of the ICC, allegedly committed at least in part<sup>63</sup>;
- 3) the situation as defined in the Decision is adequately related to it<sup>64</sup>;
- 4) it is alleged to have been committed on or after the date of entry into force of the Rome Statute for Bangladesh or another State Party concerned<sup>65</sup>.

<sup>58</sup> ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh (press release). <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>

<sup>59</sup> ICC Prosecutor, Fatou Bensouda, requests judicial authorisation to commence an investigation into the situation in Bangladesh/Myanmar (press release). <https://www.icc-cpi.int/Pages/item.aspx?name=pr1465>

<sup>60</sup> Caleb QUINLEY: Violence Erupts in Myanmar’s Rakhine State. <https://bit.ly/39ntZMs>

<sup>61</sup> Angshuman CHOUDHURY: Rakhine Violence: Unraveling the Context and State Response. <https://bit.ly/3EFKdif>

<sup>62</sup> VAGIAS (2011) op. cit.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

### 2.3. Post-Investigation Stages

The next move is for the Public Prosecutor to perform a thorough investigation and classify suspicious persons. Since Myanmar has denied the jurisdiction of the ICC, it is highly unlikely that the government will allow the Chief Prosecutor to enter the country to gather corroborative evidence.<sup>66</sup> She must therefore keep her activities to the territory of Bangladesh. The ongoing phase of IIMM endorsed by the UNHRC will provide its team with solid additional evidence to support the case.

The prosecutor will send a petition to the Court on the completion of the evidence compilation, which may take several months or years depending on different factors. If it appears that it is necessary to ensure the presence of the individual, the Court will issue a summon.<sup>67</sup> In the case of warrants being released by the Judge, the suspects will be detained and taken before the ICC for prosecution. But this is the beginning of the big hurdle.<sup>68</sup>

The ICC is mandated only by State Parties to enforce arrest warrants. Hence, until one or more of the suspects land up in the territory of a State Party, which then makes an arrest-and-transfer to the ICC, the suspected perpetrators would remain at large. The ICC also requests non-State parties to collaborate from time to time, however, they are not obligated to do so. Trials will not begin without the arrest and subsequent physical appearance of the suspect in court. And there can be no verdict or punishment and no justice without trials. The ICC states, in this regard, that the “failure to execute arrest warrants creates conditions of impunity.”<sup>69</sup>

The past precedent is not motivating in this regard. At the moment, nine suspects who have ICC arrest warrants against them remain at large. These include Sudan’s deposed President, Omar al-Bashir<sup>70</sup>, and Joseph Kony<sup>71</sup>, the leader of the infamous Lord’s Resistance Army. In reality, Bashir visited numerous countries without being detained, including three State Parties to the Rome Statute, South Africa, Uganda and Jordan, despite the Court issuing a second warrant in 2010.<sup>72</sup> These have cast negative shades on the very legitimacy of the ICC mechanism as a whole and have undeniably contributed to the culture of immunity.<sup>73</sup>

Myanmar’s military also maintains good ties with various countries in South and Southeast Asia, such as India and Thailand. Japan<sup>74</sup> and South Korea<sup>75</sup> are the only two ICC member states in the region that maintain reasonably courteous ties with the

<sup>66</sup> Ibid.

<sup>67</sup> Retrieved from <https://www.icc-cpi.int/news/seminarBooks/bookletArrestsENG.pdf>

<sup>68</sup> VAGIAS (2011) op. cit.

<sup>69</sup> Ibid.

<sup>70</sup> Retrieved from <https://www.icc-cpi.int/darfur/albashir>

<sup>71</sup> Retrieved from <https://www.icc-cpi.int/uganda/kony>

<sup>72</sup> Tom WHITE: States ‘failing to seize Sudan’s dictator despite genocide charge’. <https://bit.ly/2XF2Xxi>

<sup>73</sup> VAGIAS (2011) op. cit.

<sup>74</sup> Retrieved from [https://www.mofa.go.jp/press/release/press4e\\_002644.html](https://www.mofa.go.jp/press/release/press4e_002644.html)

<sup>75</sup> Retrieved from <https://www.moi.gov.mm/moi:eng/?q=news/8/11/2018/id-1526>

military of Myanmar. It remains to be seen whether, if they land on their territories or go the Jordan/South Africa/Uganda route, Tokyo and Seoul will be keen to impose any potential ICC warrants against Myanmar military officials.

However, given that the offenders are detained and moved to The Hague, the trial process will immediately begin. Of course, the decision depends on the strength of the facts and claims of the prosecution, the testimony of the victim, and the tenability of the defense of the suspect. Whatever the verdict, any party could make a final appeal, which may then lead the Appeals Chamber to uphold, amend or overturn the verdict or, in some cases, to order a retrial.

#### 2.4. The Suspects

Some potential suspects inside Myanmar are likely to be named by the Prosecutor. The list of perpetrators of the UN FFM provides a sense of this. Six main perpetrators within the Myanmar Military who were responsible for ordering alleged genocidal violence against the Rohingyas – Commander-in-Chief, Deputy Commander-in-Chief, Commander of the Bureau of Special Operations-3, Commander of the Western Regional Military Command, Commander, 33rd Light Infantry Division, and Commander of the 99th Light Infantry Division.<sup>76</sup>

The last three engaged directly in the ordering of the infamous “clearance” operations in northern Rakhine leading to the exodus to Bangladesh from the Rohingya. The first three may not have been personally involved, but the “doctrine of command responsibility,” as set out in Article 28 of the Law, is responsible for failing to do anything to discourage the illegal activity of their subordinates or to initiate inquiries into such crimes.<sup>77</sup>

So far, all allegations of crimes against the Rohingya have been summarily denied by the senior leadership of the Myanmar military, with the Commander-in-Chief also claiming that they fled to Bangladesh to “live with relatives” or “flee to a third country”.<sup>78</sup> Nevertheless, in April 2018, the military officially dismissed seven soldiers from the military and sentenced them to 10 years in prison with hard labor over a period of three years.<sup>79</sup> Reuters, however, announced in May 2019 that an early release was granted to the convicted soldiers in November 2018.<sup>80</sup> The Prosecutor acknowledged this in her request for an investigation.<sup>81</sup> “The military leadership suspects could use this instance to demonstrate that they were aware of crimes committed by subordinates, if they landed in an ICC courtroom, and should therefore not be held liable under the “doctrine of command responsibility. However, given the overall scale of violence, the

<sup>76</sup> VAGIAS (2011) op. cit.

<sup>77</sup> Ibid.

<sup>78</sup> Retrieved from <https://reut.rs/3AuyGQz>

<sup>79</sup> Retrieved from <https://reut.rs/3lLYG3F>

<sup>80</sup> Retrieved from <https://reut.rs/3CxkgzJ>

<sup>81</sup> Retrieved from <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/>

number of displaced Rohingya and the broad reach of Article 28 to include all forms of commission and omission, this would be a weak defense.<sup>82</sup>

Besides, the Court cited victims' representatives as identifying three other agencies responsible for the crimes in question – the Border Guard Police (BGP), the Myanmar Government, the Myanmar Police Force (MPF) and other local authorities. There is also recorded evidence that the Rakhine Buddhist vigilantes also engaged in the crime.<sup>83</sup> The Prosecutor does not make any clear reference to the role of such vigilantes in the violence that contributed to the displacement. Although the investigation could provide concrete evidence of the same, it will be very difficult for the prosecutor to identify individual vigilante suspects.

### 2.5. Challenges for The Prosecutors

As in most domestic and international courts, there has always been a lack of consent amongst judges. ICC benches have been divided sharply, leading to contentious decisions, on the holiness of the proof submitted in the past. In the majority ruling of January 2019, for instance, the Court recognized Laurent Gbagbo, former president of Ivory Coast, as unconvincing of all charges of “crimes against humanity”.<sup>84</sup> Many people were surprised, and the case was appealing. In the Rohingya case, however compelling the evidence may be, the risk of a stunted decision remains as well. In this case, however, there is strong evidence of misconduct. Therefore, on the bottom side is the possibility of a split decision.<sup>85</sup>

Besides the inability to execute the warrants, the general failure of State Parties to comply has also hindered the prosecutorial investigations. The ICC was forced in 2014 to drop all charges against Kenyan President Uhuru Kenyatta, for example, because the government only refused to provide the evidence it needed.<sup>86</sup> He remains the president of the country. But perhaps the cooperation of Bangladesh in the Rohingya case is significant, and Dhaka has demonstrated a great commitment to the Public Prosecution to date. If the main aim of Sheikh Hasina's Government is to raise international pressures on Myanmar for the return of refugees, the Prosecution will achieve the goals of prosecution of the suspects while collaborating with the ICC.<sup>87</sup>

## 3. Conclusion

For all the inherent shortcomings in the ICC system and the reluctance of the Member States to comply, the ICC remains a significant component of the international criminal

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<sup>82</sup> VAGIAS (2011) op. cit.

<sup>83</sup> Amnesty International, Myanmar: Scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State. <https://bit.ly/2VZeYxg>

<sup>84</sup> VAGIAS (2011) op. cit.

<sup>85</sup> Retrieved from <https://bit.ly/2XA5nh1>

<sup>86</sup> Retrieved from <https://www.bbc.com/news/world-africa-30347019>

<sup>87</sup> Retrieved from <https://bit.ly/3EGQ2w8>

justice system and, as a former senior prosecutor at the Court put it, “giving a huge blow to the fight against impunity.”<sup>88</sup> Particularly, in this case, it seems a prompt justice may come because of the time frame between the filing the request and final approval of the investigation, which is not common in past cases. The Hague Court remains therefore the most suitable platform to hold the suspected perpetrators responsible for their atrocious crimes and thereby provide the displaced Rohingyas with a certain sense of justice. Reconciliation or resettlement is not possible without justice.<sup>89</sup>

However, it should be mentioned that the recent development regarding crimes against the Rohingya constitute an opportunity to rethink about the interrelation between the complementarity principle and universal jurisdiction of the international criminal court.<sup>90</sup> It rests upon the future researchers to think how the gap left behind by ICC’s lack of jurisdiction be minimized by applying universal jurisdiction and principle of complementarity.

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<sup>88</sup> James A. GOLDSTON: Don’t Give Up on the ICC. (Published on August 8, 2019.) <https://bit.ly/3nUweiJ>

<sup>89</sup> VAGIAS (2011) op. cit.

<sup>90</sup> Retrieved from <https://bit.ly/39n6BPj>