


# Myanmar Government's International Crimes Against the Rohingya and The Enforcement Under the 1998 Rome Statute

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**ABSTRACT:** This article explores the international crimes committed by the Myanmar government against the Rohingya in Rakhine State under the 1998 Rome Statute and evaluates possible avenues for accountability through the International Criminal Court (ICC) or universal Jurisdiction. Utilising a normative-legal framework and a descriptive-analytical approach, a systematic review of relevant treaties and case law is conducted to categorise Myanmar's orchestrated violence, discrimination, and mass killings. The evidence indicates that these violations meet the criteria for both genocide and crimes against humanity, given their organised, systemic nature, which is aimed at eradicating the Rohingya population. The ICC's authority to enforce compliance, as outlined in Article 13 (b) of the Rome Statute, is contingent upon a referral from the United Nations Security Council under Chapter VII of the UN Charter. This process bears a resemblance to the 2011 Libyan referral against Muammar Gaddafi. However, the absence of ratification by Myanmar and the prevailing geopolitical deadlock within the Security Council serve to impede this course of action. As an alternative, universal jurisdiction provides a practical mechanism, as exemplified by Belgium's prosecution related to the Sabra-Shatila massacre, allowing states to try atrocity crimes irrespective of location or nationality. The study emphasises the necessity of international political resolve and cross-border judicial cooperation, advocating for a coordinated multilateral strategy to address existing accountability gaps and advance justice for the Rohingya.



**KEYWORDS:** Crimes of Genocide, Crimes Against Humanity, Ethnic Rohingya Myanmar, International Criminal Law, Rome Statute 1998.

## I. INTRODUCTION

The Rome Statute of 1998 defines genocide as a 'serious crime' involving an attack on a national, ethnic, racial, religious, or social group of civilians. Examples of this type of crime include murder, rape, torture, enslavement, apartheid and forced displacement.<sup>1</sup> Genocide is a violation of *jus cogens* and is considered a *crime contra humanum genus*, also known as *hostis humani generis* (enemy of humanity).<sup>2</sup> The Rome Statute established the International Criminal Court (ICC) to prosecute these crimes and other international crimes under the Statute, thereby theoretically granting it the authority to prosecute perpetrators of international crimes. In the context of the Rohingya case, for example, ICC judges authorised an investigation into the mass exodus of Rohingya people to Bangladesh in 2016–2017.<sup>3</sup> On 14 November 2019,<sup>4</sup> for example, the ICC initiated an investigation into the alleged forced displacement of 600,000–1,000,000 members of the Rohingya ethnic group from Rakhine to Bangladesh.<sup>5</sup> Furthermore, at the end of 2024, the MPI Prosecutor General announced a request for an arrest warrant against Myanmar's military commander, Min Aung Hlaing, for genocide in

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<sup>1</sup> Aulia Rosa Nasution, "Terorisme Di Abad Ke-21 Upaya Penegakan Hukum Terhadap Tindak Kejahatan Terorisme Dalam Perspektif Hukum Internasional Dan Hak Asasi Manusia," *Jurnal Mercatoria* 8, no. 1 (August 2015): 54–74, <https://doi.org/10.31289/MERCATORIA.V8I1.647>.

<sup>2</sup> Mochammad Tanzil Multazam, "Prinsip 'Jus Cogens' Dalam Hukum Internasional," *Univeristas Muhammadiyah Sidoarjo*, 2017, 1–5, <http://eprints.umsida.ac.id/711/>.

<sup>3</sup> Febi Fajar Iswari, "Tindak Kejahatan Genosida Perspektif Hukum Internasional Dan Hukum Islam ( Analisis Terhadap Kasus Etnis Rohingya Di Rakhine Myanmar )" (Universitas Islam Indonesia, 2018), [https://dspace.uui.ac.id/bitstream/handle/123456789/8448/revisi\\_skripsi\\_febi.pdf?sequence=1&isAllowed=y](https://dspace.uui.ac.id/bitstream/handle/123456789/8448/revisi_skripsi_febi.pdf?sequence=1&isAllowed=y).

<sup>4</sup> "Bangladesh/Myanmar | International Criminal Court," n.d.

<sup>5</sup> "ICC – Situation of Bangladesh/Myanmar | Independent Investigative Mechanism for Myanmar," n.d.

the form of the mass killing of the Rohingya ethnic group.<sup>6</sup> However, the MPI's jurisdiction over Myanmar is limited. Myanmar is not a party to the 1998 Rome Statute.<sup>7</sup> Consequently, the ICC's jurisdiction is limited to transnational crimes involving the territory of a state party. The ICC may acquire jurisdiction over international crimes if they are committed partly in the territory of a State Party, such as Bangladesh.<sup>8</sup> Other literature emphasises that the ICC's territorial jurisdiction covers crimes committed wholly or partly on the territory of a State Party. This means that the ICC can try the forced expulsion of the Rohingya ethnic group in Bangladesh, as Bangladesh is a State Party.<sup>9</sup>

Philosophically, the enforcement of the law in relation to such international crimes is based on the concept of 'universal justice' and respect for human dignity. The concept of universal justice states that anyone who commits crimes against humanity should be tried, regardless of their national or political status, in order to achieve a fairer global order.<sup>10</sup> It is important to emphasise that universal jurisdiction can serve as a crucial tool in uniting nations to build a better world, as it brings the ideal of universal justice closer to

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<sup>6</sup> Aulia Rosa Nasution, "The Crime of Genocide on the Rohingya Ethnic in Myanmar from the Perspective of International Law and Human Rights," *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 5, no. 1 (May 2018): 182–206, <https://doi.org/10.22304/PJIH.V5N1.A10>.

<sup>7</sup> Sharefah Almuhan, "The International Criminal Court (ICC) And The Rohingya Crisis: Jurisdiction And Future Perspectives," *مجلة كلية القانون الكويتية العالمية*, 2019, 45, <https://doi.org/10.54032/2203-007-028-011>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Bugivia Maharani Setiadji Putri and Sefriani Sefriani, "The International Criminal Court Jurisdiction Towards The Deportation Issues In Myanmar," *Yustisia Jurnal Hukum* 10, no. 3 (December 2021): 306, <https://doi.org/10.20961/yustisia.v10i3.54279>.

<sup>10</sup> Muhammad Tanvir Hashem Munim, "Universal Jurisdiction and the International Criminal Court (ICC): A Pragmatic and Holistic Approach to the Consideration and Application of Universal Jurisdiction by the ICC," *BiLD Law Journal* 5, no. 1 (December 2020): 43–67, [https://www.researchgate.net/publication/355167177\\_Universal\\_Jurisdiction\\_and\\_the\\_International\\_Criminal\\_Court\\_in\\_its\\_Quest\\_for\\_International\\_Criminal\\_Justice](https://www.researchgate.net/publication/355167177_Universal_Jurisdiction_and_the_International_Criminal_Court_in_its_Quest_for_International_Criminal_Justice).

reality.<sup>11</sup> In this context, the fundamental rights violations suffered by the Rohingya ethnic group are seen as an affront to the dignity of humanity itself. Therefore, the international community bears a collective moral responsibility to protect the victims and demand justice. The Responsibility to Protect (R2P) doctrine, for example, affirms that states have a collective obligation to prevent genocide, ethnic cleansing, war crimes, and crimes against humanity.<sup>12</sup> This is because refraining from prosecuting perpetrators for political reasons is contrary to the principle of universal respect for human dignity.<sup>13</sup>

Furthermore, the massive impact of the Rohingya humanitarian crisis is evident from a sociological perspective. In August–September 2017, for instance, as many as 700,000 people fled to Bangladesh<sup>14</sup> in just a few weeks.<sup>15</sup> Nearly 24,000 Rohingya Muslims were killed, including children,<sup>16</sup> and at least 18,000 Rohingya women and girls were raped as a result of the military campaign.<sup>17</sup> The Myanmar military's actions are indicative of international crimes, namely genocide, as categorised by the United Nations, which has evidence of their brutal actions against Rohingya Muslims.<sup>18</sup> This systemic discrimination occurs in various forms and continues to be directed at the Rohingya ethnic group. Myanmar officially does not recognise

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<sup>11</sup> *Ibid.*

<sup>12</sup> Simon Adams, "The Responsibility to Protect and the Fate of the Rohingya," *Global Responsibility to Protect* (Brill Nijhoff, October 2019), <https://doi.org/10.1163/1875984X-01104005>.

<sup>13</sup> *Ibid.*

<sup>14</sup> "Rohingya: Militer Myanmar Bantai Ribuan Orang Etnis Rohingya, Sekarang Malah Minta Bantuan - BBC News Indonesia," n.d.

<sup>15</sup> Melanie O'Brien and Gerhard Hoffstaedter, "'There We Are Nothing, Here We Are Nothing!' – The Enduring Effects of the Rohingya Genocide," *Social Sciences* 2020, Vol. 9, Page 209 9, no. 11 (November 2020): 209, <https://doi.org/10.3390/SOCSCI9110209>.

<sup>16</sup> Pandasurya Wijaya, "Mengenal Tatmadaw, Militer Myanmar Yang Terkenal Brutal Dan Kejam," n.d.

<sup>17</sup> Md Kamruzzaman, "Korban Genosida Rohingya Bersaksi Lawan Militer Myanmar," aa.com, 2021.

<sup>18</sup> Adirini Pujayanti, "Indonesia Dan Tragedi Kemanusiaan Rohingya," *Majalah Info Singkat Hubungan Internasional Kajian Terhadap Isu Aktual Dan Strategis*, 2017.

the Rohingya as legal residents, referring to them instead as 'Bangladeshi migrants' and 'foreigners residing' in Myanmar.<sup>19</sup> This labelling strips the Rohingya of their national identity, effectively making them stateless. Consequently, they live in vulnerable conditions outside the protection of any national law. Ironically, neighbouring countries such as Bangladesh have refused to grant them citizenship, and the Bangladeshi government has declared the Rohingya crisis an 'internal matter of Myanmar'.<sup>20</sup> This disparity in human rights protection has created sharp social divisions. Displaced Rohingya have limited access to education, employment and basic services, while those who commit crimes are rarely held accountable. This situation highlights the urgent need for a robust international response, as without adequate legal and humanitarian support, the Rohingya will continue to suffer injustice.<sup>21</sup>

Historically, the Myanmar government's crimes against the Rohingya ethnic group began with the killing of Rohingya Muslims by Buddhist Myanmar residents in 1938. This was followed by mass arrests in 1970 and reinforced by the 1982 Citizenship Law, which rendered the Rohingya ethnic group's existence illegal under the law by changing the country's social structure.<sup>22</sup> Furthermore, between 2016 and 2017, when the genocide was carried out, Military Commander Min Aung Hlaing led Myanmar government forces in brutal operations in Rakhine in response to attacks by the Arakan Rohingya Salvation Army (ARSA). These operations caused around

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<sup>19</sup> Mowsume Bhattacharjee, "Statelessness of an Ethnic Minority: The Case of Rohingya," *Frontiers in Political Science* 6 (June 2024): 1144493, <https://doi.org/10.3389/FPOS.2024.1144493/BIBTEX>.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Ketut Alit Putra, Ni Putu Rai Yulianti, and Dewa Gede Sudika Mangku, "Analisis Tindak Kejahatan Genosida Oleh Myanmar Kepada Etnis Rohingya Ditinjau Dari Perspektif Hukum Pidana Internasional," *Jurnal Komunitas Yustisia* 1, no. 1 (September 2018): 66–76, <https://doi.org/10.23887/JATAYU.V1I1.28662>.

750,000 Rohingya to flee and seek refuge in Bangladesh.<sup>23</sup> Therefore, even though these crimes against jus cogens were committed by perpetrators who are citizens of a non-state party to the 1998 Rome Statute, action must be taken in response to uphold law and justice, as well as to maintain world security, peace and order. For this reason, the author is interested in conducting further research on the legal issues arising from the enforcement of international criminal law against perpetrators of international crimes against the Rohingya ethnic group. The aim is to determine the extent to which international crimes have been committed. Furthermore, do the actions taken by the Myanmar government, led by the military junta under Min Aung Hlaing, fulfil the elements of genocide? What efforts can be made to prosecute perpetrators of jus cogens crimes from a country that is not a member of the 1998 Rome Statute?

To ensure the authenticity of the research, the author has reviewed literature on related topics. For comparison, Wahyuni's<sup>24</sup> previous research, published in a journal, focused on humanitarian perspectives and accountability based on the 1998 Rome Statute. This study's results indicate that Myanmar's actions against the Rohingya ethnic group constitute genocide, and that efforts to resolve the dispute were made through litigation at the ICC. However, Wahyuni's study did not examine the specific aspects of genocide within the framework of the relevant articles in depth, nor did it address the absence of other international crimes whose elements have been fulfilled based on the 1988 Rome Statute. Furthermore,

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<sup>23</sup> BBC News Indonesia, "Muslim Rohingya Di Myanmar: Para Jenderal Harus Didakwa Genosida Kata PBB," *BBC.Com*, August 27, 2018, <https://www.bbc.com/indonesia/dunia-45322062>.

<sup>24</sup> W. (Wahyuni) Wahyuni, E. (Erdianto) Effendi, and W. (Widia) Edorita, "Kejahatan Genosida Terhadap Etnis Rohingya Dalam Perspektif Humaniter Dan Pertanggungjawaban Berdasarkan Statuta Roma (Icc)," *Jurnal Online Mahasiswa Fakultas Hukum Universitas Riau* 3, no. 2 (2016): 1–15.

Wahyuni misjudged the situation in Myanmar, viewing it as a dispute rather than an organised international crime perpetrated by the Myanmar government. Additionally, Wahyuni did not comprehensively explain how the ICC's jurisdiction, with its various limitations, could be applied beyond stating that the ICC's jurisdiction is not limited to non-member states. The second study, conducted by Ketut Alit Putra, Ni Putu Rai Yulianti and Dewa Gede Sudika Mangku, was published in a journal focusing on analysing how Myanmar committed genocide against the Rohingya ethnic group from the perspective of international criminal law.<sup>25</sup> The results indicate that genocide against the Rohingya constitutes a serious human rights violation under the Universal Declaration of Human Rights, and that those who issued orders under Articles 25, 27 and 28 of the Rome Statute can be held responsible for the crime of genocide. Based on the literature review, the focus of the research differs significantly, considering that the situation in Myanmar is deemed 'of great international concern', with the crimes committed against the Rohingya recognised internationally as violations of humanity.<sup>26</sup> Therefore, this research is urgent, as there has been no comprehensive study exploring the following two areas simultaneously: first, do the international crimes committed by the Myanmar government against the Rohingya ethnic group in Rakhine, Myanmar fulfil the elements of genocide under the 1998 Rome Statute? Secondly, what can be done to enforce international criminal law against state officials who are not party to the 1998 Rome Statute?

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<sup>25</sup> Ketut Alit Putra, Ni Putu Rai Yulianti, dan Dewa Gede Sudika Mangku, *loc.cit.*

<sup>26</sup> Hitomi Takemura, *The Rohingya Crisis and the International Criminal Court, The Rohingya Crisis and the International Criminal Court* (Springer Nature, 2023), <https://doi.org/10.1007/978-981-99-2734-0>.

## II. METHODS

This normative legal research study<sup>27</sup> takes a descriptive-analytical<sup>28</sup> approach to provide a systematic overview of the international legal framework and relevant enforcement strategies for the complex Rohingya ethnic case in Myanmar. In accordance with the normative legal research guidelines, the author first identified and compiled relevant primary and secondary legal sources. These included the Rome Statute of 1998,<sup>29</sup> the Genocide Convention,<sup>30</sup> the UN Charter, UN Security Council resolutions and other documents<sup>31</sup> addressing genocide and crimes against humanity committed against the Rohingya ethnic group. The author then conducted a structured literature review of journals, books, news articles and other available online materials<sup>32</sup> to gather comprehensive information relating to international crimes against the Rohingya. The next stage is a descriptive-analytical analysis in which the collected legal data is examined in depth to identify the international crimes committed based on the elements of crime in the 1998 Rome Statute, map jurisdictional gaps of the ICC against non-party states,<sup>33</sup> and assess the possibility of international prosecution.<sup>34</sup> This data collection is supported by document analysis, involving a comprehensive study

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<sup>27</sup> Johnny Ibrahim and Jonaedi Efendy, *Teori Dan Metodologi Penelitian Hukum Normatif Dan Empiris* (Bayumedia, 2016).

<sup>28</sup> Tunggul Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (February 2023): 1–9, <https://doi.org/10.22219/ACLJ.V4I1.24855>.

<sup>29</sup> *Elements of Crimes* (The Hague: International Criminal Court, 2005).

<sup>30</sup> United Nations, "Convention on the Prevention and Punishment of the Crime of Genocide Approved and Proposed for Signature and Ratification or Accession by General Assembly Resolution 260 A (III) Of," in *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948.

<sup>31</sup> Madeline Morris, "High Crimes and Misconception: The ICC and Non-Party States," 2001.

<sup>32</sup> "Systematic Literature Review - Leiden Law Methods Portal," n.d.

<sup>33</sup> "Patterns of Noncompliance in Article 12(3) Cases at the ICC - *Opinio Juris*," n.d.

<sup>34</sup> Rosemary Jotham Mukama, "Universal Jurisdiction and the International Criminal Court in Its Quest for International Criminal Justice," April 2020.

of journal articles, international conventions, UN General Assembly and Security Council resolutions, and reports from international institutions, as recommended in Devadasan's doctrinal methodology study.<sup>35</sup> Using this methodological framework, the research critically analyses the implementation of international law, thereby making an original contribution to the literature on international law.

### **III. THE CRIME OF GENOCIDE AND CRIMES AGAINST HUMANITY COMMITTED BY THE MYANMAR REGIME AGAINST THE ROHINGYA PEOPLE IN RAKHINE**

The oppression that occurred between 2016 and 2017 was part of a series of violent acts committed by the Myanmar government against the Rohingya Muslim ethnic group in Rakhine, Myanmar. This series of events can be traced back to 1962, when the military junta<sup>36</sup> seized power through a coup, resulting in the implementation of discriminatory policies against ethnic minorities.<sup>37</sup> In the aftermath of the military junta's coup, a massacre of Muslims in Arakan ensued, precipitated by communal violence between armed militia recruits from the 5th Rohingya battalion and Rakhine Buddhists.<sup>38</sup>

The systematic persecution of the Rohingya ethnic group, which has been ongoing since at least 1938, has been characterised by the killing of Rohingya Muslims by Buddhist Myanmar residents. This was

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<sup>35</sup> Pradeep M.D., "Legal Research- Descriptive Analysis on Doctrinal Methodology," *International Journal of Management, Technology, and Social Sciences*, December 2019, 95–103, <https://doi.org/10.47992/IJMTS.2581.6012.0075>.

<sup>36</sup> "Myanmar: Mengapa Militer, Yang Berjudul Tatmadaw, Begitu Brutal Dengan Rakyat Sendiri Termasuk Muslim Rohingya? - BBC News Indonesia," n.d.

<sup>37</sup> M Angela and Merici Siba, "Pelanggaran Hak Asasi Manusia Dalam Konflik Rohingya Human Right Violations On Rohingya Conflict," n.d.

<sup>38</sup> Asril Gunawan, "Tinjauan Hukum Internasional Terhadap Pelanggaran Hak Asasi Manusia Dalam Kejahatan Genosida Suku Rohingya Di Myanmar," *Skripsi Sarjana* (Universitas Sumatera Utara, 2018).

followed by arbitrary mass arrests in 1970 and a series of actions that were enshrined in legal regulations in the form of the 1978 Citizenship Law 1982. This legislation effectively rendered the Rohingya community illegal under the law.<sup>39</sup>

As time progressed, instances of oppression increased in frequency, becoming increasingly entrenched due to the Myanmar government's discriminatory policies directed towards the Rohingya ethnic minority. These discriminatory actions were driven by ethnic and religious differences, leading to the Rohingya ethnic group being denied recognition and citizenship.<sup>40</sup> This phenomenon can be observed by examining the policies adopted by the Myanmar government, as previously referenced, which promulgated a law on citizenship in the Burma Citizenship Law of 1982. The content of this regulation states that the Myanmar government removed the Rohingya from the list of main ethnic groups and from the 135 other minority ethnic groups because the Rohingya ethnic group is considered an illegal Bengali ethnic group, which is one of the ethnic groups from Bangladesh that entered Myanmar illegally.<sup>41</sup> The act was carried out in contravention of the law. This standpoint is underpinned by the government's assertion that the Rohingya do not constitute an indigenous ethnic group within Myanmar, but rather constitute Bengali immigrants who have entered the country illegally.<sup>42</sup> The actions taken by the Myanmar government at that time

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<sup>39</sup> Ani Widayani Sudjipto, *HAM Dan Politik Internasional* (Jakarta: Yayasan Pustaka Obor Indonesia, 2015).

<sup>40</sup> Ketut Arianta, Dewa Gede Sudika Mangku, and Ni Putu Rai Yulianti, "Perlindungan Hukum Bagi Kaum Etnis Rohingya Dalam Perspektif Hak Asasi Manusia Internasional," *Jurnal Komunitas Yustisia* 3, no. 2 (September 2020): 166–76, <https://doi.org/10.23887/JATAYU.V3I2.28849>.

<sup>41</sup> Dewa Gede and Sudika Mangku, "Pemenuhan Hak Asasi Manusia Kepada Etnis Rohingya Di Myanmar," *Perspektif Hukum*, April 2021, 1–15, <https://doi.org/10.30649/PH.V2I1.14>.

<sup>42</sup> Zinda Rahma Ilfana, "Ambiguitas Sikap Politik Aung San Suu Kyi Terhadap Masalah Segregasi Etnis Rohingya" (Universitas Muhammadiyah Malang, 2017).

were carried out systematically through operations to expel the Rohingya ethnic group from Myanmar forcibly. These actions included extrajudicial killings, arbitrary arrests, property confiscation, rape, anti-Rohingya and anti-Muslim propaganda, forced labour, and a ban on religious practices.<sup>43</sup> It is evident that analogous operations were executed once more by the Burmese government in July 1945, which ultimately led to the demise of 600 individuals. This event is known as the *Kalagong Massacre*.<sup>44</sup>

Between 2016 and 2017, the Rohingya ethnic group residing in Myanmar's Rakhine State once again became the target of genocide. This period of violence began in October 2016 and concluded in August 2017, during which the Myanmar military, known as the Tatmadaw, initiated a major operation in Rakhine with the aim of systematically eradicating the Rohingya ethnic group.<sup>45</sup> This operation has been criticised as a humanitarian tragedy, with hundreds of thousands of Rohingya Muslims becoming victims of mass killings, rape, and forced displacement from their homes, which they had inhabited for decades, by the Myanmar military. The forced displacement was accompanied by the destruction of homes, resulting in the deaths of thousands of Rohingya Muslims. Consequently, 850.000 of the total population of 1.3 million Rohingya Muslims were compelled to seek refuge in the border areas of Bangladesh.<sup>46</sup>

The operations described above are the responsibility of Min Aung Hlaing, the supreme commander of the Myanmar military. This

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<sup>43</sup> Dewa Gede and Sudika Mangku, *loc. cit.*

<sup>44</sup> Jawahir Thontowi, "Perlakuan Pemerintah Myanmar Terhadap Minoritas Muslim Rohingya Perspektif Sejarah Dan Hukum Internasional," *Pandecta Research Law Journal* 8, no. 1 (2013), <https://doi.org/10.15294/PANDECTA.V8I1.2359>.

<sup>45</sup> BBC News Indonesia, "'Genosida' Muslim Rohingya Di Myanmar: Aung San Suu Kyi Menyanggah Tuduhan Di Mahkamah Internasional," Website BBC News Indonesia, 2019.

<sup>46</sup> "Genosida Etnis Rohingya, Tragedi Kemanusiaan Di Tahun 2017 | Republika Online," n.d.

assertion is substantiated by the documented evidence of the Tatmadaw military, under the command of Min Aung Hlaing, perpetrating widespread killings in the aftermath of the overthrow of the democratically elected government of Aung San Suu Kyi through a military coup. The targeted killings have been reported to include Rohingya civilians, including children, women, and the elderly. According to the Assistance Association for Political Prisoners, as of February 2021, the number of individuals killed by the Tatmadaw military since the coup has exceeded 1,500.<sup>47</sup> The United Nations has also acknowledged the plight of the Rohingya, with Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Ramos stating that "*the Rohingya ethnic group is one of the most persecuted minorities in the world*".<sup>48</sup>

In accordance with Article 6 of the Rome Statute of 1998,<sup>49</sup> the various forms of violence, cruelty, persecution, discrimination, and murder committed by the Myanmar government against the Rohingya ethnic group evidently fulfil the elements of genocide. In addition to the act of genocide, the actions taken by the Myanmar government against the Rohingya ethnic group also constitute human rights violations that have been recognised and agreed upon by the international

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<sup>47</sup> "Myanmar: Mengapa Militer, Yang Berjudul Tatmadaw, Begitu Brutal Dengan Rakyat Sendiri Termasuk Muslim Rohingya? - BBC News Indonesia."

<sup>48</sup> Setiyani Setiyani and Joko Setiyono, "Penerapan Prinsip Pertanggungjawaban Negara Terhadap Kasus Pelanggaran HAM Etnis Rohingya Di Myanmar," *Jurnal Pembangunan Hukum Indonesia* 2, no. 2 (May 2020): 261–74, <https://doi.org/10.14710/jphi.v2i2.261-274>.

<sup>49</sup> Rome Statute 1998, Article 6: *For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.* Ariun Enkhsaikhan, "Rome Statute of the International Criminal Court," in *Global Crime: An Encyclopedia of Cyber Theft, Weapons Sales, and Other Illegal Activities: Volume 1: AL: Volume 2: MZ*, vol. 1–2, 2019, 483–87, <https://doi.org/10.1163/ej.9789004149311.i-564.86>.

community through various international human rights provisions. The following facts provide further evidence that the crimes committed by the Myanmar government constitute genocide, and thereby demonstrate the intention to exterminate or destroy the Rohingya ethnic group in its entirety.

Firstly, it is evident that a series of violent, persecutory and lethal acts committed against the Rohingya Muslim ethnic group in 2016-2017 were partly caused by incitement from senior military officials, including Buddhist religious leaders who made and spread hate speech against the Rohingya ethnic group, to incite religious conflict and anti-Muslim sentiment. One such figure is Ashin Wirathu, a monk who has become a prominent figure in the militant Buddhist movement, advocating violence and the extermination of Muslims in Myanmar. Ashin Wirathu is a prominent monk who has been accused of organising a group of over 2,500 monks within his monastery. He also has a significant following on various social media platforms, including Facebook and YouTube, where he has been known to disseminate nationalist messages and hate speech directed at Rohingya Muslims. One of the most significant statements made by the speaker regarding his 'goal' to destroy the Rohingya ethnic group as a whole, which he conveyed to his followers, was that "*Burmese Buddhists need to be proactive in rooting the Rohingya out*".<sup>50</sup> Statements bearing analogous connotations have been proffered by state officials, including President Thein Sein. In response to inquiries regarding the potential restoration of full citizenship rights for the Rohingya, he stated, "*we do not have the term Rohingya in Myanmar*".<sup>51</sup> As even the Minister of Immigration and former Chief of Police Khin Yi has

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<sup>50</sup> Mahnoor Khan, "The Broken Promise of 'Never Again': Myanmar's Genocide Analyzed Under the U.N. Genocide Convention and the International Criminal Tribunal for Rwanda's Interpretation of the Convention," *Cornell International Law Journal* 53, no. 4 (2020): 799–838.

<sup>51</sup> *Ibid.*

stated, *"the State has no intention of recognising any groups beyond the 135 national and ethnic groups that are officially recognised by Myanmar"*.<sup>52</sup> Win Mying, the official spokesperson for the Rakhine State Government, also made the following statement: *"How can the violence be ethnic cleansing? They are not an ethnic group"*.<sup>53</sup>

This assertion is supported by research conducted by Matthew Walton and Susan Hayward, as referenced by Khan, which indicates that Ashin Wirathu was imprisoned for a period of nine years for inciting anti-Muslim riots that had already occurred in 2003.<sup>54</sup> Despite comprising a mere 5 per cent of the total population of Myanmar, Ashin Wirathu propounds the notion that Islam and the Rohingya community represent a menace to the prevailing Buddhist tradition.<sup>55</sup> Consequently, he disseminated hate speech directed towards the Muslim community. One of his provocations was his assertion that Rohingya Muslims *"target innocent young Burmese girls and rape them"*.<sup>56</sup> Ashin Wirathu has been accused of fostering an environment of animosity towards Muslims, whom he has described as *"those who live in our land, drink our water, and are ungrateful to us"*. This rhetoric has been cited as a contributing factor to the development of a divisive *"us versus them"* mindset among his followers.<sup>57</sup> Furthermore, he has asserted that *"Muslims will ultimately capture the country"*,<sup>58</sup> and as a result, *"Burmese Buddhists must assume an active role in the eradication of the Rohingya"*.

Secondly, there is compelling evidence indicating that Facebook facilitated the Myanmar government in achieving its objective of

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

eradicating the Rohingya ethnic group through its algorithm, which disseminated information that incited animosity towards the Rohingya. Indeed, research conducted by Neriah Yue concluded in her writing that "*Facebook undeniably chose to do business in Myanmar*".<sup>59</sup> The Reuters News and Human Rights Center of the University of California, Berkeley School of Law, has identified over 1,000 instances on Facebook comprising posts, comments, images, and videos that incite anti-Muslim sentiment in Myanmar.<sup>60</sup> A number of social media posts have advocated for the violent mistreatment of Rohingya individuals, including calls "*to shoot them, burn them alive, and feed them to pigs*".<sup>61</sup> One Facebook user even published an advertisement for a restaurant specialising in Rohingya cuisine, accompanied by the provocative statement, "*We must fight them the way Hitler did the Jews, damn kalars!*".<sup>62</sup> It is also noteworthy that several other posts have been identified in which the Rohingya are labelled as "*dogs, maggots, and rapists, and in which the extermination of the Rohingya is advocated*".<sup>63</sup> Moreover, the involvement of the Myanmar military and government in inciting animosity towards the Rohingya ethnic group was evident, as they disseminated rumours on Facebook to Muslim and Buddhist groups that attacks from other parties would soon take place. The Tatmadaw military utilised official accounts to disseminate a warning to Buddhist nationalist groups via the social media platform, Facebook Messenger. This warning indicated that the Rohingya were poised to execute a 'jihad attack'. Concurrently, the military disseminated a divergent message to the Rohingya and Muslim

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<sup>59</sup> Neriah Yue and Neriah Yue, "The 'Weaponization' of Facebook in Myanmar: A Case for Corporate Criminal Liability," *Hastings Law Journal* 71, no. 3 (2020): 813–43.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

communities, namely that nationalist Buddhist monks were orchestrating anti-Muslim demonstrations.<sup>64</sup>

In addition to the aforementioned crimes, those perpetrated by the Myanmar government are classified as crimes of genocide, as they meet the criteria outlined in Article 6 of the Rome Statute. Crimes perpetrated by the Myanmar government can be identified under Article 7 of the Rome Statute as a series of acts of violence, persecution, discrimination in various forms, and murder. These can also be classified as crimes against humanity.

The regulations pertaining to crimes against humanity are meticulously delineated in Article 7 of the Rome Statute of 1998. An examination of Article 7 of the Rome Statute reveals that crimes against humanity, as defined within the Statute, encompass a range of actions.<sup>65</sup> However, within the context of the actions undertaken by the Government of Myanmar in accordance with Article 7 of the Rome Statute, the author's analysis is directed towards the provisions of Article 7(1)(h) and Article 7(2)(g).<sup>66</sup>

Article 7(1) stipulates that, for the purposes of the Statute, the term "crimes against humanity" encompasses any of the acts enumerated

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<sup>64</sup> *Ibid.*

<sup>65</sup> Rahadyan Fajar Harris, Inaz Indra Nugroho, and Farabi Assabili, "Urgensi Penerapan Responsibility to Protect Guna Menangani Pemerkosaan Sistematis Dalam Konflik Bersenjata Internasional," *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 1, no. 2 (December 2021): 225–41, <https://doi.org/10.15294/IPMHI.V1I2.53510>.

<sup>66</sup> *Article 7 Rome Statute 1998: For the purpose of this statute, "crime against humanity" means any of following acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack: ...*

(h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court ...*

2. *For the purpose of paragraph 1:...*

(g) *"Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; Enkhsaikhon, "Rome Statute of the International Criminal Court."*

in subparagraphs (a) to (k), when perpetrated as part of a "widespread or systematic" attack directed against the civilian population. However, Article 7(1)(h) further clarifies that the term "civilian population" as previously defined refers to individuals belonging to a specific identity group, i.e. those who are targeted for persecution based on criteria such as political, racial, national, ethnic, cultural, religious, or gender grounds. This signifies that, in essence, crimes against humanity are centred on the general category of individuals targeted, specifically civilians. However, there is an exception delineated in Article 7(1)(h), which stipulates particular acts and the "specific identity" to which these acts are directed. Consequently, the implementation of Article 7(1)(h) is characterised by enhanced clarity and explicitness. Furthermore, Article 7(2)(g) elucidates that 'persecution' is committed through acts involving the intentional and cruel deprivation of fundamental rights, which are manifestly contrary to international law. Therefore, as outlined in Article 7(1)(h) and Article 7(2)(g) above, the series of violence, persecution, discrimination, and killings committed by the Government of Myanmar in an organised and systematic manner against the Rohingya ethnic group can also be concluded as crimes against humanity. This is due to the fact that the criteria outlined in Article 7(1) have been satisfied. Specifically, the acts in question were perpetrated as part of a "widespread or systematic" attack, as defined by Article 7(1)(h). Furthermore, the acts in question meet the criteria outlined in Article 7(1)(h), which states that the series of acts were directed against a group that can be identified as an ethnic group and a religious group, namely the Rohingya ethnic group, who are Muslim.

It is imperative to acknowledge the distinction between the crime of genocide and crimes against humanity, as articulated in Articles 6

and 7, respectively. The salient difference between these two crimes, which fall under the material jurisdiction of the MPI, is a "unique element". Specifically, Article 6 of the Genocide Convention focuses on the 'purpose' of the acts committed, which are defined as "intended"<sup>67</sup> to destroy<sup>68</sup>, in whole or in part, a group of persons of a national, ethnic, racial, or religious character.<sup>69</sup> Meanwhile, Article 7 on crimes against humanity focuses on acts committed as part of an attack<sup>70</sup> That is "widespread or systematic."<sup>71</sup> directed against civilian groups. As an exception, such attacks may also be directed against a group on the basis of political, racial, national, ethnic, cultural, religious, or gender grounds<sup>72</sup>, as provided in Article 7(1)(h), consistent with the similar provisions in Article 6 on genocide.

#### IV. OPPORTUNITIES FOR PROSECUTION OF PERPETRATORS OF GENOCIDE AND CRIMES AGAINST HUMANITY AGAINST THE ROHINGYA PEOPLE IN RAKHINE

The enforcement of international criminal law through the ICC is a direct enforcement system.<sup>73</sup> In the context of international criminal law enforcement through the ICC, there are several preliminary

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<sup>67</sup> Guénaél Mettraux, "Special Genocidal Intent/Dolus Specialis," in *International Crimes: Law and Practice: Volume I: Genocide* (Oxford University Press, 2024), 161–222, <https://doi.org/10.1093/law/9780198843115.003.0008>.

<sup>68</sup> Shabtai Rosenne, "How the Court Works," in *The World Court*, 2023, 79–80, [https://doi.org/10.1163/9789004632295\\_011](https://doi.org/10.1163/9789004632295_011).

<sup>69</sup> Kejahatan Genosida Dalam Perspektif, Aidil Putra Dalimunthe, and Noor Azizah, "Kejahatan Genosida Dalam Perspektif Hukum: Analisis Pidana Internasional Dan Hukum Pidana Islam," *JATISWARA* 39, no. 3 (November 2024): 353–67, <https://doi.org/10.29303/JTSW.V39I3.1151>.

<sup>70</sup> Zaenudin, Irwanto Irwanto, and Jaka Surya, "Aturan Hukum Pidana Internasional Dalam Pelanggaran Kejahatan Genosida," *YUSTISI* 12, no. 1 (February 2025): 341–56, <https://doi.org/10.32832/YUSTISI.V12I1.19030>.

<sup>71</sup> Annisa Azzahra, "Analisis Tragedi Semanggi I Terhadap Upaya Penuntutan Penyelesaian Pelanggaran HAM," *Jurnal Academia Praja* 3, no. 01 (February 2020): 103–12, <https://doi.org/10.36859/jap.v3i01.128>.

<sup>72</sup> Devy Sondakh, "Kejahatan Terhadap Kemanusiaan: Teori Dan Praktik," *TerAs Law Review: Jurnal Hukum Humaniter Dan HAM* 2, no. 3 (October 2019), <https://doi.org/10.25105/teras-irev.v2i3.5409>.

<sup>73</sup> Eddy O.S Hiarij, *Pengantar Hukum Pidana Internasional* (Jakarta: Erlangga, 2009).

provisions that must be given due consideration. The ICC's jurisdiction is subject to certain limitations in four areas, which Muladi refers to as legal parameters.<sup>74</sup>

Firstly, the jurisdiction relating to the subject matter (*rationae materiae*/subject matter jurisdiction)<sup>75</sup> is regulated in Article 5 of the 1998 Rome Statute, which delineates the scope of crimes that fall under the jurisdiction of the ICC.<sup>76</sup> Article 5 of the Statute stipulates the following:<sup>77</sup>

*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The court shall have jurisdiction in accordance with this Statute with respect to the following crimes:*

- (a) The crime of genocide, as defined in the relevant international conventions and codified in domestic law.*
- (b) Crimes against humanity;*
- (c) War crimes;*
- (d) The crime of aggression:*

As demonstrated, the Government of Myanmar has perpetrated two international crimes against the Rohingya ethnic group: namely, genocide and crimes against humanity. Crimes of genocide and

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<sup>74</sup> Muladi, *Statuta Roma Tahun 1998 Tentang Mahkamah Pidana Internasional: Dalam Kerangka Hukum Pidana Internasional Dan Implikasinya Terhadap Hukum Pidana Nasional* (Bandung: Alumni, 2011).

<sup>75</sup> *Ibid.*

<sup>76</sup> Apripari Irham and Apripari Irham, "Penegakkan Yurisdiksi International Criminal Court Atas Kejahatan Agresi Pasca Kampala Amendments Diadopsi Dalam Rome Statute," *SASI* 26, no. 4 (December 2020): 540–56, <https://doi.org/10.47268/sasi.v26i4.272>.

<sup>77</sup> The elements of the crime of genocide as outlined in Article 6 of the 1998 Rome Statute are derived from Article 2 of the 1948 Genocide Convention. These elements include two categories: the element of intent and the element of act description. Similar formulations are also used in other international legal instruments that establish the basis for international criminal courts, including ad hoc tribunals like the ICTY and ICTR, as well as the permanent ICC court. In the ICTY Statute, genocide is defined in Article 4, while in the ICTR Statute, it is outlined in Article 2. Arie Siswanto, *Hukum Pidana Internasional* (Yogyakarta: Andi, 2015).

crimes against humanity have been committed against the Rohingya ethnic group in Myanmar. These crimes were committed systematically and in an organised manner by the Government of Myanmar through various forms of violence, cruelty and discrimination.

Secondly, the jurisdiction of the ICC relates to time (*rationae temporis*/temporal jurisdiction).<sup>78</sup> In this particular instance, the jurisdiction of the ICC can only be applied to crimes committed or occurring subsequent to the entry into force of the Rome Statute of 1998, namely since 1 July 2002.<sup>79</sup> With regard to crimes falling under the material jurisdiction as stipulated in Article 5 that occurred prior to the entry into force of the Rome Statute of 1998, the MPI's jurisdiction cannot be applied to such cases. This is closely related to the application of the principle of *nullum crimen nulla poena sine lege* as a fundamental principle in the enforcement of criminal law, both at the national and international levels. The application of the principle of *nullum crimen nulla poena sine lege praevia*<sup>80</sup> concerns the principle of legality, which states that no criminal act can be said to exist in the absence of a law that regulates it. A consideration of the crimes of genocide and crimes against humanity committed by the Government of Myanmar against the Rohingya ethnic group reveals that these crimes meet the requirements for the application of the jurisdiction of the ICC. This is due to the fact that the crimes

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<sup>78</sup> Rome Statute 1998, Article 11 (1): "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute", Article 11 (2): "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3". Enkhsaikhan, "Rome Statute of the International Criminal Court."

<sup>79</sup> Nurijal Hafizh Syah and Jeane Neltje Saly, "Standar Ganda Yurisdiksi Mahkamah Pidana Internasional Dalam Kasus Perang Rusia-Ukraina Setelah Terbitnya Surat Penangkapan Presiden Vladimir Putin Sebagai Pelaku Kejahatan Perang," *Jurnal Kewarganegaraan* 7, no. 2 (October 2023): 1747–58, <https://doi.org/10.31316/JK.V7I2.5420>.

<sup>80</sup> Eddy O.S. Hiariej, *op. cit.*, hlm. 29.

committed against the Rohingya ethnic group occurred from October 2016 until the end of 2017. However, if these crimes are traced historically, it is evident that they have also occurred since 2012 until the present day.

Thirdly, the concept of territorial jurisdiction, otherwise known as jurisdiction over the territory where the crime was committed (*rationae loci*/territorial jurisdiction),<sup>81</sup> is also examined. In such cases, the ICC's jurisdiction can be invoked for crimes committed within the territory of a State Party to the 1998 Rome Statute, irrespective of the perpetrator's nationality.<sup>82</sup> Moreover, with regard to the territorial jurisdiction over crimes of genocide and crimes against humanity in Myanmar, it should be noted that the nation is not a party to the 1998 Rome Statute. This matter will be addressed in greater detail in the following section.

Fourthly, the jurisdiction of the ICC relates to the subject of the perpetrator of the crime or can be said to be personal/individual jurisdiction (*rationae personae*/personal jurisdiction).<sup>83</sup> In this

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<sup>81</sup> Rome Statute 1998, Article 12 (1): "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". Article 12 (2): "In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction in one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national". Article 12 (3): "If the acceptance of a State which is not Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9". Enkhsaikhan, "Rome Statute of the International Criminal Court."

<sup>82</sup> Mardiyanto, "Konsekuensi Yuridis Penerapan Yurisdiksi Mahkamah Pidana Internasional Terhadap Eksistensi Pengadilan Nasional Dalam Mengadili Kejahatan Internasional," *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 14, no. 1 (August 2023): 68–84, <https://doi.org/10.22212/JNH.V14I1.3774>.

<sup>83</sup> Rome Statute 1998, Article 25 (1): "The Court shall have jurisdiction over natural persons pursuant to this Statute". Article 25 (2): "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute". Enkhsaikhan, "Rome Statute of the International Criminal Court."

particular instance, it has been determined that the ICC possesses jurisdiction solely over individuals who are found to have committed international crimes. Consequently, it can be concluded that only individuals are accountable for their actions and can be subjected to trial at the ICC. Such persons include citizens who are or are the Head of State or Government,<sup>84</sup> such as the President, Prime Minister or other government officials, and military or civilian commanders.<sup>85</sup> However, individuals under the age of eighteen at the time of committing an international crime are not subject to the jurisdiction of the MPI.<sup>86</sup> In accordance with the provisions of this jurisdiction, Min Aung Hlaing, the current President of Myanmar and Commander-in-Chief of the Tatmadaw, may be deemed the individual with the highest degree of responsibility for international crimes committed against the Rohingya ethnic group in Rakhine. Consequently, he may be subject to the jurisdiction of the ICC.

As outlined in Article 13 (a), (b), and (c), there exist three methods by which a case may be brought before the Court. In essence, the following methods are to be considered: firstly, a referral by a State Party; secondly, a referral by the UN Security Council acting under Chapter VII of the UN Charter; and thirdly, an investigation by the Prosecutor acting on his own initiative.<sup>87</sup> These methods are related to the membership status of a country in that if the country concerned is a party to the Rome Statute, a situation may be referred to the

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<sup>84</sup> Rome Statute 1998, Article 28.

<sup>85</sup> Mega Oktaviana, "Yurisdiksi International Criminal Court (ICC) Dalam Penegakan Pelanggaran Hak Asasi Manusia Berat Oleh Omar Hassan Al-Bashir Di Darfur, Sudan," *BELLI AC PACIS (Jurnal Hukum Internasional)* 7, no. 2 (March 2022): 59–67, <https://doi.org/10.20961/BELLI.V7I2.59993>.

<sup>86</sup> Rome Statute 1998, Article 26: "The Court shall have no jurisdiction over any person who was under the age of 18 at time of the alleged commission of a crime".

<sup>87</sup> Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure, An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2019), <https://doi.org/10.1017/9781108680455>.

Prosecutor of the ICC by a State Party or may be initiated by the Prosecutor (*proprio motu*).<sup>88</sup> In the case of a state that is not a party to the Rome Statute, the only body authorised to submit a situation to the ICC under the provisions of Chapter VII of the United Nations Charter is the United Nations Security Council.<sup>89</sup>

In the context of the investigation into crimes against humanity and genocide allegedly perpetrated by the Government of Myanmar against the Rohingya ethnic group, it is evident that the provisions outlined in Article 13(a) and (c) are not applicable. This is due to the stipulated conditions for the applicability of these provisions, which require the State in question to be a signatory to the Rome Statute. As a party to the 1998 Rome Statute, the Government of Myanmar is not subject to these provisions. Article 13(a) stipulates that a 'state party to the Rome Statute' is obligated to submit a request for investigation to the Prosecutor.<sup>90</sup> Conversely, Article 13(c) mandates that the Prosecutor must conduct an investigation on their

own initiative (*proprio motu*) in cases that occur within the territory of a state that is a member of the 1998 Rome Statute. In this particular instance, the perpetrator of the crime of genocide against the Rohingya ethnic group is a citizen who also serves as the Commander-in-Chief of the Myanmar Armed Forces, General Min Aung Hlaing, and the crime is committed within the territorial borders of Myanmar. It is widely acknowledged that the Republic of

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<sup>88</sup> Pavel Šturma, "The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives," *Queen Mary Studies in International Law* 33 (January 2019): XI–XII, <https://doi.org/10.1163/9789004387553>.

<sup>89</sup> *Ibid.*

<sup>90</sup> Article 14 of the 1998 Rome Statute concerning the referral of a situation by a State Party, paragraph (1), states: A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, with a request that the Prosecutor investigate the situation to determine whether one or more specific persons should be charged with the commission of such crimes. Enkhsaikhan, "Rome Statute of the International Criminal Court."

the Union of Myanmar is not a signatory to the 1998 Rome Statute. Myanmar's non-participation as a state party to the 1998 Rome Statute can be traced through the MPI website, which does not include Myanmar in the list of member states.<sup>91</sup>

It is evident that, in accordance with Article 13 of the 1998 Rome Statute, the sole potential avenue for the presentation of a case pertaining to the alleged genocide committed by the Government of Myanmar against the Rohingya ethnic group before the International Criminal Court (ICC) through its enforcement mechanism is the submission of a case to the ICC Prosecutor upon referral by the United Nations Security Council, as outlined in Article 13(a) of the Rome Statute.

However, in the case of international criminal justice against perpetrators of genocide in Myanmar, prior to the Security Council referring a case, it is necessary to consider the provisions regarding the relationship between the ICC and the domestic courts or national courts of Myanmar. As stated in the Preamble to the Rome Statute and in Article 1 of the Rome Statute of 1998, the relationship between the ICC and the jurisdiction of national criminal justice systems is one of complementarity. It is important to note that the admissibility of a case may be contingent upon the following factors:<sup>92</sup>

(a) In the context of legal proceedings, the investigation and prosecution of a case is typically undertaken by a State that possesses jurisdiction over the matter. However, there are certain exceptions to this rule. Firstly, if the State in question is genuinely unwilling or unable to conduct the investigation or prosecution, then an alternative jurisdiction may be sought.

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<sup>91</sup> "States Parties - Chronological List | International Criminal Court," n.d.

<sup>92</sup> Pasal 17 Statuta Roma 1998.

(b) In the case of an investigation, the authority for prosecution resides with a state that has jurisdiction. However, should the state decide against pursuing legal action, this decision must be based on either genuine unwillingness or inability to proceed with prosecution.

(c) It is an established legal principle that the perpetrator of an offence may not be tried for the same act twice (*ne bis in idem*). However, there is an exception to this rule in the event that the proceedings against the accused were not genuine, as outlined in the following example:

1. The objective of the trial was to ensure that the accused individual would not be held accountable for any criminal actions within the jurisdiction of the ICC.
2. It is evident that the judicial proceedings were not conducted in accordance with the principles of independence and impartiality as outlined in the established norms of due process recognised by international law. Furthermore, the proceedings did not align with the fundamental purpose of the judicial system, which is to ensure the punishment of the perpetrator.

(d) It is evident that the available evidence is inadequate to substantiate the initiation of additional proceedings against the perpetrator.

In view of the aforementioned provisions, the case of Genocide committed by the Government of Myanmar meets the criteria for investigation by the ICC, or is otherwise admissible. This is grounded in Article 13(b), given that the provisions of Article 17(a), (b), and (c) have not been implemented by a State with jurisdiction. Furthermore, with regard to the provisions of Article 17(a), (b), and (c), it is evident that there is a reluctance and inability on the part of the state to

conduct an investigation or prosecution of the perpetrators of the crime of genocide. With regard to the provisions of Article 17(d), however, it is apparent that the case contains sufficient evidence for the Prosecutor to take further steps to prosecute the perpetrators.

With regard to the enforcement of law against perpetrators of genocide against the Rohingya ethnic group, it can be observed that international criminal law has been enforced against perpetrators of crimes under Article 5 of the 1998 Rome Statute. This is despite the fact that the perpetrators and the location of the crimes are not parties to the Statute. The case was subsequently referred by the UN Security Council under Article 13(b) of the Statute. An example of this is the case of Crimes Against Humanity alleged against Libyan President Muammar al-Qaddafi.

In the process of enforcing the law by the ICC in cooperation with the UN Security Council, in order to assist the ICC in prosecuting the perpetrators of crimes against humanity committed by Libyan President Muammar al-Qaddafi, based on Chapter VII of the UN Charter, the UN Security Council acted by issuing Resolution 1970.<sup>93</sup> It is vital to emphasise two key points in Resolution 1593, specifically points 1 and 2. In this resolution, the United Nations Security Council, operating under Chapter VII of the United Nations Charter, explicitly articulates its stance on the situation in Sudan. *"Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."*<sup>94</sup>

The basis for the International Criminal Court (ICC) to exercise jurisdiction over perpetrators of international crimes originating from non-States Parties to the Rome Statute, as well as crimes committed

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<sup>93</sup> "Resolution 1970 (2011) /: Adopted by the Security Council at Its 6491st Meeting, on 26 February 2011" (United Nations Security Council, February 2011).

<sup>94</sup> *Ibid.*

in the territory of a State that is not a State Party to the 1998 Rome Statute,<sup>95</sup> is provided by UN Security Council Resolution 1970, particularly point 4 above. This is achieved through the UN Security Council acting under Chapter VII of the UN Charter as the fulfilment of Article 13(b) of the 1998 Rome Statute. This is due to the fact that President Muammar al-Qaddafi is a perpetrator of crimes against humanity originating from Libya, where war crimes also occurred, and Libya is not a State Party to the 1998 Rome Statute.

In addition to point 4 of UN Security Council Resolution 1970, it is also important to highlight the key point of Resolution 1970, namely the content of Resolution point 5, which states that:

*It is hereby determined that the Libyan authorities shall provide full cooperation to and offer all necessary assistance to the Court and the Prosecutor in accordance with the stipulations of this resolution. While acknowledging that States not party to the Rome Statute are not bound by its provisions, it is strongly urged that all States and concerned regional and international organisations cooperate fully with the Court and the Prosecutor.*<sup>96</sup>

It is widely acknowledged that the enforcement of law in situations occurring in countries that are not parties to the 1998 Rome Statute through the referral mechanism by the UN Security Council to the Prosecutor, reinforced by UN Security Council resolutions, still has weaknesses in its implementation. It is evident that the United Nations Security Council has, through its resolutions, asserted that the state in question, hereafter referred to as the "*the Government of the State and all other parties to the case, shall cooperate fully and provide any*

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<sup>95</sup> Tiffani Ramalia Putri, Evi Deliana HZ, and Zulfikar Jayakusuma, "Kedudukan Negara Bukan Peserta Statuta Roma 1998 Dalam Mahkamah Pidana Internasional," *Jurnal Ilmiah Wahana Pendidikan* 9, no. 16 (August 2023): 737–43, <https://doi.org/10.5281/ZENODO.8264997>.

<sup>96</sup> "Resolution 1970 (2011) /: Adopted by the Security Council at Its 6491st Meeting, on 26 February 2011."

*necessary assistance to the Court and the Prosecutor*", as was the case in the enforcement of law against President Muammar al-Qaddafi. However, it is important to note that for states that are not parties to the 1998 Rome Statute, the enforcement of international criminal law against international crimes through the ICC, where jurisdiction is exercised upon referral by the UN Security Council to the ICC Prosecutor, is the only avenue for legal enforcement through the ICC mechanism that can be used as a basis to prosecute and punish perpetrators of international crimes.

Furthermore, the enforcement of law against perpetrators of genocide and crimes against humanity against the Rohingya ethnic group in Rakhine, Myanmar, may also be pursued using universal jurisdiction. Universal jurisdiction was developed as a means by which states could combat piracy in regions of the world where no state had territorial authority over the territory, known as *terrae nullius*.<sup>97</sup> The principle of universality is utilised to ascertain which state is entitled to initiate legal proceedings for piracy, the parameters within which this is permitted, and the modalities of law enforcement. In accordance with the principles of universal jurisdiction, states are at liberty to initiate legal proceedings and prosecute individuals accused of piracy, though they are not bound to do so. However, it should be emphasised that, despite this, it is widely agreed that states capture perpetrators of piracy at sea because it is in the interest of all states to combat maritime piracy.<sup>98</sup>

In analysing the crime of genocide as committed against the Rohingya ethnic group in Rakhine, Myanmar, in relation to the application of the principle of *aut dedere aut judicare* through universal jurisdiction,

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<sup>97</sup> Matteo Del Chicca, "Universal Jurisdiction as Obligation to Prosecute or Extradite," *WMU Journal of Maritime Affairs* 11, no. 1 (March 2012): 83–93, <https://doi.org/10.1007/s13437-012-0025-2>.

<sup>98</sup> *Ibid.*

it is necessary to first refer to the first convention governing genocide, namely the Convention on the Prevention and Punishment of the Crime of Genocide 1948. In this convention, the universal jurisdiction of national courts is reflected in the provisions of Article 6, which states the following:

*Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*<sup>99</sup>

The wording of Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide is unambiguous in clearly granting and stating which jurisdiction is competent to try perpetrators of the crime of genocide.<sup>100</sup> Firstly, it is imperative that perpetrators of genocide be subjected to trial by a court that is both 'competent' and located within the territorial jurisdiction where the crime was committed. Secondly, the convention grants authority to international criminal courts, which have jurisdiction over the State Parties that have accepted their jurisdiction. In the event that a State in which a crime of genocide has been committed is unable or unwilling to conduct its own trial in accordance with the first point of Article 3, it must accept the jurisdiction (accept the request) of another State that has jurisdiction (exercises universal jurisdiction) over the perpetrator to be tried in the requesting State. In such cases, the principle of *aut dedere aut judicare* assumes significance, as the state

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<sup>99</sup> United Nations, "Convention on the Prevention and Punishment of the Crime of Genocide Approved and Proposed for Signature and Ratification or Accession by General Assembly Resolution 260 A (III) Of."

<sup>100</sup> Nike Cahyaningrum et al., "Kejahatan Genosida Dan Hukum Internasional: Analisis Peran Icc Dan Hambatan Yang Dihadapi Dalam Penegakan Keadilan," *Aliansi: Jurnal Hukum, Pendidikan Dan Sosial Humaniora* 2, no. 1 (January 2025): 316–24, <https://doi.org/10.62383/ALIANSI.V2I1.762>.

in which the suspect is detained retains the prerogative to either initiate legal proceedings against the perpetrator or extradite them to another state (the requesting state) that has acknowledged and implemented universal jurisdiction.<sup>101</sup>

The enforcement of universal jurisdiction in relation to the Rohingya ethnic group, who have been subjected to genocidal acts, is strengthened by the fact that Myanmar is a signatory to the 1948 Genocide Convention. Myanmar signed the Convention on 30 December 1949 and ratified it on 14 March 1956.<sup>102</sup> This serves as both the basis and reinforcement for the applicability of universal jurisdiction against perpetrators of crimes of genocide against the Rohingya ethnic group. This is due to the widely acknowledged fact that the obligation to implement the provisions of an international treaty is considered to be a *jus cogens*. Consequently, a violation of such an obligation gives rise to an *erga omnes* obligation, the enforcement of which can be carried out by prosecuting the perpetrators under universal jurisdiction.

The application of universal jurisdiction in the enforcement of international criminal law, as evidenced by the case of Ariel Sharon, serves as a foundation for the prosecution of crimes against the Rohingya ethnic group. On 12 February 2003, the Belgian Supreme Court ruled to transfer the case of Ariel Sharon to the jurisdiction of

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<sup>101</sup> several other international treaties under the United Nations regulate similar obligations of *aut dedere aut judicare*, such as:

The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); The Hague Convention for Unlawful Seizure of Aircraft (1970); The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1979); The Convention against the Taking of Hostages (1979); The International Convention for the Suppression of Terrorist Bombing (1997). Rahim Hesenov, "Universal Jurisdiction for International Crimes - A Case Study," *European Journal on Criminal Policy and Research* 19, no. 3 (December 2013): 275–83, <https://doi.org/10.1007/s10610-012-9189-8>.

<sup>102</sup> Carol Pery, "United Nations Treaty Collection," *Reference Reviews* 24, no. 5 (2010): 28–29, <https://doi.org/10.1108/09504121011057716>.

a Belgian domestic court, following his resignation as Israeli Minister. The legal proceedings initiated in the Belgian court against Ariel Sharon were instigated by the victims of the 1982 Sabra Shatila-Lebanon incident. The events under discussion involved the mass killing (genocide) of Palestinian and Lebanese refugees by Israeli forces, with Sharon involved in his capacity as Minister of Defence.<sup>103</sup> The plaintiffs based their case on the Belgian Law of 1993, which recognises universal jurisdiction. This domestic law has its origins in the Loi du 16 Juin, also known as the Code Penal Belge, which codified the use and application of universal jurisdiction for international crimes in Belgian courts.<sup>104</sup>

The law grants Belgian courts jurisdiction to try war crimes, crimes against humanity, and genocide, regardless of where such crimes were committed. Consequently, it can be posited that the Belgian law signifies the most comprehensive endeavour by a state within the international system to enforce the law by extensively utilising its courts to adjudicate international crimes.<sup>105</sup> Consequently, cases that have been adjudicated by Belgian courts encompass not only those involving Ariel Sharon but also leaders of other nations, including Fidel Castro and Yasser Arafat.<sup>106</sup>

The Belgian courts<sup>107</sup> have provided a comprehensive explanation of the application of universal jurisdiction, and the Tadic Case and

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<sup>103</sup> Heru Susetyo, "Yurisdiksi Universal Dan Pengadilan Penjahat Kemanusiaan," *Hukum Online*, 2003.

<sup>104</sup> Roozbeh B. Baker, "Universal Jurisdiction and The Case Of," *ILSA Journal of International and Comparative Law* 1 (2011).

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> Asosiasi Pengajar Hukum Internasional, "Hukum Internasional Dalam Geopolitik Dunia Kontemporer: Perspektif Dan Pengalaman Indonesia," in *Prosiding Simposium Nasional Hukum Internasional Dalam Geopolitik Dunia Kontemporer: Perspektif Dan Pengalaman Indonesia "Edisi Revisi,"* 2017, 5–24.

Prosecutor v. Ntuyahaga<sup>108</sup> The case has established the applicability of universal jurisdiction to perpetrators of genocide. Myanmar is a State Party to the 1948 Genocide Convention, and as such, it is obligated to fulfil its obligations under international agreements, both as a State Party to the 1948 Genocide Convention and as a member of the United Nations. Myanmar must cooperate with other nations that have submitted formal requests for the prosecution of perpetrators, in accordance with the principles of international law and the application of jurisdiction.

## V. CONCLUSION

The Government of Myanmar's violent acts against the Rohingya ethnic group, ranging from persecution and discrimination to murder, not only constitute genocide under Article 6 of the 1998 Rome Statute, but also crimes against humanity under Article 7. These offences are considered peremptory norms (*jus cogens*) in international law as they involve organised and systematic actions aimed at destroying the Rohingya ethnic group, either wholly or in part. Regarding the possibility of enforcing the law on genocide and crimes against humanity, Article 13(b) of the Rome Statute allows the UN Security Council to refer the situation in Rakhine State, Myanmar, to the ICC Prosecutor under Chapter VII of the UN Charter. This mechanism is similar to that used by the UN Security Council in the case of crimes against humanity in Libya against President Muammar al-Qaddafi. Under Article 13(b), the UNSC can issue a binding resolution to compel member states to cooperate fully in the ICC's prosecution process, including by providing necessary assistance, even if the state concerned is not a party to the 1998 Rome Statute.

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<sup>108</sup> M. Cherif Bassiouni, "Jurisdiction: Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," in *International Criminal Law: Third Edition*, vol. 2, 2008, 153–99, <https://doi.org/10.1163/ej.9789004165311.i-602.14>.

Furthermore, as Myanmar is not a State Party, international cooperation is also expected in upholding the jus cogens norm, whereby violations give rise to an erga omnes obligation (obligation to prosecute) that may be adjudicated through universal jurisdiction recognised under international law.

## COMPETING INTEREST

None

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