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ILC Draft Articles on Crimes Against Humanity as an Emerging Safeguard Against Genocide and Discriminatory Violence

MASTER THESIS, INTERNATIONAL SECURITY AND LAW

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DATE: 02/09/2020

(80 pages/169,248 characters of main text excluding the title page, summary, tables of contents and abbreviations, footnotes, and bibliography)

SUMMARY

State accountability for failures to prevent mass atrocities is limited at best. A part of the problem lies in the lack of a specialized convention on crimes against humanity and the inability of the narrow scope of the Genocide Convention (GC) to bridge the gap. The aim of this thesis is to discuss whether the ILC's Draft Articles on Crimes Against Humanity (DA) offer a meaningful alternative to the GC in protecting groups from discriminatory violence that falls short of the legal definition of genocide. Focusing on the text of the DA, the thesis discusses two questions: (1) do the DA offer a broader definition with lower standards of intent; and (2) do the DA offer more robust and specific prevention and enforcement obligations. A case study applies the GC and the DA to the Rohingya crisis in Myanmar to test the merits of each instrument in practice.

To answer Question 1, the thesis concludes that the DA cover a broader spectrum of offenses than the GC, have a broader scope of the protected groups, and, most importantly, have an inherently lower standard of proof for the *mens rea* elements, including the discriminatory intent required for the crime of persecution. Thus, while the pending ICJ case on the Rohingya crisis is likely to fail because genocidal intent may not be held to be the only reasonable inference from the pattern of the anti-Rohingya violence, assessment under the DA would establish that the Rohingya have been victims to numerous crimes, which coupled with a clear discriminatory intent would amount to persecution. Regarding Question 2, the DA would impose on States a broader range of detailed prevention, punishment, and interstate cooperation obligations. Coupled with the broader scope of punishable offences, Myanmar's responsibility under DA would also be more extensive than under the GC. However, problems may arise due to the opt-outs in the DA mandatory dispute settlement provision and broader systemic issues of international law enforcement.

In conclusion, assuming there is the requisite political will to enforce the DA, the DA would be a very important step towards increased responsibility of states to prevent and punish mass atrocities. Its broad reach would offer a pragmatic legal base to call for an end to violence. Nonetheless, systemic issues of sovereignty, political interest, and enforcement of international norms, reflected by the DA's weak dispute settlement clause, remain crucial factors in determining the practical merits the future convention will bring. These warrant further academic study.

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TABLE OF ABBREVIATIONS

AP I	Additional Protocol I to the Geneva Conventions
ARSA	Arakan Rohingya Salvation Army
CAH	Crimes Against Humanity
DA	ILC Draft Articles on the Prevention and Punishment of Crimes Against Humanity
GC	Convention on the Prevention and Punishment of the Crime of Genocide
HCHR	United Nations High Commissioner for Human Rights
HRC	United Nations Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IIFFM	Independent International Fact-Finding Mission
ILC	International Law Commission
NGO	Non-Governmental Organization
NVC	National Verification Card
RS	Rome Statute of the ICC
R2P	Responsibility to Protect
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

The reiteration of "never agains" in response to each mass atrocity seems to have become a cliché devoid of meaning. Certainly, there have been countless lessons-learned and immense progress in international lawmaking, enshrined in the Geneva conventions, the Genocide convention, statutes of ICC and *ad hoc* tribunals et al. In the minds of many in the global West, atrocity crimes are reduced to a historic fact that belongs in textbooks, not in the agendas of contemporary governments. Nonetheless, atrocity prevention and punishment remain acute topics for academic study as some governments and non-state actors proceed with outrageous abuse of civilian populations even at the time this thesis is being written.

This research is motivated, in part, by a drive to understand the factors contributing to impunity for atrocity crimes. On the one hand, the fact that genocide and similar atrocities occur even in states that have ratified the 1948 Genocide Convention (GC) and other instruments is nothing short of outrageous. The awareness that the anarchic international order is designed to prioritize political interests and sovereignty over the enforcement of international law further contributes to this frustration. Widespread atrocity crimes, enabled or even perpetrated by states, are at best only addressed *ex post facto* and insofar as the necessary action does not contradict national interest.

On the other hand, the international community continues to express support for a number of atrocity prevention initiatives, among many others the Responsibility to Protect (R2P) doctrine, the establishment of the International Criminal Court (ICC) and the development of individual criminal responsibility for atrocity crimes, UN Fact-Finding initiatives, regional watchdogs etc. This reflects a shift towards an understanding that state sovereignty is limited by human security concerns. Here, an important development is the work on a new convention for the prevention and punishment of crimes against humanity (CAH), whereby states are now deliberating on the content of the Draft Articles prepared by the International Law Commission (ILC).

Given these challenges of holding states accountable for mass atrocities, the *Draft Articles on Prevention and Punishment of Crimes Against Humanity* (DA) as a potential treaty of equal caliber to the GC are a milestone in atrocity prevention that warrants academic attention even prior to its formal adoption. The DA present an opportunity to address some of the gaps and shortcomings in the punishment and prevention of mass atrocities. For example, the application of

the GC to the situation in Myanmar, where the long overdue legal proceedings in the ICJ have only just begun, is inherently challenging due to strict definitional limits and high standards of proof. Had Myanmar already been a signatory to a convention on CAH, the goal of ending atrocities against its Rohingya population and hold Myanmar accountable might have been within closer reach earlier on, without the need to overstretch the legal definition of genocide.

With this hope in mind, the research question posed by the thesis is: **could the DA serve as a meaningful legal safeguard against discriminatory violence that falls short of the legal definition of genocide through (1) a wider definitional scope with lower standards of proof than Art.II GC, and (2) more robust and specific prevention and enforcement obligations for States?** The formulation of these questions will be clarified in the chapter on methodology.

The thesis will show that the DA do offer a broader definitional scope while retaining the crucial focus on discriminatory violence in the crime of persecution. Furthermore, inherent in the *mens rea* of persecution is a lower standard of proof than that of genocide. Finally, the DA enumerates prevention and punishment obligations in much more detail than the GC, setting clear goals for States to develop their basic prevention capabilities. However, a significant drawback of the DA is the possibility to opt out of judicial dispute settlement. Thus, while the adoption of the DA would be a very welcome development in bridging the existing gap in law on atrocity prevention, tackling systemic prevention and enforcement issues requires further efforts. A case study on the Rohingya crisis in Myanmar will illustrate the differences and similarities between the two legal regimes and indicate the merits of each in practice.

Importantly, the DA are a work in progress. Therefore, the results of this research will only indicate possible implications of the DA if the contents remain unchanged. Nonetheless, it is important to open the discussion already at this stage to see if any challenges can be identified. The role of the DA in atrocity prevention has been subject to very limited research. Through its focus on comparing the DA to the GC, this thesis aims to contribute to the broader academic efforts in this area and indicate questions for further research.

2. RESEARCH DESIGN

2.1. METHODOLOGY

The aim of the thesis is to discuss whether the DA, as they stand now, could be a meaningful alternative to the GC in preventing and punishing mass atrocities against groups where the abuse falls short of the restrictive definition of genocide. The formulation of this aim warrants some explanation.

First, the reason why the DA are studied in comparison with the GC is that genocide is sometimes considered a specific type of CAH. This view is somewhat problematic as the key legal elements of CAH are contextual, but those of genocide – intent-based. Nonetheless, genocide and CAH share certain elements – both "constitute attacks on the most fundamental aspects of human dignity", both are normally part of a larger context massive infringements of human dignity, and both are usually carried out with a degree of state involvement or acquiescence.[1]

The thesis focuses on the CAH of persecution as it entails an important additional requirement - discriminatory intent based on the targeted population's group membership. Importantly, the CAH of extermination also has similarities to genocide as it covers mass killings, however it does not entail discrimination against a group. Yet, it is precisely the intent to destroy a group that elevates genocide to "the crime of crimes". Genocidal intent[2] is a very specific form of the discriminatory intent inherent in persecution. Thus, while characterizing instances of genocide as persecution might somewhat brush over the sinister nature of the crime to the frustration of the victims, it still captures the discriminatory nature of the crime while lowering the threshold for establishing the *mens rea.* Nonetheless, as the DA definition of persecution contains a link to the other crimes, these, including extermination, will also receive some comments.

Second, an inherent complication of such a research is the lack of an objective way to measure whether a legal regime offers "meaningful" or "effective" protection. Protection of human rights and atrocity prevention by definition seem to entail a critical studies aspect. Thus, simple questions of whether a certain law applies are too one-dimensional to reflect the complexity of

[1] Antonio Cassese, "The Rome Statute of the International Criminal Court: A Commentary" (*Oxford University Press*, 2002), 339.
[2] "Genocidal intent", "intent to destroy", "*dolus specialis*", and "specific intent" are used throughout the thesis interchangeably.

social, economic, political, legal, and ethical factors connected with protection of vulnerable groups. However, the thesis does not aim to contemplate all these issues and instead will focus on the most immediate implications of the wording and the contents of the DA as the beginning of the broader discussion. Accordingly, two key questions are posed:

(1) Is the definition of persecution in the DA more widely applicable than that of genocide in the GC with a lower standard of proof for its mental elements?
(2) Do the DA contain more specific prevention and punishment obligations than the GC, including a dispute settlement mechanism for state responsibility issues?

These questions assume (1) that legally recognizing the discriminatory element of violence is imperative for the emotional perception of justice and important for rallying political will to act, and (2) that robust and specific prevention and punishment obligations, including mandatory jurisdiction, facilitate the implementation and enforcement of a legal instrument. Hence, the DA would be a "meaningful" alternative to the GC if it combined the recognition of discrimination with a wider applicability and more specific prevention and punishment standards. State practice, especially how the characterization of an issue as a genocide or a CAH affects the political will to address a given crisis and the violating state's willingness to cooperate, is also important in evaluating the potential merits of the DA. However, because state behavior factors do not directly relate to the content of the DA, the thesis will not discuss these.

Third, to fully illustrate the merits of applying the DA to a legal issue in comparison to the GC, a case study on the Rohingya crisis in Myanmar will support the theoretical discussion. The case study will assess whether the direct violence and harmful policies against Myanmar's Rohingya population constitute a genocide and the CAH of persecution, according to the GC and the DA definitions. The Rohingya crisis is a very relevant issue because:

(a) the Rohingya have been victims of discrimination and abuse for decades. The spikes of violence since 2012 have resulted in especially large numbers of deaths and displaced persons and in immense suffering among the Rohingya. Myanmar has consequently been accused of genocide by numerous states and NGOs, and UN independent international fact-finding mission (IIFFM) has recently compiled a large body of evidence of both genocide and crimes against humanity.

(b) the ICJ in *The Gambia v. Myanmar* has only just begun assessing Myanmar's compliance with the GC. However, prior ICJ judgments on the application of the GC illustrated the difficulties of finding the requisite genocidal intent, to the great disappointment of the victims. Thus, there is cause for concern that *The Gambia v. Myanmar* will result in a similarly underwhelming judgment, whereas proceedings based on a convention on CAH, if such were applicable, might find Myanmar to have more extensive responsibility to prevent and punish atrocities.

Thus, the Rohingya crisis illustrates perhaps the most acute problem with the GC – that signing the GC has not averted an alleged genocide, perpetrated primarily by the military, but facilitated by the actions of other state organs. While the systemic compliance and enforcement issues are not something that a treaty like the GC can resolve, the narrow construction of genocidal intent and the vagueness of prevention and punishment obligations are a part of the problem. The main contribution of the DA would be bridging the state responsibility gap for CAH. Thus, seeing how it would theoretically apply to the Rohingya case might indicate its potential for similar cases in the future even if it would not aid the Rohingya crisis in any way. This would eliminate the need to stretch the GC definition of genocide.

There are, of course, other cases that highlight other shortcomings of the GC which could be mended by the DA, e.g. the focus on the physical destruction of the group (which precludes action against the identity-erasing treatment of the Uyghur Muslims in China), the limited list of the protected groups, the prevention obligations in the context of failed states (such as the Da'esh genocide against the Yazidis in Iraq) etc. However, it is unlikely that those cases would not, in addition to their own peculiarities, encounter the general obstacles exhibited by the Rohingya case. Therefore, this case study serves as an appropriate starting point, the conclusions of which can then be used in other case studies. Furthermore, the availability of factual sources on the Rohingya crisis will enable more precise and in-depth analysis.

2.2. SOURCES

Primary sources of law

Because the thesis aims to compare the GC and the DA, these two instruments will serve as the primary source on the contents of the relevant rules. Importantly, the thesis assumes that the

final convention on CAH would contain the exact same wording as the DA. If the *traveaux préparatoires* or state comments on the DA indicate that there is disagreement about the wording of a provision, this will be indicated. Importantly, while Myanmar has binding obligations under the GC as a matter of fact, the application of DA on the other hand is purely hypothetical and does not intend to establish a legal reality in the Rohingya case.

Supplementary sources for the interpretation of the law

The interpretation of the relevant rules will be based on the 1969 Vienna Convention on the Law of Treaties (VCLT), which in Art.31 prioritizes the "ordinary meaning [of] the terms of the treaty", interpreted in case of doubt "in the light of [the] object and purpose" of the treaty as a whole and supplemented by preparatory works and the historic context as envisaged by Art.32.[3] The meaning of specific elements will also be elucidated by use of academic commentaries and literature and case law.

In the discussion of the GC, the thesis will refer to ICJ in *Bosnia v. Serbia* and *Croatia v. Serbia* as the main sources of interpretation, which the pending judgment on Myanmar might closely resemble. Because these judgments are significantly influenced by the findings of the ICTY, reference will also be made to the relevant judgments of *ad hoc* tribunals.

Regarding the DA, authoritative sources for interpretation are limited at best. To make up for this handicap, the thesis will mainly refer to sources and case law on the definition of CAH in Art.7 of the Rome Statute of the ICC. The ICC and the DA definitions are nearly identical at this stage of drafting (and states have extensively commented on the need to ensure cohesion between the ICC regime and the DA[4]), therefore they are likely to present similar interpretive challenges. However, the ICJ would not be bound by the ICC interpretations, nor those of *ad hoc* tribunals, unless it considers them to be customary law. Furthermore, the ICJ might address the same interpretive questions differently. This disclaimer is even more important regarding the use of the

[3] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (hereinafter *Vienna Convention on the Law of Treaties)*, Arts.31(1) and 32. In the case of the GC, even though the VCLT does not apply retroactively, it is argued VCLT rules on interpretation reflect customary international law.

[4] International Law Commission, 71st Session, "Fourth Report on Crimes Against Humanity", A/CN.4/725 (Feb.18, 2019), paras.55 and 56. Notably, despite the significant support for the ICC definition and consistency between the two regimes, some other states have also criticized this approach and expressed concerns regarding the content of the ICC definition.

ICC's *Elements of Crimes* in this thesis. Thus, to emphasize, the interpretation of the DA in this thesis is indicative and hypothetical and does not aim to establish an actual legal reality.

Sources on the Rohingya crisis

The Rohingya crisis and the role of state bodies and other organizations therein has been extensively studied by two UN IIFFMs in 2018 and 2019. The thesis will mostly rely on those findings, as the ICJ does in the ongoing *The Gambia v. Myanmar* proceedings, supplemented by academic literature and news sources as needed.

2.3. CHAPTER PLAN

To summarize the research focus and methodological choices of this thesis, the main chapters will proceed as follows: Chapter 3 will discuss the definition of genocide according to Art.II of the GC, which will be applied to the Rohingya case in Chapter 4. Chapters 5 and 6 will follow the same structure to discuss the scope and applicability of the DA. Taken together, this will constitute the answer to Question 1.

Chapter 7 will discuss the prevention and enforcement obligations under both legal regimes in an answer to Question 2. Finally, the Conclusion will summarize the key findings of the preceding chapters and the answers to the two research questions, briefly comment on the wider systemic issues that impede atrocity prevention, and invite further research on the role of the DA in atrocity prevention.

3. GENOCIDE

To assess whether the DA has any potential to protect vulnerable groups where a case fails to meet the legal definition of genocide, it is imperative to first review the scope of the Art.II GC definition of genocide, which also constitutes customary international law:[5]

> *In the present Convention, 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;*

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Feb. 26, 2007), I.C.J. Reports 2007, p. 43, (hereinafter "*Bosnia v. Serbia"*), para. 161.

(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

Art.III follows with a list of punishable acts, e.g. incitement, conspiracy, or attempt to commit genocide etc. This chapter will group the elements of Art.II into three categories – (1) the protected groups; (2) genocidal acts; and (3) the mental element – and discuss the scope and meaning of each element with reference to the relevant case law, in particular the *Bosnia v. Serbia* judgment.

3.1. THE PROTECTED GROUPS

Art.II limits the protective scope of the GC to four groups – national, racial, ethnic, and religious – leaving no room for extension of this list by analogy.[6] The exhaustive list of protected groups has been subject to criticism since the drafting of the GC.[7] Nonetheless, the general agreement among scholars is that the drafting states did not intend to extend the same degree of protection to, e.g., political groups. Instead, the need for a narrow, difficult to abuse definition that relies on relatively stable group characteristics was emphasized.[8] This highlights the first opportunity for the DA to mend some of the shortcomings of the GC, as persecution explicitly covers more groups and is open for expansion in the future, while other CAH have no such limits.[9]

Two important clarifications must be made regarding (1) the scope of the protected groups; and (2) the targeting of the groups *as such*. First, the *ad hoc* tribunals, particularly the ICTR in *Akayesu*, have made some important clarifications regarding the scope of each protected group.

A ***national group*** is a group "perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".[10] A ***racial group*** is a group defined by "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[11] A ***religious group*** refers to "theistic, non-theistic, and

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[6] William A Schabas, "Genocide in International Law" 2nd Edition, (Cambridge University Press, 2009): 117.
[7] *Ibid.* 117-121; 151.
[8] Carola Lingaas, "Defining the protected groups of genocide through the case law of international courts", International Crimes Database Brief 18 (Dec. 2015): 6; Schabas, *op.cit.*: 117 and 132, noting that the concept of a political group may rely on rather arbitrary criteria.
[9] Rhea Brathwaite, "Towards Greater Coherence in International Criminal Law: Comparing Protected Groups in Genocide and Crimes Against Humanity" in Morten Bergsmo and Song Tianying (eds.), "On the Proposed Crimes Against Humanity Convention" (*Torkel Opsahl Academic EPublisher*, 2014): 229.
[10] *Prosecutor v. Akayesu*, Judgment, Trial Chamber I, ICTR-96-4-T (Sep. 2, 1998): para.512.
[11] *Ibid.*: paras.514-516.

atheistic groups which are united by a single spiritual ideal".[12] Lastly, an ***ethnical group***, a group added to "extend protection to doubtful cases"[13], is elegantly defined in *Kayishema and Ruzindana* as "[a group] whose members share a common language and culture; or a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including the perpetrators of the crimes (identification by others)".[14] The ICTY in *Jelisić* and *Brđanin* argued along similar lines, adding that perpetrators distinguish a group on the basis of characteristics which they consider to be particular to the targeted group.[15] Thus, cases where the targeted group or its defining characteristics are a subjective social construct can still be considered under Art.II, although an element of objectivity is desirable.[16] This interpretation has been endorsed by the ICC in *Al-Bashir,* which furthermore also rejects a negative definition of the targeted group.[17]

Second, a genocidal act must be aimed at the destruction of the group *as such*.[18] This reflects the purpose of the GC - to protect groups. Individuals are simply protected as "the means used to achieve the ultimate criminal objective with respect to the group"[19] because the individual victims are targeted because destroying them would mean destroying the group.[20] Thus, the formulation "group as such" serves to distinguish genocide from isolated incidents of murder as a hate crime or from the CAH persecution, which protects *individuals* from discriminatory violence.

3.2. THE PROHIBITED ACTS

Art.II GC proceeds with a list of acts that constitute genocide. Importantly, although the GC establishes legal obligations only towards states, for an act to qualify as genocide it need not

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[12] Matthew Lippmann, "A road map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide", *Journal of Genocide Research*, 4/2 (2002): 182.
[13] Fanny Martin, "The Notion of 'Protected Group' in the Genocide Convention and Its Applicant", in Paola Gaeta, The UN Genocide Convention: A Commentary, (*Oxford*, 2009): 116.
[14] *Prosecutor v. Kayishema and Ruzindana*, Judgment, Trial Chamber II, ICTR-95-1-T (May 21, 1999): para. 98.
[15] *Prosecutor v. Jelisić,* Judgment, Trial Chamber I, IT-95-10-T (Dec. 14, 1999), para. 71; *Prosecutor v. Brđanin*, ICTY, IT-99-36-T, Judgment, Trial Chamber II (Sep. 1, 2004), para. 683.
[16] Schabas, "Genocide in International Law", *op.cit.*:125; *Bosnia v. Serbia*, para 191.
[17] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, Pre-Trial Chamber I, ICC-02/05-01/09 (Mar.4, 2009), paras. 135 and 115–16. See also *Bosnia v. Serbia, op.cit.*: para. 193.
[18] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277 (hereinafter "Genocide Convention"): Art.II.
[19] UN General Assembly, "Report of the International Law Commission on the Work of its 48th Session 6 May-26 July 1996", *Yearbook of the International Law Commission*, A/51/10, 1996: Art. 17(6).
[20] Florian Jessberger, "The Definition and the Elements of the Crime of Genocide", in Gaeta, *op.cit.*:109.

be committed or directed by a state body.[21] The Art.II list is exhaustive, however any of the enumerated acts can individually amount to genocide as long as the act has been committed with the specific intent to destroy the protected group - the essence of the definition of genocide lies in its unique *mens rea*, and it is therefore irrelevant whether the accused actually succeeded in the genocidal act itself or the destruction of the group.[22] The contents of the prohibited acts also warrant a more detailed comment.

Art.II(a) Killing members of the group is interpreted as murder of at least one member of the group.[23] While the killing must be conscious, intentional, and volitional (to avoid the inclusion of accidents or negligence), there is no need to specifically prove premeditation of the act – genocidal intent remains the crux of the *mens rea* and already as such encompasses a degree of premeditation.[24]

Art.II(b) Causing serious bodily or mental harm to members of the group has been widely interpreted to include various types of serious damage to health, physical or mental, injuries, mutilation, disfigurement and organ damage, damage to senses, torture, sexual violence and rape, inhumane and degrading treatment.[25] The ICTR has further established a gravity threshold - the damage caused must result in a "grave and long-term disadvantage to a person's ability to lead a normal and constructive life", although it need not be permanent or irreversible.[26]

Art.II(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part covers measures intended to result in the long-term physical extinction of the group or measures likely to have such an effect.[27] Although the *Elements of Crimes* allows for the infliction of such measures even upon a single person, in practice it appears that Art.II(c) is aimed towards more widespread actions.[28] Examples include systematic

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[21] Genocide Convention, Art.IV reads: "*Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*".
[22] Jessberger, *op.cit*.: 94; 105.
[23] International Criminal Court, *Elements of Crimes,* 2011, ISBN No. 92-9227-232-2 (hereinafter "Elements of Crimes"): 2.
[24] Gideon Boas et al., "Elements of Crimes Under International Law", (*Cambridge University Press*, 2008): 179; Lippmann, op.cit.: 181.
[25] Boas, op. cit.: 181; *Elements of Crimes*: 2.
[26] Jessberger, *op.cit*.: 99. *Prosecutor v. Karadžić*, Judgment, Trial Chamber, IT-95-5/18-T (Mar. 24, 2016): para.543.
[27] Lippmann, op.cit.: 182.
[28] *Elements of Crimes:* 3.

denial of housing, deportation, deprivation of essential survival resources (e.g. food, water, medical supplies, and clothing), excessive forced labor, imprisonment in concentration or extermination camps etc.[29] Art.II(c) appears open to further interpretation, as the duration of the conditions and the particular vulnerabilities of the targeted group will greatly determine the harmful effect of such measures in a given case.[30] Importantly, because this act seems to presuppose more widespread or organized efforts, there may be an implicit organizational policy or common plan requirement akin to the context elements of CAH.[31]

Art.II(d) Imposing measures intended to prevent births within the group covers measures that restrict the group's reproductive capability, e.g. forced sterilization or birth control, compulsory abortions, prevention of marriages, gender segregation, or rape – the birth-preventing measures can also have purely mental effects on the group.[32] Importantly, whether the measures actually resulted in reduced birth rates is immaterial as long as the aim to forcibly prevent births and thus destroy the group is present.[33] Finally, similarly to Art.II(c), Art.II(d) suggests an implicit plan or policy element.[34]

Art.II(e) Forcibly transferring children of the group to another group is largely self-explanatory in the acts it refers to. Interestingly, Art.II(e) does not directly concern the physical destruction of the group, but rather focuses on preventing the children of the group from developing an identity associated with this group – as close as the drafters could get to the inclusion of "cultural genocide". However, this act is irrelevant for the Rohingya case and will not be discussed in further detail.

3.3. THE MENTAL ELEMENT

Art.II GC requires an "*intent to destroy, in whole or in part a national, ethnic or religious group as such*," meaning the unequivocal establishment of such intent is essential for the legal establishment of genocide.[35] Genocide appears to have a double mental element of sorts – a general

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[29] *Ibid.*; Jessberger, op. cit.: 100.
[30] Boas, op. cit.: 184.
[31] Antonio Cassese, "Cassese's International Criminal Law" Third Edition (*Oxford University Press*, 2013).:125.
[32] *Prosecutor v. Musema*, Judgment, Trial Chamber, ICTR-96-13-T (Jan. 27, 2000), para.158; *Prosecutor v. Akayesu*, *op.cit.*, para.508.
[33] Jessberger, op. cit.: 102.
[34] Cassese, "Cassese's International Criminal Law", *op. cit.:* 125.
[35] *Prosecutor v. Krstić*, Appeals Judgment, Appeals Chamber, IT-98-33, (Apr. 19, 2004): para.134.

intent to carry out the Art.II act itself and a specific intent to destroy a protected group through the commission of that act.[36] Thus, to emphasize, genocidal intent stipulates that the victim is targeted not only because of their group membership (i.e. with discriminatory intent), but also as a means to a larger end to destroy the group. Thus, genocide is distinguished from persecution where "mere" discriminatory intent suffices. The motive for destroying the group, however, remains irrelevant.[37] Consequently, due to the importance of the mental element and the high and specific standard thereof, it is not surprising that it is one of the most controversial questions in legal proceedings on genocide charges.

Some scholars argue that genocidal intent is present when a perpetrator has specific knowledge of the organized attempt to destroy a protected group, similarly to how CAH requires awareness of the context elements.[38] Indeed, an element of knowledge is recognized by the ICC in Art.30 RS whereby knowledge coupled with intention are the two components of criminal intent.[39] Here, knowledge refers to an "awareness that a circumstance exists or a consequence will occur in the ordinary cause of events".[40] Strauss, for example, argues for a "reasonable person" approach based in general principles of criminal law – a reasonable person would be aware that the descriptive elements of genocide would be realized by their actions in the normal course of events and that these elements have a certain normative significance.[41] Nonetheless, most sources focus on the wording of Art.II in line with the VCLT treaty interpretation rules. Thus, the prevalent view is that while knowledge can *indicate* the intent to commit genocide, it cannot replace the actual requirement of an aim to destroy the group.[42]

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[36] Kai Ambos, "What Does 'Intent to Destroy' in Genocide Mean?" *International Review of the Red Cross* 91/876 (2009): 834.
[37] Milena Sterio, "The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide" *Emory International Law Review* 31/2 (2017): 275; Elisa Novic, "Physical-Biological or Socio-Cultural 'Destruction' in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations", *Journal of Genocide Research* 17/1 (2015): 66.
[38] Jessberger, *op. cit.:* 106-107.
[39] Schabas, "Genocide in International Law", *op.cit.*: 242. UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6: Art.30.
[40] Schabas, "Genocide in International Law", *op.cit.*:242
[41] Ekkehard Strauss, "Reconsidering Genocidal Intent in the Interest of Prevention", *Global Responsibility to Protect* 5 (2013): 137.
[42] Jessberger, op. cit.: 106-107.; Schabas, "Genocide in International Law", *op.cit.*:243; Strauss *op.cit.*:137.

Therefore, the standard of proof becomes a very important part of assessment under the GC – genocidal intent must be proven beyond reasonable doubt.[43] In absence of a confession or tangible evidence of a plan to commit genocide, courts must often resort to assessing a variety of circumstantial evidence that forms a pattern of conduct, from which genocidal intent can be inferred by eliminating all alternative conclusions.[44] For example, the ICTY has even inferred intent from the simultaneous attacks on religious and cultural property of a group.[45] Reference may be made to documentary evidence, instances of hate speech, incitement and other verbal acts, repetition of destructive and discriminatory acts, physical attacks, the methods employed, the planning, the gravity and the extent of injuries etc.[46] However, the ICJ judgment in *Bosnia v. Serbia* is a prime example that even finding a widespread pattern of severe abuse may fail to meet the requirements for establishing the *dolus specialis.*

The *Bosnia v. Serbia* judgment is an example of a restrictive reading of the GC. While the ICJ did rule that the massacre in Srebrenica legally constituted a genocide, other instances of atrocities committed in Bosnia were judged as not having been committed with the same genocidal intent even though the targeted group was the same. The ICJ thereby distinguished an intent to destroy from an intent to discriminate or an intent or to carry out ethnic cleansing.[47] Consequently, the ICJ held Serbia responsible only for failing to prevent genocide and only in relation to the Srebrenica massacre.[48] The subsequent ICJ judgment in *Croatia v. Serbia* applied similar reasoning.[49] These judgments, which follow the reasoning by the ICTY, are highly illustrative of just how narrow the definition of genocide is in practice.

Furthermore, other aspects of the Art.II GC formulation of genocidal intent also warrant some clarification. These include the terms "destroy", "in whole or in part", and "as such", as well

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[43] However, contrast with ICTY in *Prosecutor v. Karadžić* where the reasoning arguably did not prove genocidal intent beyond reasonable doubt and relied heavily on inference from circumstantial evidence. See the discussion in Sterio, *op.cit.*

[44] Sterio, *op.cit.*: 275; David L. Nersessian, "The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention." *Cornell International Law Journal* 36/2 (2003-2004): 314; *Prosecutor v. Akayesu*, para.523; Strauss *op.cit.*:137.

[45] Strauss *op.cit.*:139.

[46] Nersessian, *op.cit*: 314.

[47] Sterio, *op.cit.*: 281.

[48] Sterio, *op.cit.*: 282.

[49] Sterio, *op.cit.*: 282.

the question whether the genocidal intent requirement implicitly requires a plan or policy. Each question will be considered in turn.

First, it has been debated whether the destruction of the group must be physical, or the GC also covers destruction of the group identity and distinguishing characteristics. Despite numerous arguments on the merits of including "cultural genocide" within the scope of the GC, there is overwhelming support for a narrow construction of genocide as a physical-biological destruction of the group. For example, the GC itself focuses on the physical destruction of the group only, and Art.II(e) on the forcible transfer of children is perhaps as close as the drafters could come to include something in the spirit of "cultural genocide".[50] This approach is widely endorsed by international tribunals. For example, the ICTY in *Krstić* held that 'destruction' means physical and biological destruction, not the destruction of a linguistic, cultural or historic identity.[51] The ICJ in *Croatia v. Serbia* also confirmed that even if the genocidal acts themselves need not involve a physical/biological element, the *aim* must nonetheless always be the physical/biological destruction of the group.[52] Nonetheless, as the aforementioned judgments also recognize, there is legal value in actions aimed at the destruction of the group's identity and in the general discrimination against the targeted group as evidence of broader genocidal intent.[53]

Second, the aim to destroy must be directed at the targeted group *as such,* meaning the perpetrator must intend to destroy the group "as a separate and distinct entity"'.[54] This serves to, again, distinguish genocidal intent against a group from discriminatory intent against individuals.

Third, Art.II GC covers the destruction of the group "in whole or in part". Nersessian points out two approaches to this element evident from case law of the *ad hoc* tribunals. On the one hand, the quantitative approach assumes that the targeting of a substantial number of group members will bring about the destruction of the group, thus the focus is on the sheer number of victims.[55] On the other hand, the qualitative approach assumes that not all group members have the same

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[50] Kurt Mundorff, "Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)," *Harvard International Law Journal* 50 (2009), 82.
[51] *Prosecutor v. Krstić*, *op.cit.*: para.144; Novic *op.cit.*: 65; Strauss *op.cit.*:140-141.
[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment (merits), (Feb. 3, 2015), para.136.
[53] Novic, *op.cit.*: 65.
[54] Nersessian *op.cit.*: 317.
[55] *Ibid.*

"value" for the purposes of the survival of the group. Therefore, even if the targeting within the group is limited to the intellectual elite, religious leadership, women or men, genocidal intent may be inferred regardless of the number of victims.[56] However, this approach is not without its controversies and does not enjoy a widespread judicial endorsement. In absence of a clear link between the destruction of a certain part of the group and the overall survivability of the group as such, the qualitative approach alone may not suffice.[57] In general, the application of both the quantitative, but especially the qualitative approach must be careful to conform with the wording of Art.II GC, as well as the overall object and purpose of the Convention.

Furthermore, the *ad hoc* tribunals have clarified a threshold of severity. First, genocide can be confined to a specific geographic area, and the perpetrator need not seek the total extermination of the group around the globe.[58] However, the definition of the geographic area may impact the outcome of the assessment, therefore this approach is not without inherent problems. A second important clarification, albeit purely theoretical, is the decisive role of genocidal intent. Provided the *mens rea* requirements are satisfied, a limited act against a single individual can in theory amount to genocide.[59] In practice, however, establishing the requisite intent may be near impossible in such cases.

Finally, the *ad hoc* tribunals have also tackled the question of a plan or a policy element to the definition of genocide. The ICTY in *Jelisić* held that the existence of a plan or policy is not a "legal ingredient" of the crime, but it may be an important factor in determining genocidal intent.[60] The ICTY in *Krstić* further noted the importance of a policy element where complicity in a larger criminal enterprise is concerned.[61] The ICTR in *Kayishema and Ruzindana* argued similarly that it is difficult to carry out a genocide without a plan or organization.[62] Schabas summarizes the work of *ad hoc* tribunals, noting that in practice, convictions for genocide rarely occur where a

[56] *Ibid.*: 323.
[57] *Ibid.*: 323-324.
[58] Schabas, "Genocide in International Law", *op.cit.*:285.
[59] ICTR refuted the argument that genocide cannot be committed by "isolated individuals or with trivial means" in *Prosecutor v. Kayishema and Ruzindana*, Appeals Judgment, Appeals Chamber, ICTR-95-1-A (Jun. 1, 2001) paras.167-170. This view is repeatedly reaffirmed in the *Elements of Crimes*, *op.cit.*
[60] *Prosecutor v. Jelisić*, Appeals Judgment, Appeals Chamber, IT-95-10-A (Jul. 5, 2001): para.48.
[61] *Prosecutor v. Krstić*, Judgment, Trial Chamber, IT-98-33-T (Aug. 2, 2001): para.549.
[62] *Kayishema and Ruzindana*, Trial Chamber, *op.cit.*: para.94.

plan or a policy has not been established.[63] Thus, it seems fair to conclude that while the wording of Art.II GC does not require a plan or a policy, in practice these are important factors in the determination of whether genocidal intent can be inferred from the pattern of conduct.

3.4. CHAPTER CONCLUSION

To summarize, a given case will qualify as a genocide for the purposes of the GC if:

1. The victim group self-identifies or is perceived as a distinct national, racial, ethnical, or religious group;
2. One or more of the prohibited acts listed in Art.II GC is committed against one or more member of the group;
3. The prohibited acts are committed with the specific genocidal intent to physically or biologically destroy the protected group as such in whole or in substantial part within a particular geographic area;
4. The pattern of conduct allows for no other inference than that of a genocidal intent.

With these criteria in mind, the thesis will now turn to the application of Art.II GC to the case study on the Rohingya crisis in Myanmar.

4. THE ROHINGYA CRISIS AS A GENOCIDE

The aim of this chapter is to assess whether the treatment of the Rohingya by the Tatmadaw (the armed forces of Myanmar), and the Government between 2017 and 2019 constitutes genocide for the purposes of the GC. 2017 saw the peak of large-scale violence against the Rohingya (a.k.a. "clearance operations") by Tatmadaw, the armed forces of Myanmar, whereas 2019 marks the end of the mandate of the UN IIFFM, which issued two reports on the crisis in 2018 and 2019. After a brief overview of the situation in Myanmar, the thesis will proceed to apply the criteria from Chapter 3 to the case study.

[63] Schabas, "Genocide in International Law", *op.cit.*:246.

4.1. THE SITUATION IN MYANMAR

The Rakhine State in Myanmar comprises numerous ethnic and religious groups. The majority of the population are ethnic Rakhine and Buddhist by faith. Muslims, of which the majority are Rohingya, are the second largest religious group.[64] Although the Rohingya have been victims to violence and discrimination for decades, the so-called "clearance operations" by the Tatmadaw, in 2017 attracted much international situation as the peak of anti-Rohingya violence.[65]

The "clearance operations", which peaked in Fall 2017, entailed razing of Rohingya villages, arson, indiscriminate shooting at villagers and their houses, rape and torture of survivors etc.[66] The IIFFM accounts of the most notable incidents suggests a similar pattern of violence across different villages. The "clearance operations" were justified as a counter-insurgency measure against the Arakan Rohingya Salvation Army (ARSA), whose coordinated attacks on a military base and numerous security outposts on August 25, 2017 triggered the wave of violence by the Tatmadaw.[67] Meanwhile, the broader systemic discrimination against the Rohingya, a factor driving the ARSA activities, is justified by a government narrative that the Rohingya are illegal immigrants from the territories of modern-day Bangladesh.[68] There is indeed significant controversy regarding the historic account of Rohingya presence in the Rakhine state, however the general agreement is that the Rohingya settlements in the Rakhine state predate the colonial era.[69]

Nonetheless, the official narrative remains pervasive, as the Government and civilians fear what they perceive as a terrorist threat from the ARSA and alleged territorial ambitions.[70] This narrative is further reinforced by the 1982 Citizenship Law, which excludes the Rohingya from the list of "national races" that are eligible for citizenship by default.[71] The consequent

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[64] UN Human Rights Council, 39th Session, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar" A/HRC/39/CRP.2, 2018 (hereinafter "IIFFM Report 2018"): para.406.
[65] Adam E. Howe and Zachary A. Karazsia, "A Long Way to Peace: Identities, Genocide, and State Preservation in Burma, 1948–2018", *Politics, Groups, and Identities* 8/7 (2018): 689.
[66] IIFFM Report 2018, *op.cit.*: para.752.
[67] *Ibid.*: para.749.
[68] *Ibid.*: paras. 407, 748. The Rohingya are called "Bengalis" by the Government – a term which the Rohingya reject.
[69] Howe and Karazsia, *op.cit.*: 689.
[70] Rajika L. Shah, "Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis" Loyola Law School, Los Angeles Legal Studies Research Paper No. 2018-36 available at: https://ssrn.com/abstract=3275649: 186.; Anthony Ware and Costas Laoutides, "Myanmar's 'Rohingya' Conflict: Misconceptions and Complexity", *Asian Affairs*, 50/1 (2019): 64.
[71] Socialist Republic of the Union of Burma, *Burma Citizenship Law*, 15 October 1982, https://www.refworld.org/docid/3ae6b4f71b.html: Art.3.

statelessness of most Rohingya, as well as their lack of other proof of legal status or identity (e.g. the authorities have ceased to issue birth certificates to Rohingya children[72]) further facilitates their vulnerability to abuse - many human rights and livelihood guarantees in practice depend on the individual's affiliation to a state from which the individual may request protection.

Simply put, the Rohingya have been placed in a lacuna of legal protection unless they apply for citizenship (which requires providing documented evidence of familial links to Myanmar prior to the establishment of the State in 1948 – a tall order for a population where over 25% lack official documents or have lost them due to violence or displacement[73]). In doing so, the individual is forced to endorse the official narrative that classifies the Rohingya as immigrants.[74] The Authorities attempt to force the Rohingya to accept National Verification Cards (NVCs), which explicitly recognize the holder as a non-citizen, through making various acts essential for daily survival conditional upon a valid NVC or through threats of violence.[75]

In short, the IIFFM describes in great detail how the Rohingya are routinely subject to violence by the Tatmadaw and State authorities, which involves not only killings and destruction of settlements, but also restrictions on movement, confinement into camps, restricted access to food or medical care, arbitrary detention, torture in custody, sexual violence etc. The IIFFM characterizes the situation as the CAH of persecution and inhumane treatment with evidence of genocidal intent and serious risk that genocidal actions may occur or recur.[76]

Clearly, an assessment of the situation under the GC and the DA is warranted. This chapter will focus on the GC, whereas assessment under the DA will be the focus of Chapter 6. The IIFFM conclusions do not guarantee that the ICJ in *The Gambia v. Myanmar* will come to the same conclusions or reason in the same manner. Importantly, this chapter does not seek to definitely establish the legal reality of the situation, but rather draw parallels to ICJ reasoning in the past to highlight the definitional obstacles that the pending case may encounter and the challenges of

[72] IIFFM Report 2018, *op.cit.*: paras.460-1.
[73] UN Human Rights Council, 42nd Session, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar" A/HRC/42/CRP.5, 2019 (Hereinafter "IIFFM Report 2019"): para.63.
[74] *Ibid.*, para.66.
[75] *Ibid.*, paras.73-76.
[76] *Ibid.*: para.58.

applying the GC in general. Thus, the claims by the IIFFM will be weighed against the standards set by the ICJ in the *Bosnia v. Serbia* judgment.

Chapter 4 will be structured in line with the conclusion of Chapter 3, which grouped the requirements for the legal establishment of genocide into three categories: (1) that the Rohingya constitute a protected group for the purposes of Art.II GC; (2) that the treatment of the Rohingya corresponds to one or more of the prohibited acts; and (3) that the perpetrator harbored the requisite intent to destroy the Rohingya, proven by excluding other reasonable inferences from the pattern of conduct. This mirrors the method and order of questions used by the ICJ in *Bosnia v. Serbia.*

4.2. THE ROHINGYA AS A PROTECTED GROUP

First, the legal assessment of the Rohingya crisis must address whether the Rohingya as a group are entitled to protection under the GC, i.e. whether the Rohingya constitute an ethnical, national, racial, or religious group. In the present case, the Rohingya are most accurately characterized as an ethnical group.

On the one hand, Rohingya could also be considered a "religious group". One of the distinguishing characteristics of the Rohingya as a group is their Islamic faith, whereas the majority of Myanmar's population is Buddhist. However, although other Muslim minority groups are also victims to discrimination and anti-Islamic rhetoric and policies, most of the violence in the Rakhine state in the context of the "clearance operations" seems to target the Rohingya specifically.[77] Indeed, the Government does seem to single out the Rohingya, whom they refer to as "illegal Bengal immigrants", while other Muslim minority groups have not, e.g., been denied inclusion in the list of "national races".[78] This suggests that if one adopts a purely subjective approach to group membership, the Rohingya could perhaps be characterized as a "national" group instead.

Indeed, the Rohingya crisis features the question of nationality quite prominently. The notorious 1982 Citizenship Law effectively rendered the Rohingya stateless as only groups listed as "national races" were entitled to automatic citizenship.[79] Should the Rohingya choose to apply

[77] See the IIFFM Report 2018, *op.cit.*
[78] Nehginpao Kipgen, "Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum", *Journal of Muslim Minority Affairs*, 33/2 (2013): 300; Howe and Karazsia, *op.cit*: 14.
[79] IIFFM Report 2019: para.63.

for a NVC or citizenship, the complex process involves, *inter alia,* answering non-amendable questions regarding the time of entry of the applicant's family into Myanmar, thus forcing an applicant to endorse elements of the anti-Rohingya narrative of the Myanmar government.[80] Furthermore, the NVCs, a pre-requisite for many day-to-day survival activities do not permit the holder to officially identify as Rohingya, only offering the term "Bengali".[81] Thus, from a purely subjective point of view, the Rohingya do seem to be regarded by the perpetrators as a national group, although case can also be made to consider them a racial group given the "national races" formulation used by the government.[82] However, characterizing the Rohingya as such would mean accepting a factually imprecise narrative, which does not accurately reflect the unique circumstances of the Rohingya and which would undervalue the true nature of the abuse by the Myanmar government.

Therefore, combining both subjective views by the perpetrators and objective characteristics of the Rohingya, it seems most appropriate to consider the Rohingya as an ethnical group. First, the Rohingya speak a distinct language.[83] Second, the Rohingya are predominantly Muslim, as opposed to the majority of the population of Myanmar. Third, from religion and language arise other cultural traditions and a distinct history. Fourth, the Rohingya regard themselves as a separate ethnicity.[84] Fifth, although the official narrative of the Myanmar government is that the Rohingya are "illegal Bengal immigrants", this subjective conception may also allude to the Rohingya as a particular ethnicity, even if indirectly. Finally, a sizeable part of academic works on the Rohingya crisis also characterize the group as ethnic.[85]

In short, based on objective factors, self-identification, and the perception by the perpetrator, the Rohingya constitute an ethnical group for the purposes of the GC. Thus, the abuse

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[80] *Ibid.*: para.86.
[81] *Ibid.*: para.66.
[82] IIFFM Report 2018, *op.cit.* The Report also considers the Rohingya as potentially a racial group "based on hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors", see para.1391.
[83] Lindsey N. Kingston, "Protecting the world's most persecuted: the responsibility to protect and Burma's Rohingya minority", The International Journal of Human Rights, 19/8 (2015): 1168.
[84] Adria Ferrer-Monfort, "Revisiting the Interpretation of the Protected Groups of the Genocide Convention in Light of the Rohingya Case," *Trinity College Law Review* 22 (2019): 99.
[85] See e.g. Kingston, *op.cit.*: 1167; :79; Nehginpao Kipgen, "The Rohingya Crisis: The Centrality of Identity and Citizenship", *Journal of Muslim Minority Affairs*, 39/1 (2019), 71; Jobair Alam, "The Rohingya of Myanmar: Theoretical Significance of the Minority Status", *Asian Ethnicity* 19/2 (2018): 180.

against them may be further scrutinized under Art.II. Interestingly, the 2018 Report avoids a determination of which group the Rohingya specifically constitute for the purposes of the GC, arguing simply that the Rohingya ought to constitute a protected group that can be seen as an ethnical, racial, or religious group, or a combination thereof.[86] The proof of their status is further solidified by the differential treatment of the Rohingya by the Myanmar government.[87] In deciding on provisional measures in *The Gambia v. Myanmar* case, the ICJ likewise agreed that the Rohingya appear to be a protected group.[88] Although this approach seems to lack some precision, there is no difference in the scope of protection depending on what kind of group is targeted.

4.3. MATERIAL ELEMENTS

For a State to violate the prohibition of genocide, it must be proven that State organs or other actors whose acts are attributable to the State have committed one or more of the underlying Art.II GC acts with genocidal intent. The 2019 Report notes that the violence directed against the Rohingya constitutes the underlying acts (a), (b), (c) and possibly (d), echoing the conclusions of the 2018 Report.[89] The factual findings of such reports can be a highly authoritative source of evidence, which the ICJ is likely to assess in its own proceedings. Indeed, the ICJ in *Bosnia v. Serbia* relied on the Reports by the United Nations Special Rapporteur as sources of evidence of genocidal acts committed in various incidents Bosnia.[90]

Art.II(a) Killing

The Tatmadaw played a significant role in executing violent attacks against the Rohingya in the context of the "clearance operations" in a "highly organized" manner.[91] The 2018 Report highlights the similarity in method and character of Tatmadaw attacks against the Rohingya across a broad geographic area.[92] The 2018 Report records indiscriminate shooting at Rohingya villagers

[86] IIFFM Report 2018, *op.cit*: para.1391.
[87] *Ibid.*
[88] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, (Jan. 23, 2020): para. 52.
[89] IIFFM Report 2019, *op.cit.*: para.44.
[90] See e.g. *Bosnia v. Serbia, op.cit.*: para. 246.
[91] Maung Zarni and Alice Cowley, "The Slow-Burning Genocide of Myanmar's Rohingya", *Pacific Rim Law & Policy Journal*, 23/3 (2014): 716; Alina Lindblom et al. "Persecution of the Rohingya Muslims: Is genocide occurring in Myanmar's Rakhine State?" Fortify Rights, 2015): 45.
[92] IIFFM Report 2018: paras.751-2.

and attempts to chase down and kill those who tried to flee.[93] Survivors were rounded up, men separated from women and systematically killed by gunshots or stabbing, whereas infants and children would often be thrown into the river.[94] Although the number of casualties cannot accurately be established, IIFFM estimates indicate that in August 2017, the "clearance operations" caused more than 10,000 deaths.[95] Here, Schabas on behalf of Myanmar criticizes the report for not accurately specifying the number of casualties, noting that this number would be contested if the pending case proceeds to the merits stage.[96] . and Even if found to be true, this number might not satisfy an implicit severity threshold of the destruction "in part" element.[97]

Aside from the "clearance operations", the 2019 Report notes that the refusal to accept NVCs is often met with death threats. For example, a Tatmadaw commander explicitly threatened to kill a group of Rohingya villagers and burn their village in August 2017, and the villages were indeed attacked five days later – a fairly common type of violent incidents against the Rohingya as the Report concludes.[98] Other examples of the Tatmadaw's involvement in the killing of the Rohingya include joining local militias in attacking Rohingya civilians or shooting at Rohingya refugee boats to drive them towards Bangladesh, Thailand, and Malaysia.[99] Overall, as the 2018 Report emphasizes, the killings were intentional, widespread, and systematic.[100]

These are but a few examples of the horrifying brutality and intensity of the killings of the Rohingya by the Tatmadaw and other security forces and civilian groups. To recall, it theoretically suffices that even one person is killed with genocidal intent for the incident to qualify as a genocide. If genocidal intent is established in the given case, it is abundantly clear that the elements of Art.II(a) would be satisfied.

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[93] *Ibid.*: para.767.
[94] *Ibid.*: paras.767-770.
[95] *Ibid.*: para.1395.
[96] William Schabas in *The Gambia v. Myanmar*, Verbatim Record of the Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, ICJ, CR 2019/19 (hereinafter, "Verbatim Record A"), paras.47-48.
[97] *Ibid.*
[98] IIFFM Report 2019, *op.cit.*: paras.90-92.
[99] Lindblom et. al., *op. cit.*: 27.
[100] IIFFM Report 2018, *op.cit.*: para.1395.

Art.II(b) Causing serious bodily or mental harm

As noted in the previous chapter, Art.II(b) entails two elements – (1) physical or mental harm to the members of the group, which is (2) severe enough to significantly impede the ability of the victims to lead a normal, constructive life. The IIFFM Reports contain ample examples of the Rohingya being subject to beatings, torture, and sexual violence by the Tatmadaw and other perpetrators. The 2018 Report claims the physical injuries sustained of survivors of the "clearance operations" amount to serious bodily harm due to their scale, brutality, and the methods used.[101]

The 2018 Report by the IIFFM verified events in six villages/areas as the most serious incidents during the "clearance operations". These incidents, as explained prior, followed a strikingly similar pattern which involved burning and razing of Rohingya homes (with people inside), looting, violent robberies of the villagers, rape, mass beatings and killings. The 2019 Report notes that the Tatmadaw routinely round up men and boys of fighting age to interrogate them for possible links to the Arakan Army, a practice which routinely involves arbitrary detention, torture to obtain confessions, and death in custody.[102]

Women would often be subject to torture in conjunction with sexual violence and rape, which according to, e.g., the ICTY in *Furundžija* can constitute an act of genocide.[103] Furthermore, the official bodies are also accused of sexual violence during detention or on forced labor sites as a punishment for non-compliance.[104] Many interviewees identified Tatmadaw soldiers as the main perpetrators, and the IIFFM estimates the Tatmadaw to be responsible for about 82% of the gang rapes corroborated.[105] The militias were said to commit gang rapes on regular basis since 2012, often killing women immediately afterwards or leaving them in a critical condition.[106] Women were also often subject to maiming and mutilation of their reproductive organs and other body parts.[107] Although the 2019 Report noted that instances of sexual violence had decreased, demonstrating the ability of the Tatmadaw to exercise control over the conduct of their troops,

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[101] *Ibid.*: para.1397.
[102] IIFFM Report 2019, *op.cit.*: para.11.
[103] *Prosecutor v. Furundžija*, Judgment, Trial Chamber, IT-95-17/1-T (Dec. 10, 1998): para. 172.
[104] Lindblom et. al., *op.cit.*: 47.
[105] IIFFM Report 2018, *op.cit.*: para.1372.
[106] Engy Abdelkader, "Myanmar's Democracy Struggle: The Impact of Communal Violence Upon Rohingya Women and Youth", *Pacific Rim Law & Policy Journal* 23/3 (2014): 524.
[107] IIFFM Report 2018, *op.cit.*: para.1397.

"coordinated and systematic" sexual violence against women and children committed by Rakhine militias, the Tatmadaw, and the police forces has nonetheless been widespread in the years prior and severe enough to constitute serious bodily harm[108]

In short, during the "clearance operations", survivors of attempted killings and rape reported beatings, stabbings, burning, and other forms of bodily harm by the Tatmadaw, which, in turn, also constituted deep psychological trauma for the victims and witnesses of the acts of violence.[109] The injuries sustained, particularly where the victim was subject to deliberate maiming and mutilation, clearly amount to permanent damage, exceeding the threshold set by Art.II(b), whereas the severe shock, mental terror, and humiliation constitute "destruction of the spirit, of the will to live, and of life itself" and thus serious mental harm.[110]

Art.II(c) Deliberately imposing conditions of life calculated to bring about the destruction of the group

Art.II(c) covers "measures of slow death". However, the actual effect of such measures is irrelevant as long as they were "calculated" to achieve the destruction of the group. Under Art.II(c), three main aspects of the daily life conditions of the Rohingya must be highlighted – expulsion from homes and internment in camps, systematic denial of essential services and sustenance, and forced labor. All of these imply an element of planning by government authorities.

First, the "clearance operations" have resulted in the destruction of numerous Rohingya settlements, effectively and systematically expelling the Rohingya from their homes and lands. The survivors attempt to flee to other countries, primarily Bangladesh, where the living conditions of the ~800,000 Rohingya refugees are not significantly better in terms of their ability to lead a normal and constructive life.[111] These attempts to flee are often hindered by security forces targeting refugee boats or shooting at those attempting to cross the border. The Rohingya refugees

[108] IIFFM Report 2019, *op.cit.*: para.15; *Human Rights Watch*, "Burma: Security Forces Raped Rohingya Women, Girls" (Feb. 6, 2017), https://www.hrw.org/news/2017/02/06/burma-security-forcesraped-rohingya-women-girls.
[109] IIFFM Report 2018, *op.cit.*: para.772.
[110] *Ibid.*: para.1397.
[111] IIFFM Report 2018, *op.cit.*: para.1404.

clearly lack safe and viable homes to return to, while those who stay in Myanmar are subject to movement restrictions and internment is special ghettos.[112]

Second, the movement restrictions, which the 2019 Report calls "discriminatory and arbitrary", significantly affect the ability of the Rohingya to sustain themselves.[113] For example, the Aung Mingalar quarter of Sittwe, the Capital of the Rakhine State, is effectively a closed ghetto for Muslims, from which it is nearly impossible to access markets, livelihoods, and medical facilities without going through long and complex bureaucratic procedures.[114] The movement restrictions in general effectively prevent access to numerous essential survival resources – food, medical aid, employment, education etc.[115] In particular, the restricted access to medical services is even more dangerous to the survival of the Rohingya, considering the Rohingya are routinely subject to severe physical violence and exertion as explained prior. This is said to result in many preventable deaths.[116]

Likewise, access to food is a widespread and acute problem, upon which the "clearance operations" are said to have had a "devastating impact". Extreme food deprivation is experienced by one-third of homes in northern Rakhine State with children being particularly vulnerable to malnutrition.[117] Furthermore, the IIFFM notes, the humanitarian relief supplies were distributed in favor of ethnic Rakhine over Rohingya.[118] There have also been instances of the Tatmadaw illegally confiscating food supplies, destroying them or depriving the Rohingya of farmland, which suggests a deliberate attempt to starve the population.[119] Noting that the Government manifestly fails to respect, protect, and fulfil the right of the Rohingya to an adequate standard of living, including the right to food, the IIFFM claims the deprivation of food and denial of humanitarian aid is one of the many indicators of the State harboring genocidal intent against the Rohingya,

[112] IIFFM Report 2019, *op.cit.*: para.4.
[113] *Ibid.*
[114] IIFFM Report 2018, *op.cit.*: paras.521; 544-7.
[115] IIFFM Report 2019, *op.cit.*: para.10.
[116] IIFFM Report 2018, *op.cit.*: paras.521; 544-7.
[117] *Ibid.*: paras.535-7.
[118] IIFFM Report 2019, *op.cit.*: para.158.
[119] *Ibid.*

particularly as the restrictions on access to food and livelihoods have facilitated the Rohingya exodus from Myanmar.[120]

Finally, the 2018 Report documented a pattern of the Tatmadaw using Rohingya for forced labor to rebuild the Rohingya villages and settlements, construct camps, security checkpoints, and prisons under constant threats of violence and extortion.[121] The workers were provided no food, water, or appropriate lodging.[122] Although initially both the Rohingya and the ethnic Rakhine were subject to forced labor and the treatment thus did not exclusively target the Rohingya, the 2019 Report notes that the use of ethnic Rakhine for forced labor had markedly decreased.[123]

Thus, it is reasonable to conclude that the conditions to which the Rohingya are subject by the authorities would contribute to the long-term destruction of at least a substantial part of the group. This has also been recognized by a non-legal study of the Rohingya crisis as a genocide, which examines the case through a critical studies lens.[124] However, the severe effect of these conditions seems to be a result of taking together the broader context of violence against the Rohingya and the cumulative effects of a number of factors, thus it might be difficult to infer the "calculated" element of Art.II(c) from looking at the individual measures alone. However, the discussion in the 2018 Report allows for awareness of context and the group's particular vulnerabilities as a valid basis for consideration of Art.II(c), akin to the logic of CAH.[125] There is support for this approach in prior jurisprudence.[126] Considering the Government of Myanmar was on multiple occasions made aware of the grim life conditions of the Rohingya yet did not seem to address these issues, it is reasonable to conclude Rohingya have been subject to conditions of life calculated to bring about their physical destruction.

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[120] Ibid.: para.172-4; IIFFM Report 2018, *op.cit.*: paras.538; 568.
[121] IIFFM Report 2018, *op.cit.*: paras. 614-615 and 412-424.
[122] *Ibid.*: para.420.
[123] IIFFM Report 2019, *op.cit.*: para.181.
[124] See Penny Green *et.al.*, "Countdown to Annihilation: Genocide in Myanmar", *International State Crime Initiative* (2015), http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf.
[125] IIFFM Report 2018, *op.cit.*: para.1401.
[126] See e.g. *Prosecutor v. Karadžić, op.cit.*: para. 548.

Art.II(d) Imposing measures intended to prevent births within the group

There appear to be numerous efforts on part of the Government authorities to limit or prevent births within the Rohingya, most of which pertain to legal and administrative obstacles to safely starting a family.

The most clear-cut example is a local order whereby a Rohingya family cannot have more than two children. Violation of this order results in criminal penalties, as the government propagates a narrative of "uncontrollable" Rohingya birthrates as a "threat to the nation".[127] Another factor that indirectly may prevent births among the Rohingya is the requirement for obtaining marriage licenses. Lack of compliance likewise results in criminal punishment for the couple and the exclusion of the children from the household lists.[128] However, the 2018 Report notes some efforts to improve birth registration more broadly, although the extent to which these have advanced the registration of Rohingya children specifically remains unclear.[129]

The 2018 Report notes that these and other factors can lead to women resorting to unsafe illegal abortions, further undermining their physical ability to have children and threatening their lives.[130] The restricted access to medical care also has indirect effects on birthrates and infant mortality rates among the Rohingya, as women and infants in need of emergency care are unduly prevented from receiving emergency services.[131] Furthermore, the brutality of sexual violence by the Tatmadaw significantly affected the victims' reproductive health, if the victims even survive the rape in the first place. Many pregnant women suffer miscarriages, and in general the damage sustained prevented victims from having sexual intercourse with their husbands months after the rape.[132] Thus, there is also a physical aspect to the measures preventing births among the Rohingya.

In sum, the narrative of "uncontrollable" birth rates among the Rohingya clearly indicates an intention on part of the government to restrict births within the group, which is then carried out through direct legal and administrative obstacles and, indirectly, through widespread and severe

[127] IIFFM Report 2018, *op.cit.*: paras. 466; 1409.
[128] *Ibid.*: paras.592-3.
[129] *Ibid.*: para.468.
[130] *Ibid.*: para.599.
[131] *Ibid.*: para. 545.
[132] *Ibid.*: para. 934.

sexual violence against Rohingya women with limited access to emergency medical care. Thus, the elements of Art.II(d) can reasonably be considered met.

Art.II(e) Forcible transfer of children

The IIFFM Reports do not discuss Art.II(e) GC, nor is there any mention of any acts that might amount to forcible transfer of children from the Rohingya to another group.

To summarize, the IIFFM Reports provide abundant evidence that the Rohingya have been victims to acts listed in Art.II(a)-(d), and the Gambia is, in fact, relying on these findings in the ongoing case before the ICJ. Thus, whether the proceedings will lead to holding Myanmar responsible for genocide depends on whether the requisite genocidal intent can be established.

4.4. GENOCIDAL INTENT

To establish that the requisite intent to destroy the protected group, it needs to be proven that the perpetrator either had a plan expressing the intent to commit genocide or that the pattern conduct reveals such an intent as the *only* plausible explanation. In practice, evidence of a genocidal plan would be hidden or destroyed, therefore most cases would concern the establishment of a pattern of conduct and the elimination of alternative explanations.

Although the IIFFM in both Reports claimed that genocidal intent is present based on such a pattern of conduct, its arguments for ruling out alternative inferences have been criticized by Myanmar's defense.[133] Thus, it is important to discuss the findings of the IIFFM in comparison with the ICJ practice.

Importantly, the 2018 Report cautions that it has no mandate to specifically attribute genocidal intent to particular perpetrators or others acting at their behest, noting this would involve a very specific assessment of the individual circumstances of the perpetrator at the relevant moment in time.[134] Likewise, this chapter will simply consider whether the present case displays factors that have enabled a reasonable inference of genocidal intent in other cases.

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[133] William Schabas in *The Gambia v. Myanmar*, Verbatim Record of the Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, ICJ, CR 2019/19 (hereinafter, "Verbatim Record A"), para.19.
[134] IIFFM Report 2018, *op.cit.*: paras. 1417-8.

Genocidal intent according to the UN IIFFM

The IIFFM concludes that the Tatmadaw is the most notable, but not the sole State organ that has engaged in the underlying genocidal acts with inferred genocidal intent, and that overall, the violence against the Rohingya extensively involved a combination of military and civilian acts, organs, and persons.[135] The IIFFM, in light of its own survey of jurisprudence on genocide, considers the crimes in Rakhine State to be similar in nature, gravity, and scope to those that have led to the establishment of genocidal intent in other contexts.[136] Schabas on behalf of Myanmar, however, counters that the IIFFM does not specify these "other contexts" and that comparable cases have also led to the contrary conclusion.[137] Nonetheless, the 2018 Report identifies five categories of the factors relevant to inferring genocidal intent.

First, the IIFFM considers a broader context within which the specific acts occurred, noting that systemic discrimination is as an important factor enabling the violence against the Rohingya.[138] This is reminiscent of the contextual elements of CAH, discussed in Chapter 5. The 2018 Report extensively discusses the broader oppressive context and hate speech, specific quotes of commanders and direct perpetrators, attempts to alter the demographic composition of the Rakhine State, the degree of organization as an indicator of the plan for destruction, and the extreme scale and brutality of the violence against the Rohingya.[139] A statement by the Commander-in-Chief of the Tatmadaw is quoted: "the Bengali problem was a longstanding one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem.".[140] Such rhetoric from authority figures significantly encourages violence against the Rohingya. Hate rhetoric often precedes or accompanies violence against the targeted group, as can be observed in genocides

[135] IIFFM Report 2019, *op.cit.*: para.45.
[136] UN Human Rights Council, 39th Session, "Report of the independent international fact-finding mission on Myanmar", A/HRC/39/64 (2018) (hereinafter "Summary of the IIFFM Report 2018"): para.85.
[137] Schabas in "Verbatim Record A", *op.cit.*: para.41.
[138] IIFFM Report 2018, *op.cit.*: para.1420.
[139] Summary of the IIFFM Report 2018, *op.cit.*, para.85.
[140] *Ibid.*: para.35.

throughout history. On the other hand, this quote arguably does not specifically refer to the "clearance operations".[141]

Second, the perpetrators, including Tatmadaw soldiers, are reported as using language focused on the victims' Rohingya identity while threatening or humiliating them. This strongly suggests a discriminatory intent. The IIFFM also notes utterances from government officials which likewise directly communicate an exclusionary vision and an intent to destroy the Rohingya or banish them from Myanmar. Examples include "we will kill you all" or "we are going to kill you this way, by raping. We are going to kill Rohingya", or "Have been wanting to kill these 'Kalar'[142] for so long. Only got to kill them just now", "If we do not kill, shoot, and bury them, they will keep sneaking into our country!"[143] The IIFFM emphasizes the similarity between this rhetoric and that used against the Tutsi population during the Rwandan genocide.[144]

These and many more instances suggest that genocidal acts had been committed with the specific intent to destroy the Rohingya, at least those acts which these utterances specifically concerned. The dismissal of the Government of any warnings that genocidal intent might be harbored reinforces this conclusion. However, these quotes refer both to an aim to "kill Rohingya" and to force them to leave Myanmar, which can complicate the inference of genocidal intent. Although an intent to "ethnically cleanse" and area is not by default equal to genocidal intent, it may serve as an indication thereof. Indeed, ethnic cleansing may be the ultimate end which a government may seek to achieve through the destruction of the group. Therefore, the rhetoric and policies that directly or indirectly facilitate the Rohingya exodus, the reduction in the numbers of Rohingya residents in Rakhine State, or the legal erasure of Rohingya people from official registers are all relevant to determining the true intention behind the acts of violence and the discriminatory policies.

Third, the IIFFM refers extensively to the general hostility in government policies against the Rohingya – denial of citizenship and ethnic identity, deplorable living conditions, failure to reform the discriminatory laws, alleged prior commission of genocide, and reluctance to

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[141] Schabas in *The Gambia v. Myanmar,* Verbatim Record of the Public sitting held on Thursday 12 December 2019, at 4.30 p.m., at the Peace Palace, CR 2019/21 (hereinafter "Verbatim Record B"), para.8.
[142] "Kalar" is a derogatory term used to refer to the Rohingya.
[143] IIFFM Report 2018, *op.cit.*: para.1422.
[144] *Ibid.*

investigate the conduct of the "clearance operations" – as providing the IIFFM with reasonable grounds to infer that the Government harbors genocidal intent.[145] The evidence only strengthens when the 2018 and the 2019 Reports are taken together.

Fourth, the 2018 Report discusses the existence of an organized plan or policy, again drawing inspiration from the CAH language. The highly organized nature of the violence against the Rohingya has already been discussed in sufficient detail. The systemic oppression of the Rohingya further contributes to their vulnerability to genocidal abuse. Another problematic trend is the removal of individual persons from "household lists" – an annual population record tool – e.g. when the individual was absent from home during population checks or refused to succumb to extortion, unofficial fees, and physical or sexual violence.[146] This legal erasure is often accompanied by arrests, extortion, denial of basic services, and other consequences so severe that many have fled Myanmar specifically to avoid the aggravated vulnerability that arises from being excluded from the "household lists".[147]

Fifth, the IIFFM highlights the extreme brutality and widespread and indiscriminate nature of the acts of violence against the Rohingya – not even children have been spared by the Tatmadaw during the "clearance operations".[148]

To add to the IIFFM list, another indication of genocidal intent may be the fact that despite the detailed list of severe abuses in the 2018 Report and the corresponding recommendations by the UN HRC, the 2019 Report notes that many of the factors aggravating the vulnerability of the Rohingya were still present a year after.[149] No progress had been made to address the institutionalized discrimination through appropriate legislation.[150] In general, the IIFFM finds that the Myanmar government is refusing to cooperate, rejecting the findings, and failing to adopt the recommendations, which further indicates the complete disregard for the plight of the Rohingya.[151] Although Myanmar has argued that investigation and accountability mechanisms specifically for the Rakhine state have been established, the IIFFM deems these "woefully inadequate" in

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[145] IIFFM Report 2019, *op.cit.*: para.9.
[146] *Ibid.:* paras.96-100.
[147] *Ibid.:* para.97.
[148] IIFFM Report 2018, *op.cit.*: para.1432.
[149] IIFFM Report 2019, *op.cit.*: para.2.
[150] *Ibid.*
[151] *Ibid.*: para.29.

methodology, independence, and follow-up.[152] *Human Rights Watch* also notes that despite official claims to the contrary, violence against the Rohingya has wide support within the Government.[153]

Regarding other reasonable inferences, although the IIFFM does not address them in too much detail, the Mission counters the arguments that the "clearance operations" legitimately aimed to eliminate a terrorist threat from ARSA, claiming that this aim would imply more discriminate, precise targeting, instead of destruction of entire settlements and communities, particularly with such brutality.[154] Another inference, that the Myanmar government "merely" aimed to alter the ethnic composition of the Rakhine state and displace the Rohingya therefrom also does not withstand further scrutiny, as this aim, however lawful, had been pursued decades prior through oppressive, but non-violent means.[155] The IIFFM thus concludes that there is no other reasonable inference from the pattern and broader context of anti-Rohingya violence than a genocidal intent.

In short, the IIFFM bases its inference of genocidal intent on the broader context of oppression, specific utterances by State officials and direct perpetrators, State policies that exhibit particular hostility against the Rohingya, the organized nature of the violence, and its unnecessary brutality. The IIFFM claims that this suggests State endorsement of the Tatmadaw's "clearance operations" and the manner in which they were conducted.[156] Thus, in addition to being responsible for carrying out acts of genocide with the requisite genocidal intent under Art.II GC, the IIFFM also notes the consequent failure of Myanmar to comply with its prevention and punishment obligations under Art.I and Art.III GC.

These arguments are persuasive and hopefully influential in the ongoing proceedings in *The Gambia v. Myanmar*. However, Schabas criticizes the IIFFM reasoning as lacking legal grounds and precise argumentation. On behalf of Myanmar, Schabas argues that the IIFFM findings did not eliminate alternative inferences from the pattern of conduct and, in fact, even indicated possible alternative explanations, e.g. ethnic cleansing, deportation, and counter-

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[152] *Ibid.*: para.230.
[153] *Human Rights Watch*, "A New Wave of Atrocities is Being Committed Against Muslims in Burma's Rakhine State" (Mar. 15, 2017), https://www.hrw.org/news/2017/03/15/new-waveatrocities-being-committed-against-muslims-burmas-rakhine-state.
[154] IIFFM Report 2018, *op.cit.*: para.1436.
[155] *Ibid.*: para.1437.
[156] IIFFM Report 2019, *op.cit.*: para.225.

insurgency.[157] Referring to prior ICJ jurisprudence, Schabas argues that genocidal intent therefore is not established, and the IIFFM conclusions have no legal ground. Indeed, even the 2018 Report itself begins with a warning that its standards of proof are lower than those required in criminal proceedings.[158] Thus, it is essential to also consider the ICJ approach to genocidal intent in its prior judgments.

Genocidal intent in the ICJ jurisprudence

The aim of studying ICJ practice in determining genocidal intent is to gauge whether *The Gambia v. Myanmar* case might encounter similar challenges as the *Bosnia v. Serbia* and *Croatia v. Serbia* cases, both of which resulted in more limited findings than the applicants had hoped for due to the strict construction of genocidal intent.

In *Bosnia v. Serbia*, the ICJ assessed Serbia's responsibility for violations of the GC against Bosnian Muslims. The ICJ found *inter alia* that no genocidal acts could be attributed to Serbia, that Serbia had neither conspired to commit genocide, nor incited genocide, and that Serbia had not been complicit in genocide.[159] However, it *had* violated the obligations to prevent the genocide that occurred in Srebrenica in July 1995 and to cooperate with the ICTY in the prosecution of Ratko Mladic.[160]

Bosnia claimed that genocidal intent should be inferred from the established facts, which arguably constituted a "pattern of acts" which "speaks for itself"[161] The ICJ, however, in line with its established practice of requiring "fully conclusive" evidence, was unable to infer genocidal intent.[162] The ICJ further required evidence of genocidal intent to be shown in relation to each specific incident, in contrast to Bosnia's reliance on the alleged existence of an overall plan to commit genocide.[163] Importantly, it is the applicant who is required to provide all evidence supporting the allegations.

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[157] Schabas in "Verbatim Record A", *op.cit.*: paras 22; 40-43.
[158] IIFFM Report 2018, *op.cit.*: para.10.
[159] C. F. Amerasinghe, "The Bosnia Genocide Case", *Leiden Journal of International Law* 21/2 (2008): 411-412.
[160] *Ibid.*
[161] *Ibid.* 422.
[162] *Ibid.*
[163] *Bosnia v. Serbia, op.cit.*: para.370.

The ICJ emphasized that if a general plan to commit genocide cannot be convincingly demonstrated, for a pattern of conduct to be accepted as evidence of genocidal intent, it must be such that it can only point to the existence of genocidal intent eliminating any other reasonable inferences.[164] Here, the ICJ did not find conclusive evidence of the intent to destroy the group where the perpetrator's actions can also be seen as a tactic to force the group to flee, distinguishing genocide from ethnic cleansing.[165] Thus, an aim to "render an area ethnically homogeneous" – i.e. to conduct ethnic cleansing – does not in itself constitute genocidal intent, and therefore has no legal significance on its own.[166] However, the broader aim of ethnic cleansing can indicate the presence of genocidal intent, as genocidal intent can be limited to the destruction of a group within a geographically limited area.[167] The ICJ reasoned similarly also in the *Croatia v. Serbia* judgment.[168]. Nonetheless, in *Bosnia v. Serbia* the evidence was deemed insufficient to unequivocally infer genocidal intent, save for the Srebrenica massacre.[169]

Myanmar's defense relies on the genocide-ethnic cleansing distinction in the Rohingya case. Referring to the ICC Pre-Trial Chamber on Myanmar, Schabas argues that the pattern of conduct suggests that the aim to remove the Rohingya from the Rakhine state.[170] He further points out that the UN HCHR has described the case as "textbook ethnic cleansing".[171] The problem, however, remains that there is no clear legal definition of "ethnic cleansing". Nor is it inconceivable that ethnic cleansing might be a goal that is pursued through the (partial) destruction of the protected group – i.e. through acts with genocidal intent. Why then, according to this approach, the broader aim of ethnic cleansing must necessarily rule out genocidal intent in such cases is puzzling.

Nonetheless, when considering the ethnic cleansing goals of the Bosnian Serb leadership, the ICJ in *Bosnia v. Serbia* discussed whether the destruction of the Bosnian Muslim group was *necessary* for that objective.[172] As mentioned prior, there is some evidence of, e.g., the Tatmadaw

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[164] *Ibid.*: para. 373.
[165] *Ibid.*: para.328.
[166] *Ibid.*: para. 190.
[167] *Ibid.*: paras. 190 and 199.
[168] *Croatia v. Serbia, op.cit.*: para. 477.
[169] *Bosnia v. Serbia, op.cit.*: para.376.
[170] Schabas in "Verbatim Record A", *op.cit.*: paras. 24-27.
[171] *Ibid.*: para.37.
[172] *Bosnia v. Serbia, op.cit.*: para.372.

and local militias shooting at Rohingya while they were trying to flee to Bangladesh. This would be entirely unnecessary if the true aim of the violence were simply to force the Rohingya population to leave Myanmar. Thus, although there are many signs pointing at an aim to ethnically cleanse the Rakhine state, such incidents of unnecessary (for that particular aim) violence might indicate a genocidal aim instead. Thus, the dilemma posed by the diverging utterances by officials recorded in the 2018 Report – some specifically referred to ethnic cleansing goals, while others to the need to kill the Rohingya – might also be avoided if a necessity test is applied.

Furthermore, regarding the Srebrenica massacre where genocidal intent was established, the ICJ cited ICTY in *Krstić*. There, the intent was established on the basis that a genocidal plan could be inferred from the nature of the massacre – the number and nature of the forces involved, the scale and the indiscriminate nature of the executions, the invariability of the killing methods etc.[173] If a similar standard is applied to the violence against the Rohingya, specifically the incidents discussed under Arts.II(a)-(b), the IIFFM Reports do indicate a stark similarity in the nature of the conduct of the "clearance operations" by the Tatmadaw troops in different settlements, thus perhaps indicating a genocidal plan in line with the *Krstić* standard.

Finally, the ICTY was also quoted by the ICJ as arguing for the establishment of genocidal intent on the basis of the sheer fact that the destruction of one fifth of the overall Srebrenica community "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'".[174] This departs from the stubborn focus on the more explicit establishment of genocidal intent, as opposed to inference based on what a foreseeable consequence of a certain act might be. This further supports the argument that the ICJ had been strongly influenced by ICTY precedent with little critical assessment of its own.[175] Such a constraint is not present in the given case. It remains uncertain whether this would lead to an easier establishment of intent in the present case, given the nature and effects of the "clearance operations" outlined throughout this chapter.

4.5. CHAPTER CONCLUSION

[173] *Ibid.*: para.292.
[174] *Ibid.*: para.293.
[175] Christian J. Tams and Martin Mennecke, "The Genocide Case Before the International Court of Justice", https://ssrn.com/abstract=1416756: 6-7.

To conclude, the Rohingya clearly constitute a protected ethnical group for the purposes of Art.II GC. From the facts presented by the IIFFM it is abundantly clear that the Rohingya have been victims to Art.II(a) and (b) acts, with ample evidence also pointing towards the deliberate imposition of long-term measures covered by Art.II(c) and (d). However, as with many cases of alleged genocide, the main controversy concerns genocidal intent.

The IIFFM presents persuasive arguments of both direct expressions of genocidal intent and factors from which it may be inferred. However, the approach the ICJ will take in the ongoing *The Gambia v. Myanmar* proceedings remains a wild card. It will require genocidal intent to be established in relation to each alleged genocidal act, rejecting an argument based on an overall plan in line with the *Bosnia v. Serbia* decision. The outcome will depend on whether the IIFFM evidence and other arguments presented by the Gambia will eliminate other potential inferences or Myanmar's defense will successfully argue that the true aim is to remove the Rohingya from northern Rakhine state, not destroy them. The thesis will proceed with a discussion of the CAH of persecution to see if an assessment of the present case under Art.2 DA might yield a more unequivocal conclusion.

5. THE CRIME AGAINST HUMANITY OF PERSECUTION

Noting that CAH comprise the vast majority of indictments by modern international tribunals, Schabas deems CAH to be the "core of the core crimes" - a reflection of the close relationship between CAH and other atrocity crimes, the relatively wide scope of their definition, and the overall importance of CAH in holding perpetrators of atrocities accountable.[176] The delay in their codification into an international convention is therefore somewhat puzzling, although the wide reach of CAH certainly presents an obstacle to attaining a universally acceptable formulation.

Indeed, the definition of CAH has significantly evolved since its very first codification for the purposes of the Nuremberg trials. Subsequent tribunals adapted a certain set of "core" elements to the peculiarities of their own jurisdiction. However, the thesis will not dwell on the historic developments. For the purposes of this research, what is relevant is the study of the ICC definition

[176] William A. Schabas, "Atrocity crimes (Genocide, Crimes Against Humanity and War Crimes)" in William A. Schabas (ed.), "The Cambridge Companion to International Criminal Law" (*Cambridge University Press*, 2015): 203.

of CAH in Art.7(2) of the Rome Statute (RS), specifically the crime of persecution, which is virtually identical to the current definition in Art.2 DA.

Regarding persecution, the Art.2 DA reads as follows: [177]

1. *For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a 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, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph; […]*
2. *For the purpose of paragraph 1:*
    - *(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; […]*
    - *(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; […]*

With the contents of Art.2 DA in mind, after a brief discussion on the current CAH-shaped gap in the law of atrocity prevention, this chapter will follow a similar structure to Chapter 3. More specifically, the chapter will be organized according to five general elements that taken together constitute a CAH for the purposes of Art.7 RS (and are thus likely an appropriate conceptualization of the elements of Art.2 DA), namely:

1) *an attack directed against any civilian population,*
2) *the widespread or systematic nature of the attack,*
3) *a State or organizational policy,*
4) *a nexus between the individual act and the attack, and*
5) *knowledge of the attack on part of the perpetrator.*[178]

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[177] International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, 71st Session, A/74/10 (2019) (hereinafter "Draft Articles"): Art.2. The rest of the contents of Art.2 are not directly relevant to the present discussion. References thereto will be made only as needed.

[178] Mark Klamberg (ed.), "Commentary on the Law of the International Criminal Court", (*Torkel Opsahl Academic EPublisher*, 2017): 31

Similar approach has been adopted by e.g. the ICTY in *Kunarac*, absent the policy requirement, which is a legal development by the ICC.[179] The thesis will discuss elements 1-3 in the subchapter on contextual elements of CAH, the nexus and individual acts elements in the subchapter on material elements, and the knowledge element in the subchapter on mental elements.

5.1. THE CURRENT GAP IN THE LAW

For several decades the GC was the only legal instrument that was both widely ratified and obliged states to take atrocity-prevention measures within their domestic jurisdictions.[180] This resulted in attempts to overstretch the application of the GC to an unduly wide range of state-sanctioned criminal acts, leading to a clash between those who advocated for a restrictive reading of the Art.II definition and those who criticized it as too narrow and rigid.[181] The development of a specific legal instrument on CAH would lessen the practical need for this disagreement.

The meaning and scope of CAH has been clarified by the work of ICTY, ICTR, and the ICC. The RS defines CAH in a way which, due to the broad membership to the ICC and the calls for complementarity between the RS and the DA definitions by numerous states, might eventually become a customary law definition if state practice and *opinio juris* are established.[182] State comments on the DA mainly focus on the theoretical gap in international law on CAH as a matter of state responsibility, not discussing the problems in the application or enforcement of other atrocity-prevention regimes.

First, aside from a prohibition of CAH as a matter of customary law/*jus cogens*, there is no instrument that clearly establishes the scope of state obligations to prevent and punish CAH. Japan comments that the RS only establishes a "vertical relationship" between the ICC and a state party. The adoption of DA would, in turn, complete the regime by creating "horizontal relationships" among state parties – the DA would establish *erga omnes* obligations, whereby any state party

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[179] Gideon Boas *et.al.* „Crimes Against Humanity" in Gideon Boas *et.al.* "International Criminal Law Practitioner Library" (*Cambridge University Press*, 2009): 35.
[180] Schabas, "Genocide in International Law", *op.cit.*: 118-9.
[181] *Ibid.*
[182] *International Law Commission*, 71St Session, "Crimes Against Humanity: Comments and Observations Received from Governments, International Organizations and Others" A/CN.4/726 (2019) (Hereinafter "State Comments and Observations"). See e.g. the comments by Japan, New Zealand, Portugal, Sierra Leone, Brazil, Panama, Peru, Nordic Countries represented by Sweden, Switzerland, the United Kingdom etc. Importantly, however, comments on the DA have been received from only a limited number of states with entire regions absent from the discussion.

regardless of its connection to the case could demand compliance from a violating state – much like in *The Gambia v. Myanmar* case on the applicability of the GC.[183]

Second, the RS does not impose any obligations on its members to harmonize their national legislation on CAH. Belarus therefore welcomes ILC's view that "an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation".[184] The inter-state cooperation is also highlighted by Sierra Leone in its opinion that the significance of such an improvement is not limited to CAH alone. Sierra Leone considers that as CAH, genocide, and war crimes are often perpetrated at the same time, the other core crimes could also be affected by the DA.[185] Indeed, the DA elaborate on domestic criminalization and mutual legal cooperation in commendable detail.

In addition to these practical benefits, a future convention on CAH might fill in a number of theoretical gaps in the law of atrocity prevention. Murray argues that CAH are not only a good fallback option in case genocide is inapplicable, but in general are better positioned to prevent atrocities due to their broad scope.[186] Indeed, when studying the definitions of genocide and CAH, what stands out is the narrow definition of the former and the much wider scope of the latter. Furthermore, in addition to a longer list of acts explicitly covered by CAH, the DA definition even contains a Martens clause of sorts by including "other inhumane acts of a similar character" as an open door for future expansions of the crime.[187] Finally, many genocidal acts, albeit without the intent element, are covered by CAH and even more extensively. If group discrimination is relevant in a given case, persecution covers that as well.[188] While the genocide label might be emotionally desirable for the victims or justice seekers to fully reflect the outrageous scale of violence, CAH would pragmatically provide a stronger legal standing. Before examining the contents of Art.2 DA, some comments must be made on the relationship between genocide and CAH.

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[183] *Ibid.*: 12.
[184] *Ibid.*: 9
[185] *Ibid.*: 25.
[186] Alexandar R. J. Murray, "Does International Criminal Law Still Require a Crime of Crimes: A Comparative Review of Genocide and Crimes against Humanity", *Goettingen Journal of International Law* 3/2 (2011): 611-613.
[187] Saadatu Salisu Matori and Abubakar Bukar Kagu. "The Need for a Clear Legal and Contextual Framework to Distinguish Between the Crime of Genocide and the Crimes Against Humanity in Modern International Criminal Law." *IOSR Journal of Humanities and Social Science* 22/2 (2017): 73.
[188] Murray, *op.cit.*

5.2. THE RELATIONSHIP BETWEEN GENOCIDE AND CRIMES AGAINST HUMANITY

Although genocide is sometimes considered to be the "crime of crimes" and a specific type of persecution, the ICTY in *Krstić* warns against cumulating the two offences and treating the prohibition of genocide as a *lex specialis* to a more general prohibition of CAH.[189] The ICTY notes that such cumulation erroneously overlooks that each crime requires elements that the other does not and that each crime seeks to protect similar, but different interests of the international community.[190] Thus, considering genocide as a type of persecution is an inaccurate oversimplification, and CAH complete the law of atrocity prevention also through their unique contextual elements.

That persecution includes in its scope not only a wider range of punishable acts, but also a broader range of protected groups is self-evident from Art.2 DA. However, there are caveats to the reliance on CAH as a plan B when genocide charges fall short of the standards of the GC.

First, as already pointed out, although Art.II GC is much more limited in scope than Art.2 DA, CAH do require the establishment of a specific context – a "widespread or systematic attack" – and the perpetrator's awareness of such context. Furthermore, the establishment of this context may be challenging due to the policy requirement.[191] Art.II GC has no such stipulations. This, in theory, means that while a perpetrator may be charged with genocide even for a single isolated attempt at destroying the group, CAH, on the other hand, require the crime to be committed in the context of a widespread or systematic attack against a civilian population. Thus, isolated incidents by definition evade the scope of CAH.

In practice, however, the establishment of genocidal intent most of the time does not rely on clear-cut evidence of such intent. The *dolus specialis* is usually inferred from a systematic pattern of conduct, and genocidal acts in practice are rarely limited to isolated incidents.[192] As

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[189] Scott Straus, "The Limits of a Genocide Lens: Violence Against Rwandans in the 1990s." Journal of Genocide Research 21/ 4 (2019): 505; Tasnim Motala, "The Genocide Name Game: The Case for Crimes against Humanity to Prevent Genocide." Quinnipiac Law Review 37/4 (2018-2019): 674; Leila Nadya Sadat, "Codifying the 'Laws of Humanity' and the 'Dictates of the Public Conscience': Towards a New Global Treaty on Crimes Against Humanity" in Bergsmo and Song (eds.), *op.cit.*: 23.
[190] Fulvio Maria Palombino, "Should Genocide Subsume Crimes Against Humanity? Some Remarks in the Light of the Krstić Appeal Judgment" *Journal of International Criminal Justice* 3/3 (2005): 782.
[191] "Draft Articles", *op.cit.*: Art.2(2)(a).
[192] Antonio Cassese, "International Law" 2nd Edition, (*Oxford University Press,* 2005): 444.

shown by the ICJ in *Bosnia v. Serbia,* even an overwhelming amount of evidence may not be enough to satisfy this standard, where it would perhaps be sufficient to prove that a widespread or systematic attack against a civilian population has occurred. This leads to the conclusion that in practice, the inclusion of contextual elements in the definition of CAH do not necessarily render the application of the DA more difficult than that of the GC.

With these differences between CAH and genocide in mind, the thesis will turn to a more in-depth study of the contextual, material, and mental elements of the CAH of persecution.

5.3. THE CONTEXT ELEMENTS

The contextual elements of Art.2 DA elevate an otherwise ordinary crime or inhumane conduct to a CAH and distinguish CAH from genocide and war crimes.[193] These elements include (1) an attack directed against any civilian population, (2) the widespread or systematic nature of such an attack, and (3) a state or organizational policy which is furthered through this attack.[194] Notable is the absence of a nexus to an armed conflict, which characterized the earlier definitions of CAH. This reflects the purpose of CAH, namely, to prevent and punish serious violations of human rights committed by states against their own nationals.[195]

An Attack Directed Against any Civilian Population

For an act to constitute a CAH, it must form a part of a broader *attack* against any civilian population. Art.2(2)(1) DA defines an attack as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". In *Bemba,* the ICC understood a "course of conduct" as conditioned upon the "multiple commission of acts", meaning "that more than a few isolated incidents or acts as referred to in Article 7(1) of the Statute have occurred".[196] The *Elements of Crimes* further emphasize that the acts concerned need not constitute a military attack, further reaffirming the view that CAH may take place also during peacetime.[197]

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[193] Klamberg, *op.cit.*: 31; Bergsmo and Song, *op.cit.*: 4.
[194] *Draft Articles, op.cit.:* Art.2(1) and (2).
[195] Bergsmo and Song, *op.cit.*: 4.
[196] Eleni Chaitidou, "The ICC Case Law on the Contextual Elements of Crimes Against Humanity" in Bergsmo and Song (eds.), *op.cit.*: 65.
[197] *Elements of Crimes, op.cit.*: 5.

Furthermore, the wording of Art.2(2)(1) DA implies a requirement of an active conduct, as it is the commission of the Art.2(1) acts that constitute the broader attack itself.[198]

Importantly, the underlying offences by the perpetrator must form a part of such an attack, i.e. they must be objectively linked to the overall attack and cannot be isolated acts.[199] In *Bemba,* the ICC continuously referred to a particular *modus operandi* as evidencing a broader attack and the nexus between the attack and the specific act of violence.[200] This nexus requirement can be satisfied through proof that the act was instigated or directed by the overall policy or through proof that the physical perpetrator or another relevant actor was aware of the context of the attack against the civilian population (this will be elaborated on in the following subchapters).[201] Ultimately, the assessment depends on the specific circumstances of the case.

Aside from the "widespread or systematic" threshold, which will be discussed below, the most important elements of an attack are (1) the targeting of a civilian population and (2) the policy requirement.

Firstly, in absence of a special definition of civilians for the purposes of CAH, ICTY established a practice of defining the term "civilian" in line with Art.50 of the Additional Protocol I (AP I) of the Geneva Conventions.[202] The ICC in *Bemba* considered this definition to reflect customary international law.[203] However, reliance on AP I raises some concerns. First, the Geneva Conventions offer varying degrees of protection depending on whether the armed conflict is international or non-international and whether a person, civilian or combatant, takes active part in hostilities. It is unclear whether and how these differences would affect the application of the "civilian population" to a given case, especially if CAH occur during peacetime. Second, states have been able to selectively ratify the Additional Protocols. Thus, unless the customary law status

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[198] Klamberg, *op.cit.*: 32.
[199] Boas *et.al., op.cit.*: 54.
[200] *Prosecutor v. Bemba,* Judgment, Trial Chamber III, ICC-01/05-01/08 (Mar. 21, 2016): para.671.
[201] Simon Chesterman, "Altogether Different Order: Defining the Elements of Crimes against Humanity," *Duke Journal of Comparative & International Law* 10/2 (2000): 320-321.
[202] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609: Art.50; Göran Sluiter, "'Chapeau Elements' of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals" in Leila Nadya Sadat, "Forging a Convention for Crimes against Humanity", (*Cambridge University Press*, 2011) :118.
[203] *Prosecutor v. Bemba,* Judgment, *op.cit.*: para.152.

of Art.50 AP I is unequivocally established, the legitimacy of relying on its definition might be undermined if the state concerned is not a signatory to AP I.

Avoiding a deep-dive into the meaning of "civilians", Boas simply explains that a "civilian population" comprises "all persons who are civilians", and the civilian character of the population is not affected by the presence of individuals that do not qualify as civilians as long as the population is predominantly civilian.[204] The ICTR adopted an even broader approach – civilians are "all persons except those who have the duty to maintain public order and have the legitimate means to exercise force".[205] This view was supported by the ICC in *Bemba*.[206] Importantly, it is not necessary for the entirety of the civilian population within a given area to be subject to the attack. Instead, the purpose is to exclude acts that target "a limited and randomly selected number of individuals".[207] If the ordinary meaning of "civilian population" remains unclear, Art.31(1) VCLT stipulates interpretation in line with this purpose.

Second, the "directed against" element requires the attack to primarily target civilians (as opposed to civilians being incidental victims of the attack). The relevant factors for assessment include the means and methods of the attack, the status and number of victims, the discriminatory nature of the attack, the nature of specific crimes committed in the course of the attack etc.[208] In other words, the attack cannot be such that can be characterized as offences directed at random civilian individuals.[209]

An attack pursuant to or in furtherance of a State or organizational policy

The identification of multiple inhumane acts even if they occur in the course of a "campaign" or an "operation" is not by itself sufficient to constitute an "attack". Art.2(2)(a) DA explicitly requires the attack to be carried out "pursuant to or in furtherance of a State or organizational policy", a requirement first established by Art.7(2)(a) RS.[210] The inclusion of the policy requirement has been criticized upon the adoption of the RS, notably from the ICTY, which

[204] Boas *et.al., op.cit.*: 43-49.
[205] *Prosecutor v. Kayishema and Ruzindana,* Trial Judgment, *op.cit.*: para.127.
[206] *Prosecutor v. Bemba,* Decision, Pre-Trial Chamber II, ICC-01/05–01/08–424 (Jun. 15, 2009): para.78.
[207] Boas *et.al., op.cit.*: 42, Klamberg, *op.cit.*: 32.
[208] *Prosecutor v. Bemba,* Pre-Trial Chamber II, *op.cit.*: para.76.
[209] Boas *et.al., op.cit.*: 50-51.
[210] *Draft Articles, op.cit.,* Art.2(2)(a); Chaitidou, *op.cit.*: 66.

rejects the requirement and has convicted individuals for the relevant acts even if the perpetrators were acting in relative isolation and in absence of a generalized policy.[211] However, the policy requirement might simply serve, once again, to reflect the nature of CAH as an organized crime and to exclude random and unconnected acts.[212] The wording of the RS and the DA seems to suggest that the policy may originate both from state and non-state actors, reflecting the focus on the organized nature of CAH as the essence of the context elements.

In the *Elements of Crimes,* the meaning of policy is clarified as the State or organization actively promoting or encouraging such an attack against a civilian population.[213] However, in exceptional circumstances a policy may also entail a deliberate failure to act, which consciously aims to encourage such an attack (mere inaction on part of the relevant state actor or organization is therefore insufficient in itself).[214] In *Bemba,* however, the ICC simply noted that the policy "implies that the attack follows a regular pattern" and that it "need not be formalized".[215] Chaitidou notes that ICC in general tends to accept inference of policy from a regular pattern or the organized nature of the crimes, as e.g. in the *Bemba* case.[216]

While the ICC has not yet elaborated on the meaning of and the distinction between "pursuant to" or "in furtherance of", it has elaborated on the threshold of "organizational" for the purposes of the policy requirement.[217] In *Kenya,* the ICC assessed whether the group was capable of carrying out "acts which infringe on basic human values", discussing factors such as hierarchy, capacity, control over territory, or the articulation by the group of its intent to attack civilians.[218] In *Katanga,* the ICC more concisely put that the organization must have sufficient means to facilitate or encourage the attack.[219]

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[211] William A. Schabas, "Crimes Against Humanity as a Paradigm for International Atrocity Crimes", *Middle East Critique* 20/3 (2011): 264.
[212] Evelyne Schmid, "Taking Economic, Social and Cultural Rights Seriously in International Criminal Law" (*Cambridge University Press*, 2015): 84.
[213] *Elements of Crimes, op.cit.*: 5.
[214] Klamberg, *op.cit.*: 33.
[215] Chaitidou, *op.cit.*: 66.
[216] *Ibid.*: 67; *Prosecutor v. Bemba*, Judgment: para.676.
[217] Chaitidou, *op.cit.*: 66.
[218] Schmid, *op.cit.*, 86;
[219] *Ibid.*; *Prosecutor v. Katanga*, Judgment, Trial Chamber II, ICC-01/04–01/07, (Mar. 7, 2014) para. 1119.

Most importantly, however, the attack against a civilian population must be widespread or systematic to amount to a CAH. The *ad hoc* tribunals have taken a widespread or systematic attack to effectively mean a pattern of widespread or systematic underlying offences (i.e. the specific acts listed in the relevant statutory definitions of CAH and Art.2 DA).[220] The purpose of such a threshold is to exclude random and isolated crimes from the ambit of CAH.[221]

Due to the use of the word "or", the requirement for the attack to be widespread or systematic is, in theory, disjunctive – if a case meets one of the elements, there is no need to consider the other.[222] However, the disjunctive approach was a controversial question during the drafting of the RS, and thus it runs the risk of being amended during the final stages of adopting the DA.[223] In practice, however, the assessment of "widespread or systematic" is not quite as disjunctive as the wording suggests. The Art.2(2)(a) definition of an "attack" explicitly involves both the "multiple commission of acts" and the policy requirement, although these elements are arguably less demanding than "widespread" or "systematic" respectively.[224] This will be elaborated on below

Finally, the assessment of these elements differs on case-by-case basis. Thus, the civilian population targeted by the attack must be defined first, and only then the assessment of the widespread or systematic nature of the attack can be made in considering the circumstances of the targeted population and the means, methods, and results of the attack.[225]

Widespread

According to the ICC in *Katanga,* "widespread" refers to the "large-scale nature of the attack and the number of targeted persons".[226] The *Bemba* judgment noted that the attack ought to be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[227] Thus, an underlying act constituting an attack against a civilian population will be considered "widespread" if the underlying acts are committed on a large-scale,

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[220] Boas *et.al., op.cit.*: 51.
[221] Chesterman, *op.cit.*: 315.
[222] Boas *et.al., op.cit.*: 52.
[223] Boas *et.al., op.cit.*: 106; Klamberg, *op.cit.*: 33.
[224] Boas *et.al., op.cit.*: 107; Klamberg, *op.cit.*: 34.
[225] Boas *et.al., op.cit.*: 52-53.
[226] Schmid, *op.cit.,* 90., Klamberg, *op.cit.*: 33.
[227] Chaitidou, *op.cit.*: 70.

frequently, or against a multiplicity of victims.[228] The geographic scope of the attack is likewise a relevant factor.[229] The term widespread is sufficiently broad to cover various circumstances where a multiplicity of victims are involved, i.e. both to cover the cumulative effect of a series of inhumane acts or the singular effect of a single inhuman act of severe magnitude.[230]

While the quantitative nature of the term "widespread" is therefore relatively straightforward, there has been some controversy and confusion regarding the "systematic" element and the degree of planning and organization it precisely entails.

Systematic

In defining the "systematic" prong of the context elements, the ICTY in *Kunarac* understood it as referring to "the organized nature of the acts of violence and the improbability of their random occurrence".[231] This can be inferred from a pattern of conduct that suggests a non-accidental repetition of acts of a similar nature on regular basis.[232] The ICTR went a step further, alluding to a soft policy requirement. In *Akayesu*, for example, "systematic" was understood as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources", while in *Kayishema and Ruzindana* a systematic attack was one "carried out pursuant to a preconceived policy or plan".[233] Thus, while some form of a preconceived plan or policy seems to be required by the ICTR, there was no requirement for this plan/policy to be adopted as a formal policy of a state.[234]

Despite adding a policy element to the very definition of an attack, the ICC has failed to draw a clear boundary between the "systematic" and "policy" elements, leading to an arguably inconsistent interpretation between different cases.[235] In *Katanga,* the ICC emphasized the improbability of the random occurrence of the acts of violence in question, reminiscent of the

[228] Christopher Roberts, "On the Definition of Crimes against Humanity and Other Widespread or Systematic Human Rights Violations," *University of Pennsylvania Journal of Law and Social Change* 20/1 (2017): 21.
[229] Klamberg, *op.cit.*: 33; Chaitidou, *op.cit.*: 70.
[230] Roberts, *op.cit.*: 21.
[231] Roberts *op.cit*: 21; *Prosecutor v. Kunarac,* Appeals Judgment, Appeals Chamber, IT-96-23 & IT-96-23/1-A (Jun. 12, 2002): paras.94, 98.
[232] *Prosecutor v. Kunarac*, Appeals Chamber, *op.cit.*
[233] Chesterman, *op.cit.*: 315.
[234] Roberts, *op.cit.*: 21.
[235] Chaitidou, *op.cit.*: 72.

ICTY approach in *Kunarac*.[236] In *Arrest Warrants,* the ICC spelled out in more detail what facts may serve as indicators of systematic conduct, namely the use of the state apparatus or the involvement of army and police forces, national intelligence and security services, and even allied militia groups.[237]

Some scholars further argue that where the attack against a civilian population is widespread, a systematic nature of the attack may arguably also be presumed.[238] Indeed, carrying out a widespread attack against a civilian population that involves acts listed in Art.2(1) DA would very likely necessitate a degree of planning and certain organizational capacities on part of the perpetrators. In *Bemba,* the ICC applies a "two-step" approach to establishing whether an attack is widespread or systematic. First, it would determine the existence of an attack pursuant to Art.7(2)(a) RS (corresponding to Art.2(2)(a) DA) – a determination that would involve the assessment of the policy element. Only then would it proceed to assess whether the attack is widespread or systematic. Thus, Chaitidou notes, "a "widespread" or "systematic" attack will regularly embrace the cumulative requirements of Article 7(2)(a) of the Statute at a lower level" – effectively minimizing the disjunctive meaning of the "widespread or systematic" formulation.[239]

However, the definition would not be phrased disjunctively if the "systematic" standard could be proven just through the sheer scale of the attack. Thus, a separate conception of "systematic" is indeed crucial in cases that involve a policy of an attack against a civilian population without necessarily amounting to a widespread attack just yet.

To summarize, the term "systematic" generally refers to an organized act or omission, which follows a pattern or a common policy.[240] It appears that much like the other contextual elements of CAH, "systematic" is a further safeguard against the inclusion of random or isolated acts. With the context elements outlined, the thesis will proceed to discuss the material elements pertaining to persecution.

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[236] *Prosecutor v. Katanga and Ngudjolo,* Decision, Pre-Trial Chamber I, ICC-01/04-01/07-717 (Sep. 30, 2008): para. 394.
[237] *Ibid.*: 63.
[238] Roberts, *op.cit.*: 22.
[239] Chaitidiou, *op.cit.*: 73.
[240] Schmid, *op.cit.*, 90., citing *Prosecutor v. Akayesu, op.cit*: para.580.

5.4. MATERIAL ELEMENTS - PERSECUTION AND OTHER PROHIBITED ACTS

The inclusion of persecution within the ambit of CAH aims to criminalize massive violations of human rights committed on impermissible discriminatory grounds.[241] Although the RS definition has added to the list of underlying acts that may constitute CAH in the requisite context, the scope of persecution has been subject to qualifications under Art.7 RS.[242] The definition in the DA is consequently also narrower. Specifically, persecution must occur "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court", thus adding a nexus element not required by previous definitions.[243] Importantly, the drafters of the RS were divided on whether persecution ought to be included in Art.7 RS and what its definition should be.[244] Similar controversies may arise upon the final adoption of the DA.

Indictments on persecution tend to allege that persecution was committed through other underlying offences, hence the nexus to the other underlying acts.[245] Thus, persecution effectively entails (1) the particular underlying offence that is alleged to be persecutory; (2) the specific requirements of persecution as such – the targeted group, severe and intentional deprivation of a fundamental right, and discriminatory intent; and (3) the widespread or systematic nature of the persecution or its nexus to such an attack.

This section will study the material aspects of these requirements, while discriminatory intent will be discussed under the subchapter on mental elements. The material elements of persecution consist of a (1) severe denial of fundamental rights in violation of international law; (2) discrimination on prohibited grounds in fact, and (3) a connection with any other Art.2(1) DA act.[246] Each will be considered in turn.

Severe and Intentional Deprivation of a Fundamental Right

Persecution is a broad crime intended to cover a variety of acts that "violate an individual's right to the equal enjoyment of his basic rights".[247] These acts are considered of serious concern

[241] Klamberg, *op.cit.*: 55.
[242] Schabas, "Atrocity Crimes", *op.cit.*: 205.
[243] *Ibid.*
[244] Klamberg, *op.cit.*: 55.
[245] Boas *et.al.*, *op.cit.*: 88.
[246] Klamberg, *op.cit.*: 56.
[247] William A. Schabas, "Crimes Against Humanity as a Paradigm for International Atrocity Crimes", *op.cit.*: 263

not because of apparent cruelty, but rather because of the harmful discrimination they aim to bring about.[248] It is not necessary to define what constitutes a "fundamental right" for the purposes of persecution – it can be a right deriving from both customary and treaty law.[249] What matters for the purposes of DA is that this deprivation of fundamental rights is severe and intentional, again to weed out random instances of discrimination, and that it discriminates in fact. Breaches of fundamental rights would typically occur through the underlying acts of CAH by themselves.

The Targeted Group

To constitute a discriminatory act, the conduct in question must target the members of an identifiable protected group or collectivity because of their group affiliation. The RS and DA definitions extend the scope of groups that enjoy protection from persecution - it is no longer limited to political, racial, or religious grounds as in statutes of the *ad hoc* tribunals, and now also includes discrimination on national, ethnic, cultural, gender or any other grounds "universally recognized as impermissible under international law".[250] The inclusion of "other grounds" allows for future expansion of the protective scope of CAH while retaining a fairly high threshold for potential additions with the universal recognition standard. It is not necessary for the purposes of this thesis to consider these groups in further detail.

The Nexus to an Underlying Act

Art.2(1)(h) DA stipulates that persecution must be established in connection with any other act listed in Art.2(1). As with the introduction of a policy element to the list of context elements of CAH, the purpose of the nexus requirement is to once again ensure that isolated acts unrelated to the overall context are not covered by persecution.[251] The nexus requirement is notably a higher standard than the *ad hoc* tribunal approach whereby any act or omission can constitute persecution as long as it is deliberate and infringes a fundamental right deriving from customary law or a treaty.

However, the list of the underlying offences has been elaborated by the RS and the DA to include different types of sexual violence, forcible transfer, enforced disappearances, and apartheid

[248] *Ibid.*
[249] Murray, *op.cit.*: 597.
[250] *Draft Articles*, *op.cit.*: Art.2(1)(h).
[251] Chaitidou, *op.cit.*: 53.

in addition to the previously enumerated acts of murder, extermination, enslavement, imprisonment in violation of rules of international law, torture, and other inhumane acts.[252] Furthermore, because persecution historically tends to be accompanied by other inhumane acts, meeting the nexus to another Art.2(1) DA act requirement should not cause much difficulty in practice.[253] In *Bemba*, the ICC noted that the nature, aim, and consequences of the act are indicators that may assist in the determination of whether a link between the act and the overall attack against a civilian population is present.[254] These acts will be elaborated on in the Chapter 6 case study.

5.5. THE MENTAL ELEMENTS – KNOWLEDGE AND DISCRIMINATORY INTENT

All CAH involve a mental element of knowledge of the attack against a civilian population, however persecution entails an additional requirement - discriminatory intent on grounds impermissible under international law (i.e. discrimination against the protected groups as already discussed). Each will be considered in turn.

Knowledge

Art.2(1) DA requires that the underlying acts to be committed "with knowledge of the attack" against a civilian population. The knowledge requirement is twofold: the perpetrator knew of the widespread or systematic attack and the perpetrator either generally knew that their conduct would be a part of such attack or intended their conduct to be a part thereof (thus covering the situation of an emerging widespread or systematic attack).[255] Boas further notes that the mental element behind a CAH may be fulfilled not only by the physical perpetrator, but also by another relevant actor who directs or orders the act.[256] Indeed, there is general agreement that the perpetrator need not know specific details of the attack or be involved in the planning thereof.[257] The ICTY in *Blaškić* further allowed for the awareness of the risk of participating in the attack to satisfy the knowledge requirement.[258]

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[252] Boas *et.al., op.cit.*: 108.; *Draft Articles*, *op.cit.*: Art.2(1).
[253] Klamberg, *op.cit.*: 56.
[254] *Prosecutor v. Bemba*, Pre-Trial Chamber II, *op.cit.*: para.86.
[255] Sluiter, *op.cit.*: 135.
[256] Boas *et.al.*, *op.cit.*: 54.
[257] Klamberg, *op.cit.*: 35. *Prosecutor v. Gbagbo*, Decision, Pre-Trial Chamber I, ICC-02/11-01/11 (Jun.12, 2014): para.214.
[258] *Prosecutor v. Blaškić*, Judgment, Trial Chamber, IT-95-14-T (Mar.3, 2000): paras. 251-5.

Discriminatory intent

The discriminatory intent is an element that allows persecution to bridge the conceptual gap between CAH and genocide. The ICJ in *Bosnia v. Serbia* described discriminatory intent as the targeting of group members due to their group membership, noting that *genocidal* intent requires more than just *discriminatory* intent.[259] Thus, the lower intent standard allows persecution to cover a crime similar in its malicious nature to genocide but without the high threshold of genocidal intent. Thus, persecution is theoretically a pragmatic and more accessible alternative to genocide charges.

In general, persecution is described as an intentional act or an omission that is discriminatory in fact, i.e. denying or infringing upon a fundamental right arising from customary international law and committed with the intention to discriminate against the targeted group.[260] *Elements of Crimes* characterizes the discriminatory intent as follows:

> *2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.*
> *3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender […] or other grounds that are universally recognized as impermissible under international law.*[261]

Importantly, the discriminatory intent refers to specifically to the underlying act of persecution, not to the overall widespread or systematic attack which has no such requirement apart from being directed against any *civilian* population.[262]

The establishment of discriminatory intent, in practice, is somewhat similar to the establishment of genocidal intent. Boas notes that the discriminatory intent requirement may not be satisfied on the basis of the allegedly discriminatory character of the act alone, however it "may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent".[263] Furthermore, as with genocidal intent, the specific individual motive of the perpetrator is irrelevant

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[259] *Bosnia v. Serbia*, *op.cit.*, para.187.
[260] Boas *et.al.*, *op.cit.*: 89-90.
[261] *Elements of Crimes*, *op.cit.*: 10.
[262] Schmid, *op.cit.*: 92.
[263] Boas *et.al.*, *op.cit.*: 94.

- much like genocide, CAH can also be committed for "purely personal" motives.[264] In other words, while genocidal intent has an inherently high standard of proof that specifically requires an intent to destroy the protected group, discriminatory intent simply stipulates that the victims were targeted because of their group affiliation. Thus, the inherent standard of proof for the *mens rea* of persecution is lower than that of genocide, leading to a broader applicability of persecution.

5.6. CHAPTER CONCLUSION

To summarize the discussion of this chapter, for a given case of violence against a group to constitute persecution it will be necessary to establish that:

1. The targeted group constitutes a civilian population;
2. The civilian population was a victim to an attack – the multiple commission of Art.2(1) DA acts in pursuit of a State or organizational policy;
3. The attack against the civilian population was widespread or systematic;
4. The targeted group was severely and intentionally deprived of fundamental rights in violation of international law in connection with another Art.2(1) act and the overall attack;
5. The victims were targeted with knowledge of the widespread and systematic attack (or the intention to form such an attack) and on the basis of their affiliation with the protected group.

This text-based study already suggests that CAH cover a broader area of subject matter with a lower standard of *mens rea.* However, to complete the answer to Question 1, the thesis will proceed to apply these criteria to the case study on the Rohingya.

6. THE ROHINGYA CRISIS AS PERSECUTION

The first part of the case study in Chapter 4 concluded that establishing the material acts of Art.II GC poses no difficulty in the present case. However, the ICJ practice suggests a high threshold for inferring genocidal intent from a pattern of conduct, which may also be applied in the ongoing proceedings between the Gambia and Myanmar. Assessment under the DA could

[264] Boas *et.al., op.cit.*: 55.; Schmid, *op.cit.*: 92.

serve as a more unequivocal indication of whether the establishment of state responsibility for the relevant crimes is likely in a given case. The second part of the case study on the Rohingya will be structured according to the conclusions of Chapter 5.

6.1. A Widespread or Systematic Attack Against a Civilian Population

Already since the 1990s, Special Rapporteurs of the UN have repeatedly characterized various anti-Rohingya measures as widespread and systematic international crimes emanating from state policy.[265] Focusing on the time period between 2017 and 2019, the following study of the IIFFM findings shows that this view is well-founded and that the contextual elements of CAH are met in the present case.

Civilian Population

Although the IIFFM Reports highlight alarming developments in the treatment of many minority groups in Myanmar, the focus of this thesis is the "clearance operations" against the Rohingya in the Rakhine state. In this context, the Rohingya constitute the relevant civilian population that the overall attack is directed against, a claim supported by the discriminatory anti-Rohingya rhetoric in connection with the "clearance operations". As already noted, the alleged presence of some ARSA members within the populations of the targeted settlements and among the Rohingya does not as such alter the primarily civilian status of the population for the purposes of CAH. Furthermore, the ICC in *Bemba* considered the indiscriminate nature of an attack as indicative of the principal targeting of civilians, and the Tatmadaw likewise seemed to make no efforts to distinguish between civilians and alleged insurgents.[266]

The Attack and the Underlying Policy

Art.2(2)(1) DA states that an attack is "a course of conduct" involving multiple commission of the prohibited acts in pursuit or furtherance of a State or organizational policy. This policy need not be formally adopted and would often be inferred from a pattern of organized conduct. The ICC in *Gbagbo* considered the pattern acts, methods, and perpetrators viewed collectively in

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[265] *Human Rights Watch*, "'All You Can Do is Pray': Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State", (2013), https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims: 11.
[266] *Prosecutor v. Bemba,* Judgment, *op.cit.*: para.673.

determining the existence of such a "course of conduct" and the nexus of an underlying act to the overall attack.[267] In the present case, the IIFFM Reports highlight numerous factors evidencing both an attack against a civilian population – the Rohingya, targeted regardless of their actual ties with the ARSA – and an underlying policy by the Government of Myanmar to remove the Rohingya from the Rakhine state.

That the Tatmadaw in cahoots with local militias have repeatedly razed entire Rohingya settlements indiscriminately killing their inhabitants has already been discussed in sufficient detail by Chapter 4 and the IIFFM Reports, as is the widespread sexual violence, brutal assault, and the overall inhumane treatment that the Rohingya are routinely subject to. This seems to easily fulfil the requirement that an attack must be comprised of a course of conduct involving a multiplicity of the underlying acts. In this case, these acts include murder, extermination, imprisonment (into ghettos and internment/forced labor camps, also discussed prior), rape etc.[268] The IIFFM in its discussion of the CAH aspects of the crisis singles out the Tatmadaw and other security forces and local militias as the key perpetrators of the broader attack based on victim and witness testimonies.[269]

Regarding the existence of a State or organizational plan or policy, reference could be made to two general "plans" or "policies" by the Government of Myanmar – to remove the Rohingya from the Rakhine state and Myanmar in general and, allegedly, to carry out "counter-terrorism" operations against the ARSA.

First, Government officials and the Tatmadaw leadership have been explicit in discussing their goal of removing the Rohingya from the Rakhine state. Some of their statements, quoted prior in Ch.4, referred to their aim to solve "the Bengali problem" and remove the "illegal Bengal immigrants" from Myanmar. Many instances of anti-Rohingya hate speech by officials also claim that the Rohingya as such do not belong in Myanmar. Evidence of such a plan/policy is further expressed by the initial adoption and the subsequent refusal to amend the 1982 Citizenship Law

[267] *Prosecutor v. Gbagbo,* Pre-Trial Chamber I, *op.cit.*: para.212.
[268] *Draft Articles, op.cit.*: Art.2(2)(a).
[269] IIFFM Report 2018, *op.cit.*: para.1508.

despite international pleas to that effect or by the attempts to cajole the Rohingya into endorsing the "illegal immigrant" narrative in the process of applying for the NVCs.

Second, the Government of Myanmar officially justified the "clearance operations" as a counter-terrorism response to the threat posed by the ARSA. This is undeniable evidence that the attack against the Rohingya population was planned and organized by State authorities and/or the Tatmadaw. The indiscriminate violence further suggests that any IHL or human rights law considerations of "necessity" in an armed conflict or to counter a terrorist threat may not justify the scale, intensity, and brutality of the violence employed during the "clearance operations".[270] Therefore, the argument that regardless of the justification, the "clearance operations" constituted an organized attack against a civilian population, specifically the Rohingya, is further reinforced.

In general, as the crux of CAH is the context in which the crimes occur, the IIFFM notes that the abuse of the Rohingya is not limited to the timespan of the "clearance operations", but rather reflects a broader regime of State-sanctioned mistreatment and oppression.[271] For this reason, the IIFFM considers the attack against the Rohingya population to have commenced in 2016 at the latest, with the "clearance operations" forming a part of this broader attack.[272] Thus, the IIFFM also agrees that there is little room for any other inference than a State or organizational policy as a driver of the attack.[273] With the existence of an attack established, what remains is determining if the attack can be considered widespread or systematic.

Widespread

To recall, the "widespread" prong of Art.2 DA refers to the large-scale – geographically or quantitatively - commission of the acts constituting the overall attack against a civilian population. The ICC in *Gbagbo* considered the number of acts, the number of victims, the duration of the attack, and the geographic area.[274] In the present case, the Tatmadaw (1) carried out numerous

[270] Considering that e.g. the Heidelberg Institute for International Conflict Research considers the Rohingya crisis to be a "limited war" prior to 2019 (see the "Conflict Barometer 2019" (2019), https://hiik.de/wp-content/uploads/2020/08/ConflictBarometer_2019_4.pdf: 146), there may be cause to study the legality of the Tatmadaw's conduct also under international humanitarian law.
[271] *Ibid.* para.1509.
[272] *Ibid.* The 2016 spike in violence was triggered by attacks against Burmese border posts by ARSA.
[273] *Ibid.*
[274] *Prosecutor v. Gbagbo,* Pre-Trial Chamber I, *op.cit.*: para.224.

"clearance operations", (2) across northern Rakhine state in at least 54 separate locations,[275] (3) subjecting most inhabitants to brutal violence and resulting in more than 10,000 casualties, (4) throughout August and September 2017, with smaller incidents thereafter.[276] These factors cumulatively suggest that the attack against the Rohingya is widespread in line with the *Gbagbo* approach.

Systematic

Although the establishment of the "widespread" element means that there is, theoretically, no need to assess the systematic nature of the attack, the argument that the Rohingya were victims to CAH would only be strengthened by highlighting the systematic nature of the abuse. The line between the policy component of an "attack" and the "systematic" element remains somewhat unclear. "Systematic" implies a pattern of conduct that has a degree of underlying organization, underscoring the improbability of the random occurrence of the acts of violence.[277] In *Gbagbo,* the ICC also considered planning and coordination as relevant factors.[278]

The IIFFM has repeatedly characterized the anti-Rohingya violence as systematic, including in its discussion of the crisis as a CAH.[279] The Mission rightly emphasizes the degree of organization of the "clearance operations" and other acts of violence against the Rohingya and the similarity in their methods and underlying rationale as ruling out the possibility of their random occurrence.[280] The consistency in the nature of the "clearance operations" across multiple villages is abundantly clear from the IIFFM Reports.

As the IIFFM Reports suggest, the sequence of events in each reported incident follows a similar pattern, whereby the Tatmadaw, at times accompanied by local militias, enters a settlement early in the morning and opens fire at the inhabitants or rounds them up for executions by gunfire. Survivors of gunshots are often chased down while they flee or maimed or killed with sharp weapons. Women and young girls are often raped, often by multiple soldiers. The similarities between these incidents indicate a degree of organization, further evidenced by official statements

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[275] IIFFM Report 2018 *op.cit.*: para.1508.
[276] *Ibid.*: para.1482.
[277] *Ibid.* para.1444.
[278] *Prosecutor v. Gbagbo,* Pre-Trial Chamber I, *op.cit.*, para.225.
[279] IIFFM Report 2018 *op.cit.*: para.1508.
[280] *Ibid.*: para.1508.

which justify these "clearance operations" in the context of "solving the Bengali problem". Furthermore, more broadly, the systematic character of the violence is evidenced by the overall context of institutionalized discrimination against the Rohingya, which derives from the citizenship legislation and related policies of the Government of Myanmar.

Thus, it can be concluded that the anti-Rohingya attack is not only widespread, but also systematic, and consequently the context elements of CAH are established. Therefore, the case study may proceed with the assessment of the material and mental elements.

6.2. Intentional and Severe Deprivation of Fundamental Rights

To recall its definition in Art.2(2)(h) DA, persecution entails the intentional and severe deprivation of fundamental rights in contravention of international law with discriminatory intent on prohibited grounds. The DA further require a nexus between persecution and other underlying acts to further emphasize the organized nature of CAH and add an element of aggravation thereto. Relying on the same definition of CAH, the ICC considered it plausible that persecution and "other inhumane acts" are relevant offences in the Rohingya case.[281]

Chapter 5 already pointed out that the very commission of the underlying acts of CAH with discriminatory intent often forms the basis of convictions on the grounds of persecution. Thus, the subchapter will first discuss the deprivation of fundamental rights the Rohingya are entitled to in the context of the underlying acts committed against them, effectively combining the denial of rights with the nexus requirement to persecution and the underlying Art.2(1) DA acts. Afterwards, a brief comment on the severity and intentionality of the deprivation of rights will follow.

The official narrative of the Government of Myanmar that the Rohingya are "illegal Bengali immigrants", enshrined in its citizenship law and related discriminatory policies, is the red thread throughout various expressions of anti-Rohingya sentiment. The IIFFM notes that the wide scope of the discriminatory policies and their arbitrary implementation constitute a denial of a numerous fundamental rights, all aimed at the stripping the Rohingya of their "essence as a group"

[281] *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Decision, Pre-Trial Chamber I, ICC-RoC46(3)-01/18 (Sep. 6, 2018) (hereinafter "Decision on ICC Jurisdiction"): paras. 75-78.

and their individual humanity.[282] A number of Art.2(1) DA acts can be identified as having a nexus to the persecution of the Rohingya or, given their intent, constitute persecution in themselves.

Murder and Extermination (Arts.2(1)(a) and (b) DA)

As previously noted, the "clearance operations" of 2017 resulted in more than 10,000 deaths, an estimate deemed "conservative" by the IIFFM.[283] The IIFFM is certain that the perpetrators acted with intent to kill or cause serious bodily harm, which they could have reasonably foreseen to be potentially lethal.[284] Thus, establishing the occurrence of murder as a CAH raises no further questions, considering the broader context of a widespread and systematic attack against the Rohingya population. The Tatmadaw leadership, as indicated by the utterances quoted prior, appears to have been aware of this context and to have intended to perpetuate it. Moreover, the brutality of the killing methods may also fall under "other inhumane acts" in Art.2(1)(k), as in the *Gbagbo* judgment.[285] Furthermore, the establishment of murder as a CAH suggests that the CAH of extermination might also be a relevant underlying act.

Extermination and murder differ in that the killings in the former must occur on a "mass" or "large" scale, albeit without specifying a formal numerical threshold.[286] The IIFFM notes some comparable cases where extermination as a CAH was established. For example, the Independent International Commission of Inquiry on the situation in Syria pointed out that killings that took place "with high frequency over a long period of time and in multiple locations" constituted extermination, while The ICTR repeatedly found the mass murders of Tutsis to meet the threshold of extermination, as did the ICTY referring to the killing of at least 1,699 victims in *Brdjanin.*[287] Again, considering the Tatmadaw's awareness of the context and how their actions would further the attack against the Rohingya, it follows that also the underlying act of extermination as a CAH can also be established with relative certainty.[288]

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[282] IIFFM Report 2018 *op.cit.*: para.1500.
[283] *Ibid.*: para.1482.
[284] *Ibid.*: para.1482.
[285] *Prosecutor v. Gbagbo,* Pre-Trial Chamber I *op.cit.*: paras. 198-199.
[286] *Elements of Crimes, op.cit.*: Art.7(1)(b); IIFFM Report 2018 *op.cit.*: para.1483.
[287] IIFFM Report 2018, *op.cit.*, para.1483.
[288] See *Ibid.*: paras.884-893 for detailed discussion of mass killings of the Rohingya.

Enslavement (Art.2(1)(c) DA)

As explained in Chapter III, forced labor was a common feature of Rohingya life, although other groups were also subject to similar conditions. The Rohingya – but also ethnic Rakhine until more recently – were forced to comply with work orders from the Tatmadaw under significant duress and threats to their life and well-being, alternatively being forced to pay bribes.[289] The fact that the laborers could not exercise their free will to affect any aspect of the work conditions suggests, according to the IIFFM, that certain acts of forced labor – both against the Rohingyas and the ethnic Rakhine – amount to enslavement as an underlying act of CAH.[290] The potential persecutory character of this act may be reflected by the fact that while the use of ethnic Rakhine for forced labor had decreased, as noted prior, this is not the case for the Rohingya.

Deportation and forcible transfer of a population (Art.2(1)(d) DA)

The crimes of deportation and forcible transfer arise in situations of forced displacement – through expulsion or other coercive acts without a legitimate ground under international law – from the area in which the persons affected were lawfully present.[291] The Pre-Trial Chamber of the ICC in assessing whether it has jurisdiction over the Rohingya case focused specifically on deportation as a relevant offence.[292] The IIFFM notes that the 2017 "clearance operations" resulted in over 725,000 displaced Rohingya, out of the approximately 1 million Rohingya residing in Myanmar, contrasting the number with the 2016 exodus of an estimated 87,000.[293] As previously argued, the main reason the Rohingya flee from Myanmar is the violence they are routinely subject to. The IIFFM further claims that the entire Rohingya population was effectively displaced as a result of the Tatmadaw violence, emphasizing the lack of a genuine and meaningful choice for the victim as the determinative factor in establishing the crimes of deportation/forcible transfer.[294] There is no suggestion of a legitimate ground for such mass displacement either.

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[289] *Ibid.*.: paras.1485-6.
[290] *Ibid.* para.1487.
[291] *Elements of Crimes*, *op.cit.*: Art.7(2)(d).
[292] *Decision on Jurisdiction*, Pre-Trial Chamber I *op.cit.*: Chapter VI. Importantly, the ICC could only focus on deportation, as it is a cross-border displacement whose result took place in Bangladesh – a member of the ICC, as opposed to Myanmar.
[293] Shah, *op.cit.*: 182; IIFFM Report 2018, *op.cit.*: para.1489.
[294] IIFFM Report 2018, *op.cit.*: para.1489.

Although arguments could be raised that the Rohingya were not "lawfully present" in the relevant areas as far as the official acts and legislation, however discriminatory, are concerned, the IIFFM distinguishes "lawfully present" from the legal concept of lawful residence. More specifically, the protection is said to extend to anybody who has come to "live" in a community for whatever reason, and therefore the arbitrary denial of citizenship for the Rohingya or any other aspect of the discriminatory national policies cannot be evoked to justify the effective displacement of the majority of the Rohingya population.[295] In short, the elements of Art.2(1)(d) DA are met.

Imprisonment, torture, enforced disappearance (Arts.2(1)(e), (f), and (i) DA)

The IIFFM points out the unlawfulness of the forcible transfer of the Rohingya into displacement camps, beginning after the surge of anti-Rohingya violence back in 2012.[296] The restrictions on movement and the confinement of the Rohingya into "ghettos" has already been sufficiently discussed. What remains to be added are the "widespread and systematic" arbitrary arrests of the Rohingya in the Rakhine state by various law enforcement bodies, particularly in the context of the "clearance operations.[297] These, according to the IIFFM, amount to enforced disappearances, which mostly target young men or influential individuals, who remain missing and have no recourse to any legal or procedural safeguards.[298] The issue is exacerbated by the routine removal of individuals from household lists, which already severely undermines the legal existence of the victims and their capacity to exercise their rights in general. The detainees are often subject to torture and general brutality to extract confessions. Finally, it must be noted that the Government organized the relocation and encampment of Rohingya into specifically designated areas of abhorrent living conditions, departure from which is severely restricted by armed guards and bureaucratic obstacles.[299] Clearly, the Rohingya have been subject to severe deprivation of physical liberty, whereby they were subject to torture and inhumane treatment and, in cases of detention, often denied procedural guarantees to the point of likely constituting enforced disappearances.

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[295] *Ibid.*: para.1490.
[296] *Ibid.*: paras.1491; 499,517-519.
[297] *Ibid.*: paras.1492-3; see also paras.607-610.
[298] *Ibid.*: para.1493.
[299] Kingston, *op.cit.*: 1168.

Rape and sexual violence (Art.2(1)(g) DA)

The thesis has already discussed the widespread sexual violence against Rohingya women in sufficiently gruesome detail. These paragraphs discussed sexual violence in the context of the "clearance operations" – indeed, the IIFFM finds that the frequent large-scale gang rapes with multiple perpetrators and victims were an orchestrated attack by the Tatmadaw, linking the sexual violence to the overall attack.[300] However, it must be emphasized that the sexual violence against Rohingya women is not exclusive to the "clearance operations", but rather a regular feature of the anti-Rohingya violence throughout the duration of the IIFFM and beyond.[301] The IIFFM concludes that it was impossible for the victims to control or change their situation and that not only does the overwhelming body of evidence prove the occurrence of rape and sexual violence as a CAH, there is reason to also consider these acts under the CAH of torture.[302] Thus, the elements of the CAH of rape and sexual violence have been met.[303]

Denial of other rights – citizenship and the "right to have rights"

Finally, it must be recalled that persecution factors in other violations of fundamental rights that do not find expression in the underlying acts listed by Art.2(1) DA.[304] These serve to capture the nature of abuse in a given case more accurately. For the purposes of this thesis, it is not necessary to dwell on additional breaches of fundamental rights in much depth, as the other underlying acts already constitute the requisite deprivation of fundamental rights. However, Ch.VI of the 2018 Report discusses the problematic aspects of Myanmar's domestic legislation in more depth, focusing on nationality matters which curtail the Rohingyas' capacity to exercise their fundamental rights in general. Hannah Arendt poignantly calls statelessness a "rightless condition".[305] Indeed, a variety of economic, social, and cultural rights are denied as a result of Rohingyas' statelessness, severely undermining their quality of life and access to any sort of legal protection.[306] Taken together, it is clear that the Rohingya have been deprived of numerous

[300] IIFFM Report 2018, *op.cit.*: para.1496. See also para.921.
[301] *Ibid.*: para.1496.
[302] *Ibid.*: paras.1498; 582. The thesis, however, will not dwell on torture in further detail, as the focus is on persecution, and the other acts are considered only for the purposes of establishing the required nexus.
[303] *Elements of Crimes*, *op.cit.*: Art.7(1)(d).
[304] Roberts, *op.cit.*: 23-34.
[305] Hannah Arendt, The Origins of Totalitarianism (*Harcourt, Brase Company*, 1951): 281.
[306] Kingston, *op.cit.*: 1167.

fundamental rights through these practical procedural obstacles, and that the context of the NVCs and the Citizenship Law suggests a discriminatory intent.

Intentionality and severity

Considering that the deprivation of fundamental rights in the Rohingya case is primarily brought about by the other underlying acts of CAH, the intentionality and severity elements are satisfied by the very nature of these acts. First, the organized nature of many of these abuses and the anti-Rohingya rhetoric that accompanied specific instances of violence clearly point to the fact that the deprivation of the relevant rights was an intentional act. Second, the severity of the acts is reflected both by the widespread nature of the attack against the Rohingya population and the brutality of their treatment. Considering the excessiveness of violence relative to the official "justification" therefor, the intentionality and severity elements of persecution are undeniably satisfied.

Persecution as a part of the overall attack

Persecution and anti-Rohingya discrimination are the red thread throughout most of the violence during the "clearance operations". The discrimination is strongly institutionalized into a complex mechanism of oppression and denial of legal status. The IIFFM argues that the consistent pattern of criminal acts with discriminatory intent suggests that the Tatmadaw and State authorities play an active role in directly perpetrating many of the underlying acts discussed in this chapter.[307] The IIFFM goes so far as to suggest that the context of the discriminatory acts and the acts themselves effectively result in a system of oppression that may even amount to apartheid – another CAH according to Art.2(1)(j) DA.[308]

The next subchapter will show that the knowledge and intent requirements are satisfied, and therefore the CAH of persecution in its own right and through the other underlying acts constitutes a part of the widespread and systematic attack against the Rohingya population. Thus, all requirements of Art.2 DA appear to be met.

[307] IIFFM Report 2018, *op.cit.*: para.1499.
[308] *Ibid.*: paras.1503-7.

6.3. MENTAL ELEMENTS – KNOWLEDGE AND DISCRIMINATORY INTENT

The genocide prong of the case study showed that doubts remain as to whether the existing proof of genocidal intent will withstand scrutiny by the ICJ. Although the mental elements of CAH are not without their own subjective and esoteric aspects, their scope seems to be wider and thus, arguably, easier to prove. This subchapter will discuss the knowledge element of CAH in general, as well as the discriminatory intent which is a specific feature of the CAH of persecution.

Knowledge of the widespread or systematic attack against the Rohingya

An undeniable factor suggesting that the Government of Myanmar and the Tatmadaw leadership were aware of the attack against the Rohingya, in addition to their own utterances of intent, is the fact that the findings of the IIFFM Reports were communicated to the Government along with a set of UN HRC recommendations.[309] The 2019 Report notes that these had, at the time of the publication of the Report, been ignored or dismissed.[310] Furthermore, concerns about the anti-Rohingya violence and the enabling role of the Citizenship Law and related policies have been raised for years prior by numerous human rights watchdogs, notably *Amnesty International* and the *Human Rights Watch*, and the UN, the latter having issued numerous special reports on the broader human rights situation in Myanmar.[311] Thus, the Tatmadaw and the Government of Myanmar must have known of the widespread and systematic attack against the Rohingya or, at the very least, been aware of the risk to the Rohingya posed by the discriminatory policies and acts of violence. This awareness further signals the intentionality of the underlying acts of CAH.

Discriminatory intent against the Rohingya

While there are similarities between genocidal and discriminatory intent, the latter has inherently lower standard of proof. Indeed, while the perpetrator must still consciously intend to discriminate a protected group, unlike genocide, intent in persecution can simply be inferred from the perpetrator's awareness of their participation in a discriminatory enterprise.[312]

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[309] *Summary of the IIFFM Report 2018,* A/HRC/39/64*, op.cit.*
[310] IIFFM Report 2019*, op.cit.*: paras.226-7.
[311] See e.g. UN General Assembly, "Situation of human rights in Myanmar" A/65/368 (Sep.15, 2010), para.73.
[312] Schabas, "Crimes Against Humanity as a Paradigm for International Atrocity Crimes", *op.cit.*: 263.

The awareness prong of the discriminatory intent needs no further comment. Nor is it necessary to further dwell on the intent to discriminate the Rohingya, aside from noting that ethnicity is explicitly listed by Art.2(1)(h) as a prohibited ground for discrimination. There is ample evidence of the perpetrators singling out and targeting the Rohingya solely on the basis of their group membership, in general and in relation to specific incidents, creating a rhetoric and an environment of hatred, contempt, and misinformation against the Rohingya.[313] Thus, by reference to the points raised in this thesis in previous chapters, the discriminatory intent standard is undoubtedly satisfied in the present case.

6.4. CHAPTER CONCLUSION

In conclusion, the organized commission of numerous Art.2(1) DA acts constitutes a widespread *and* systematic attack for the purposes of the DA. The Tatmadaw and other State organs as the main perpetrators of the attack were aware of this context and of how their actions furthered the anti-Rohingya violence. The intent to discriminate the Rohingya on prohibited grounds is therefore clear. Thus, there is a clear connection between, on the one hand, the established commission of murder, extermination, enslavement, forcible displacement, imprisonment, rape and sexual violence, enforced disappearance, and possibly torture and apartheid and, on the other hand, a discriminatory intent. Thus, the treatment of the Rohingya by the State bodies and the Tatmadaw constitutes the CAH of persecution under Art.(2)(1)(h) DA as a part of the broader attack in furtherance of specific state policies. Importantly, while findings under the GC depend on whether the ICJ will deem that genocidal intent is the only reasonable inference from the facts of the case, the discriminatory intent is clearly communicated, leaving no room for doubt that the Rohingya are persecuted for the purposes of the DA.

Consequently, to answer Question 1, it seems that the establishment of state responsibility for the relevant crimes or failure to prevent them would be easier under the DA than the GC, primarily owing to the lower standard of proof for *mens rea*. However, it is very important to acknowledge that even if the definition of CAH and the standards for establishing *mens rea* in theory offer better protection to vulnerable groups than the GC, the effectiveness of the former still largely depends on the prevention obligations established therein and the international

[313] IIFFM Report 2018, *op.cit.*: paras.1500-1.

community's enforcement toolset in general, and specifically in relation to the DA. The thesis will proceed to a brief overview of these issues.

VII. PREVENTION AND ENFORCEMENT

Establishing that a genocide or a CAH has taken place does not in itself lead to state accountability. Specific prevention obligations and robust enforcement tools are crucial in fighting impunity and holding states accountable for atrocity crimes and failures to prevent them.[314] However, a caveat is that a broad spectrum of prevention obligations might also deter states from using terms "genocide" and "CAH" to avoid triggering their own extraterritorial obligations.[315] This chapter will compare the relevant provisions of the GC and the DA and discuss state responsibility for atrocity crimes more broadly. The aim is to simply sketch out some of the issues arising from the prevention, enforcement, and state responsibility provisions within each instrument – more in-depth insight warrants further research.

7.1. STATE RESPONSIBILITY

The legal concept of state responsibility is crucial in outlining the extent to which a State is responsible for acts and decisions made by the individuals acting on its behalf. The Nuremberg Tribunal argument that "crimes are committed by men, not by abstract entities" points to the necessity and the important role of individual criminal responsibility.[316] However, given the organized nature of atrocity crimes, often enshrined in policies that may remain in force even if the individual perpetrators are punished and removed from power, the concept of state responsibility seems very necessary to ensure complete accountability for international crimes.[317] Indeed, the VCLT in Arts.53 and 64 states that a treaty that conflicts with a *jus cogens* norm – such as the prohibition of genocide – would be void. It would therefore be odd to consider States

[314] Laura M. Olson, "Re-enforcing Enforcement in a Specialized Convention on Crimes Against Humanity" in Sadat, *op.cit.*: 323.
[315] Tams and Mennecke, *op.cit.*: 11.
[316] Schabas, "Genocide in International Law", *op.cit.*: 512.
[317] For a similar argument, see e.g. Saira Mohamed, "A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice", *University Of Colorado Law Review* 80 (2009) or Gentian Zyberi, "The Practice of Shared Responsibility in Relation to Responsibility of States and Individuals for Mass Atrocity" SHARES Research Paper 105 (2016): 24.

as not having an obligation to not commit genocide or CAH.[318] The GC and DA incorporate state responsibility in fairly similar ways.

On the one hand, Art.I GC obliges the states to prevent and punish genocide, Art.II defines genocide, and Art.III lists the punishable acts e.g. commission of genocide, conspiracy, incitement, attempt, and complicity. The wording and the overall focus of the GC suggests a criminal justice-oriented approach aimed at national prosecutions of individual perpetrators.[319] The question of state responsibility in the context of genocide was addressed by the ICJ in *Bosnia v. Serbia.* Therein, the court found that it would be "paradoxical" if Art.I did not cover state responsibility for committing genocide if it directly obliges states to prevent and punish it.[320] Furthermore, the amendment recognizing state responsibility for genocide was rejected only by margin of two votes.[321] Finally, Art.IX on dispute settlement includes disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", implying that a State may be held responsible for committing genocide.

On the other hand, the DA discuss state responsibility through clearly obliging signatories "not to engage in acts that constitute crimes against humanity" in Art.3, also noting a general obligation to prevent and punish CAH and emphasizing the non-derogable nature of the prohibition of CAH. Most of the DA provisions, however, concern specific criminal justice procedures, which suggests a criminal justice-focused approach similar to that of the GC. Likewise, the general obligation to prevent and punish in Art.3(2) DA also mirrors that of Art.I GC. Importantly, however, where the GC makes explicit reference to state responsibility for genocide (Art.IX GC), the DA do not, although the ICJ might easily make an inference of state responsibility from Art.3(2) similarly to how it has done so from Art.I GC in *Bosnia v. Serbia*. Furthermore, Art.2(2)(a) DA implies an obligation for States not to commit CAH in that it defines an attack as dependent on the existence of a State or organizational policy.[322] Thus, it is clear that states incur some form

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[318] Etienne Ruvebana, and Marcel Brus. "Before It's Too Late: Preventing Genocide by Holding the Territorial State Responsible for Not Taking Preventive Action." *Netherlands International Law Review* 62/1 (2015): 36.
[319] Kevin Aquilina and Klejda Mulaj, "Limitations in attributing state responsibility under the Genocide Convention", *Journal of Human Rights* 17/1 (2018): 124;
[320] *Bosnia v. Serbia*, Judgment, *op.cit.*: 166.
[321] Schabas in "Genocide in International Law", *op.cit.*: 492.
[322]Andreas Zimmermann and Felix Boos, "Bringing States to Justice for Crimes against Humanity: The Compromissory Clause in the International Law Commission Draft Convention on Crimes against Humanity", *Journal of International Criminal Justice* 16/4 (2018): 850.

of responsibility not to commit genocide or CAH, although the nature of this responsibility remains unclear.

Schabas highlights that the drafters of the GC intended a civil, rather than criminal liability of states.[323] Furthermore, while the ILC contemplated the inclusion of state crimes into the Articles on Responsibility of States for Internationally Wrongful Acts, this was dropped after lengthy debates.[324] Indeed, the idea that a state can be criminally responsible for committing genocide is further challenged by the need to prove the criminal intent of the perpetrator, including subjective constructs such as "knowledge" or "discriminatory intent" or "intent to destroy".[325] A "State" as an abstract entity clearly does not have a consciousness which may create such intent.

Therefore, Gaeta concludes that Art.I GC ought to merely impose upon the signatories a special duty of care and diligence and that the state is responsible to prevent and punish genocide as a criminal act committed by individuals.[326] Similar approach by analogy ought to be taken regarding the DA. Indeed, although genocide is often perceived as impossible without a degree of state involvement, only individuals have so far been held criminally responsible for the actual perpetration of genocide, even though their actions may be attributable to the State through the ILC Articles on Responsibility of States.[327] Alternative views suggest establishing state criminal responsibility by requiring that a State policy is proven in lieu of the intent requirements.[328]

Ultimately, the nature of state responsibility for atrocity crimes as either "civil" (i.e. contractual) or criminal – and the implications thereof – remains unclear and warrants further research. In either case, what matters is the specific obligations States incur in relation to each atrocity crime. The thesis will turn to discuss the general obligations in each instrument to prevent and punish the crime, criminalize it in national law, cooperate with other states and organizations in matters of adjudication and investigation, as well as the dispute settlement provisions.

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[323] Schabas in "Genocide in International Law", *op.cit.*:512-513.
[324] *Ibid.*:515.
[325] Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?" *European Journal of International Law* 18/4 (2007): 635.
[326] *Ibid.*: 640-641.
[327] Aquilina and Mulaj, *op.cit.*: 124,
[328] Schabas, "Genocide in International Law", *op.cit.*: 518.

7.2. THE OBLIGATIONS TO PREVENT AND PUNISH

Art.I GC obliges signatories to prevent and to punish the crime of genocide. The ICJ has held that Art.I imposes "distinct obligations over and above those imposed by other Articles of the Convention".[329] While the punishment prong of the Art.I GC obligations is clarified in the remaining text of the treaty, the obligation to "prevent" remains rather unclear.[330] What has been established is that Art.I is an obligation of conduct and due diligence, rather than result. This means that whether the State *succeeded* in preventing a genocide is irrelevant as long as it has taken all measures within its power in an attempt to prevent a genocide.[331] Relevant criteria for assessing whether due diligence was exercised include geographic proximity of the State to the genocide and the State's capacity to influence the behavior of alleged perpetrators.[332] The due diligence obligation commences as soon as the State becomes aware or should have become aware of the genocidal intent of the perpetrators.[333]

Nonetheless, some uncertainties remain. First, the relationship between Art.I and other provisions of the GC is unclear. For example, although enacting the necessary legislation to criminalize genocide under Art.V is a clear obligation, Art.VIII, whereby states *may* call upon the competent UN organs to take preventative or suppressive action, is optional, yet perhaps indirectly mandated by the due diligence obligation of Art.I. ICJ has so far simply held that Art.VIII measures do not relieve a State from Art.I obligations.[334]

Second, it is likewise unclear to what extent Art.I is shaped by other fundamental norms of international law. While arguably all signatories and – if the prohibition of genocide is *jus cogens* – all states have the obligation to prevent any genocide, UN Charter prohibits the use of force and intervention in domestic affairs of a State, stipulates peaceful dispute settlement, and empowers only the UNSC to take binding measures in response to threats to or breaches of international peace

[329] Bosnia, para. 165.
[330] Peter Quayle, "Unimaginable Evil: The Legislative Limitations of the Genocide Convention", *International Criminal Law Review* 5/3 (2005): 367.
[331] Nina H.B. Jørgensen, "'The Next Darfur' and Accountability for the Failure to Prevent Genocide." *Nordic Journal of International Law* 81/4 (2012): 418.
[332] *Bosnia v. Serbia,* Judgment, *op.cit.:* paras.430-431.
[333] Tams and Mennecke, *op.cit.*: 10.
[334] *Bosnia v. Serbia,* Judgment, *op.cit.:* para.427.

and security.[335] Furthermore, while most states have rhetorically committed to atrocity prevention, the state *practice* half of the coin paints a different picture. Finally, although the *Bosnia v. Serbia* judgment extends Art.I obligations to genocide prevention beyond a State's own borders, it is unclear how the scope of extraterritorial obligation to prevent differs from the prevention obligations on the State's own territory. The non-binding Responsibility to Protect (R2P) doctrine, whose relationship with the prevention obligations of the GC also warrants further study, poses similar dilemmas.[336]

The DA likewise establish general prevention obligations in Art.3 – "not to engage in acts that constitute crimes against humanity" and to prevent and punish CAH irrespective of whether CAH take place during an armed conflict, political instability or any other public emergency. The content of Art.3 does not seem to significantly differ from Art.I GC. Nonetheless, some interpretive questions may arise under the obligation not to engage in "acts that constitute" CAH, e.g. whether the State must not engage in the underlying Art.2(1) acts in general or only when the contextual elements of CAH are present. Furthermore, as with the GC, it remains to be clarified how the interpretation of the Art.3 obligations will affect those contained in the rest of the DA and how Art.3 will be shaped by the UN Charter, the R2P doctrine, and other related norms.

To briefly relate this discussion to the Rohingya crisis, it appears from the conduct of the Tatmadaw and the Government of Myanmar that the due diligence obligations under either instrument have not been fulfilled, in light of the conscious disregard of the UN recommendations on the matter, denial of the claims as to the risk of genocide or CAH, obstacles to the work of the IIFFM etc. Those investigations that have allegedly been conducted might be akin to mock proceedings for international criminal law breaches where a state wishes to evade ICC jurisdiction under the complementarity principle, whereby the ICC cannot rule on a case already addressed by national courts.

The key takeaway of this subchapter, however, is that prevention obligations, whether in the GC or the DA, do not operate in isolation. The clarification of their scope and relationship to

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[335] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS 16
[336] UN General Assembly "2005 World Summit Outcome Document", A-RES-60-1-E, (2005), http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf: paras. 138-9.

other international norms is essential. These questions, however, are beyond the scope of the current research, which will turn to the more specific obligations imposed by the GC and the DA.

7.3. CRIMINALIZATION IN NATIONAL LAW

The GC provisions on domestic criminalization of genocide are rather concise. Art.V GC stipulates the enactment of the necessary legislation to give effect to the substantive provisions of the GC, particularly focusing on effective penalties for perpetrators. Art.IV denies individual perpetrators any official immunities from prosecution they may otherwise be entitled to. While domestic criminalization does not mean increased effectiveness of the broader prohibition of genocide (or CAH), it opens at least theoretical avenues for victims to seek justice. Overall, while the focus of the GC seems to be on the individual criminal punishment aspect of the Art.I, the specifics are up to judicial interpretation.

On the other hand, the DA very meticulously outline numerous specific prevention and punishment obligations. First, Art.5 reiterates the *non-refoulement* principle that expulsion, return, or extradition of any person is prohibited if there is a risk that the person would be a victim to CAH. Art.6 DA obliges States to criminalize CAH in their national laws, analogous to Art.V GC. It likewise emphasizes individual criminal responsibility, including command responsibility, sets standards for criminalization under national law, and precludes the invoking of official immunities. Art.7 concerns mandatory establishment of national jurisdiction over CAH, while Art.8 establishes a duty to promptly, thoroughly, and impartially investigate potential CAH (an obligation that is likely to have been violated in the Rohingya case). Preliminary measures and the rights of victims are also elaborated on in detail.

A downside, however, might lie in the effect criminalization might have on ICC jurisdiction (where applicable) or on the extradite or prosecute obligations (*aut dedere aut judicare;* Arts.10 and 13 DA). The ICC jurisdiction is limited by the complementarity principle. *Aut dedere aut judicare* is likewise by definition dependent on whether national proceedings have commenced. If states did criminalize CAH domestically, but the content of the domestic law on CAH and procedural and judicial independence nuances are biased in favor of the perpetrator, the practical merits of ICC or *aut dedere aut judicare* might be undermined. Furthermore, Nouwen cautions that criminal justice approach may not always be the "appropriate response" to CAH,

depending on the specific political interests and circumstances of the society affected, including the requirements for a peaceful domestic transition process.[337]

Thus, the prevention and punishment obligations do appear to be more focused on the punishment prong and on individual perpetrators and the rights of victims. Broader state- or international-level prevention measures recognized by the R2P doctrine, such as monitoring, early warning, capacity building etc., have not been spelled out, although Art.14(9) DA lists specific measures for cooperation with other states or international bodies for investigation and prosecution purposes.[338] Problematically, in absence of these more systemic prevention measures (although these may be the responsibility of other international bodies), atrocities risk being acknowledged only after a manifest failure to prevent them. Thus, the greatest merit of the DA lies primarily in how it would oblige states to prosecute or extradite individual perpetrators of CAH, not so much in its preventative potential.

7.4. Interstate Cooperation in Criminal Proceedings

An important part of atrocity prevention is international cooperation to that effect.[339] The GC is laconic in spelling out any obligations in this regard. Art.VI merely stipulates trying offenders in either national or international courts, while Art.VII concerns extradition. Art.VIII GC is interesting in that it allows any signatory to request a competent UN organ to take preventative or suppressive action against genocide or any of the Art.III GC acts. In practice, however, invoking this article would encounter the typical obstacles to UN action – lack of legally binding power (UNGA and others), a veto from a Permanent member (UNSC), or statutory limitations and jurisdiction by consent (ICJ).

On the other hand, the DA establish more specific interstate obligations of mutual assistance. First, Art.10 DA contains a pragmatic and specific *aut dedere aut judicare* obligation, which is crucial for mending accountability gaps.[340] Notably, the GC does not include such a

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[337] Sarah M.H. Nouwen, "Is There Something Missing in the Proposed Convention on Crimes Against Humanity?" *Journal of International Criminal Justice* 16/4 (2018): 906.
[338] Jørgensen, *op.cit.*: 409.
[339] International assistance in atrocity prevention constitutes one of the three pillars of the R2P doctrine (see "2005 World Summit Outcome Document", *op.cit.*), along with a primary responsibility of a State to prevent atrocities on its own territory and a responsibility of the international community to take a timely and decisive action in case of a manifest failure to prevent mass atrocities.
[340] Olson, *op.cit.*: 326-327.

provision, allowing extradition to be governed by the existing rules as applicable to the states concerned. The DA, however, effectively serves as a legal basis for extradition on CAH charges even where the States concerned do not have a pre-existing bilateral extradition agreement.[341]

Second, Olson notes the importance of inter-state cooperation in enforcement (Art.8 DA), which is essential to enabling states to actually fulfil their Art.10 obligations.[342] This, however, might conflict with sovereignty or individual rights concerns – many states remain reluctant to extradite their own nationals, and extradition is limited by the *non-refoulement* and fair trial principles. Nonetheless, the inclusion of detailed inter-state cooperation rules already represents a step further than the GC, which remains silent on these matters. Olson adds that the enforcement of the DA should be reinforced through technical assistance and capacity building to ensure the implementation of the new convention.[343] Such assistance need not be limited to CAH, however, and should ideally extend to mass atrocity prevention also under other instruments.

However, although the specific enumeration of punishment and international assistance obligations is very commendable, the DA approach to dispute settlement may undermine their effectiveness.

7.5. JUDICIAL DISPUTE SETTLEMENT

Although in many aspects the DA appears to establish more specific and robust prevention and punishment obligations than the GC, this is not the case regarding dispute settlement. Art.IX GC stipulates mandatory dispute settlement before the ICJ unless a state concerned has made a reservation. Art.15 DA, on the other hand, spells out a more detailed approach, akin to that of Art.22 of the Convention on the Elimination of All Forms of Racial Discrimination.[344]

To balance the wide scope of CAH with sovereignty concerns or a potential prohibition of substantive reservations, States would first attempt to settle disputes through negotiations (Art.15(1) DA).[345] If a dispute is not settled through negotiations, it would be brought to the ICJ unless the States agree to arbitration instead (Art.15(2)). However, Art.15(3) allows states to

[341] *Ibid.*: 330.
[342] *Ibid.*: 329; 336.
[343] *Ibid.*: 344.
[344] Zimmermann and Boos, *op.cit.*: 835.
[345] *Ibid.*: 836; 853.

declare themselves not bound by paragraph 2 or withdraw from such a declaration. It remains unclear if there is a time limit within which a state can make this Art.15(3) declaration, which might suggest that a state can choose to opt in or out depending on its interests. Thus, Art.15(3) severely undermines the enforceability of the DA, unless it is interpreted as requiring a reservation according to Section 2 of the VCLT.[346]

Importantly, the contents of Art.15 might be subject to further changes. While some states have expressed a general support for Art.15, others have noted the lack of clarity and wish to interpret Art.15(3) as stipulating a formal reservation.[347] Sierra Leone, for example, is very critical of the content of Art.15, advocating for adoption of the Art.IX GC text including a reference to state responsibility for CAH.[348] The 4th Report by the ILC notes that, indeed, the technical language characteristic of treaties has not yet been included in the DA, and it is likely that Art.15 may be tweaked in the future, although the Special Rapporteur does not recommend substantive amendments thereto.[349]

7.6. CHAPTER CONCLUSION

To summarize the answer to Question 2, while the DA establish more specific and detailed obligations to prevent and, especially, to prosecute CAH, the dispute settlement mechanism of Art.15 DA appears weak in comparison to Art.IX GC, assuming that the Art.15(3) opt out from mandatory dispute settlement is considered a reservation for the purposes of the VCLT. Certainly, in the process of drafting a treaty of such importance, it may be prudent leave some of the more controversial provisions vague to ensure a wider ratification. The drafters of the DA seem aware of this, however the choice to compromise on dispute settlement seems somewhat counterproductive.

Nonetheless, the elaborate list of prevention and punishment obligations in the DA is commendable and enables more specific assessment of a state's conduct and responsibility in potential future cases even if no adjudicating body has jurisdiction. The legal basis for political

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[346] ILC, "State Comments and Observations" *op.cit.*: 119.
[347] International Law Commission, 71st Session, "Fourth Report on Crimes Against Humanity", A/CN.4/725 (Feb.18, 2019): para.281; ILC, "State Comments and Observations" *op.cit.*: 118.
[348] ILC, "State Comments and Observations" *op.cit.*: 119. See also Zimmermann and Boos, *op.cit.*: 850.
[349] ILC, "Fourth Report on Crimes Against Humanity" *op.cit.*: para.287.

pressure would certainly be provided. However, the full spectrum of atrocity prevention measures, ranging from long-term management of social tensions to early warning to intervention in ongoing atrocities, may be beyond the reach of the DA.[350] Additional instruments or international bodies or even systemic changes to the international order would be required to fill in the gaps. It remains to be seen how the addition of technical treaty provisions at the end of the drafting process will change the scope of the prevention and enforcement provisions of DA.

8. CONCLUSIONS AND IMPLICATIONS

The thesis aimed to study those implications of the ILC's Draft Articles on Crimes Against Humanity that arise purely from their content. The goal was to examine whether the DA, as they currently stand, could provide a meaningful alternative course of legal action where violence against a protected group falls short of the definition of genocide in the GC. For the purposes of this thesis, the yardstick was (1) whether the scope of the definition is broader and the standard of intent – lower, and (2) the robust and specific definition of prevention and enforcement obligations. The case study on the Rohingya crisis in Myanmar, a catastrophic failure of the overall legal regime of atrocity prevention, illustrated the challenges and merits of applying the GC and the DA.

8.1. SUMMARY OF THE FINDINGS

After outlining the research design in Chapter 2, Chapters 3 and 4 discussed genocide. Chapter 3 studied the scope of the GC definition, while Chapter 4 applied the legal elements of genocide to the Rohingya case. It concluded that (1) the Rohingya constitute an ethnic group and thus are entitled to protection under the GC; (2) the Rohingya were victims to 4 out of 5 genocidal acts listed in Art.II GC, and (3) the pattern of these acts, the specific utterances by senior members of the Tatmadaw, and the fact that the other "reasonable inference" – ethnic cleansing – would not require the perpetration of certain acts of violence or the degree of brutality, suggests an intent to destroy the Rohingya population in the Rakhine state. To the UN IIFFM, as to the Author, this persuasively indicates genocidal intent, and thus of the perpetration of genocide by the Tatmadaw, the Armed Forces of Myanmar.

[350] See Ruyebana and Brus, *op.cit.*:28-29 for a detailed 3-level approach to atrocity prevention.

However, the ICJ applied high standards for inferring genocidal intent from a pattern of of the perpetrators' conduct in the *Bosnia v. Serbia* case. Therein, many instances of alleged genocide fell short of the definition as genocidal intent was not proven in a way that eliminated other plausible inferences from the pattern conduct. The ICJ is very likely to apply the same high standard in the ongoing case between the Gambia and Myanmar as well. Indeed, during the hearings on preliminary measures, Schabas, one of Myanmar's defense lawyers, relied heavily on this standard. It remains to be seen how the ICJ will interpret the GC in the final judgment in *The Gambia v. Myanmar* case. So far, the court has issued robust preliminary measures in favor of the Gambia, including an order for Myanmar to allow further UN investigations.[351] However, this does not guarantee that the final decision will hold Myanmar accountable on all charges. Skepticism in this regard would not be unreasonable.

With these conclusions in mind, Chapters 5 and 6 studied the contents of the DA and assessed whether the Rohingya crisis constitutes persecution instead. First, the Rohingya are a civilian population that is targeted by a widespread and systematic attack which (1) furthers a State policy to remove the Rohingya from the Rakhine state (2) by involving multiple underlying acts of CAH, notably murder, extermination, rape, deportation etc. Thus, both the material and contextual elements are established.

Second, most of these underlying acts are clearly accompanied by discriminatory intent, thus amounting to persecution. The UN IIFFM Reports and studies by other watchdogs notified Myanmar of the risk of both CAH and genocide, and many official anti-Rohingya measures, notably Myanmar's nationality and residence policies, deliberately deprived the Rohingya of the capacity to exercise their fundamental rights. Thus, the knowledge and intent elements are likewise unequivocally established. Inherent in discriminatory intent is a lower standard of proof, as it is easier to prove that the perpetrator intended to simply target a group than to prove that the perpetrated intended to destroy it as such. Consequently, while it remains to be seen whether genocidal intent can be established without any other reasonable inferences, the knowledge and discriminatory intent behind the anti-Rohingya violence are abundantly clear. Finally, because the discriminatory intent behind the underlying acts is the red threat throughout the Rohingya crisis,

[351] Priya Pillai, "Expanding the Scope of Provisional Measures Under the Genocide Convention." *The Cambridge Law Journal* 79/2 (2020): 201.

the explicit and the implied nexus requirements are also met. In short, the Rohingya crisis constitutes not only persecution, but numerous other CAH.

To conclude, Question 1 of the thesis asked whether the DA, particularly the definition of persecution, are broader in scope than the GC and entail a lower standard of proof than genocide. The crux of the case studies – the question of intent and mental elements – showed that it is indeed much more easy to infer the knowledge elements of CAH and the discriminatory intent of persecution from a pattern of conduct than it is to infer genocidal intent, which relies on the elimination of alternative inferences. This conclusion is not prejudiced by the contextual elements of CAH, as genocide prosecutions in practice implicitly require a degree of severity akin to a widespread or systematic attack against a civilian population. Coupled with a broader scope of material elements, it seems easier to establish state responsibility for committing or failing to prevent persecution than genocide. The CAH of persecution therefore offers a stronger legal standing than genocide to a wider variety of cases. Should even persecution fail, DA offers a range of other acts covering numerous other types of violence.

Admittedly, persecution does not fully capture the unique "essence" of genocide as the denial of existence to groups. However, the lower standards of proof avoid the frustrating situation when states or individuals cannot be held accountable because the outrageous violence they perpetrated was not "genocidal enough". Thus, the formal adoption of the DA will create an avenue through which states incur obligations to prevent and punish perpetrators of atrocities aimed at protected groups. Whether such an outcome would truly be emotionally satisfactory to victims and how the use of terms "genocide" and "CAH" would affect willingness of states to act is a subject for further research For now, it suffices that it may serve simply to put an end to the abuse, and that is an adequate and pragmatic starting point.

Here, however, Chapter 7 highlights a worrying aspect of the DA. Question 2 in the beginning of this thesis asked whether the DA establishes more robust and specific prevention and enforcement obligations than the GC. Both the GC and the DA contain general obligations to prevent and punish the crimes concerned, and both take a criminal justice-focused approach to atrocity prevention. The DA discuss matters of criminalization, extradition, mutual legal assistance etc. in impressive detail, in contrast to the much more laconic provisions in the GC. Thus, the criteria for assessment of State compliance with the DA provisions are more specific, although

room for judicial interpretation remains. At the very least, this level of detail might ensure improved harmonization in the implementation of the DA or clear standards for legal assessment.

However, the main Achilles heel of the DA may be Art.15 on dispute settlement. The current wording of the provision suggests that before judicial settlement can be sought, states must first attempt to negotiate. While the negotiation requirement is not counterproductive per se, it will present interpretive challenges as to when the requirement is fulfilled. Furthermore, while Art.15(2) establishes ICJ jurisdiction by default unless States agree to arbitration, Art.15(3) enables States to opt out of Art.15(2), effectively removing any sort of mandatory dispute settlement beyond negotiations.

Thus, important issues of compliance to the DA obligations may go judicially unassessed, which further undermines the available response measures under the law of state responsibility or efforts to rally political will within international bodies to address the ongoing crisis. Art.15 may be subject to change or simply interpreted as requiring a formal reservation upon the signing of the future convention. As it stands now, however, the enforcement prong of the DA seems inferior to the GC. What remains is lawful countermeasures or retortion by concerned states or collective sanctions through international organizations insofar as existing international obligations and political interests permit.

Nonetheless, the gap in the existing law of atrocity prevention must be bridged by a regime covering CAH that would enable states to make direct claims against other states and offer a stronger legal standing to demand a change in the violating state's behavior or rally international pressure to address atrocity crimes. Ideally, this would be done before the ICJ to gather maximum international legitimacy and further develop this field of international law. Otherwise, the future convention might simply clarify the political and normative obligations of states, e.g. those established by the R2P doctrine. The indirect impact and the symbolic value of the DA for atrocity prevention must not be underestimated.

8.2. Systemic Issues and Broader Implications

Nonetheless, even if the DA were tweaked to make the prevention and enforcement obligations more robust and even if the GC in a fairytale scenario was reinterpreted to allow for a broader understanding of genocidal intent, international law as such cannot be separated from

international politics and the principles upon which the international system is constructed. Sovereignty remains the core value of the international system. Even the efforts to limit sovereignty to prevent mass atrocities through the non-binding R2P doctrine had to be marketed as a reconceptualization of sovereignty as a *responsibility*. Thus, one must not be overly optimistic in expecting instruments such as the GC or the DA to fix systemic issues of international law enforcement and atrocity prevention.

Unsurprisingly, therefore, the closest the world has come to a global "policeman" is the UNSC, infamous for the veto powers of its Permanent members which have prevented humanitarian interventions out of political or strategic concerns in the past. Even in the Rohingya case, draft resolutions have been vetoed by Russia and China.[352] Cassese points out that collective security system of the UN is, in fact, not aimed at enforcing international law, but rather at simply maintaining international peace and security, even at the expense of justice.[353] Thus, in absence of decisive UNSC action, it is up to individual states to see whether and which lawful countermeasures or collective sanctions they may pursue and whether support can be gathered through the UNGA as a politically influential body. Whether individual states act, again, is an assessment that will always factor in their individual political interests.

Thus, while it may be inspired by noble normative ideals, international law is born out of political interest and remains governed by it. This is prominently visible in the basic features of international dispute settlement, whereby courts have no automatic jurisdiction unless states consent to it. Whether the strong emphasis of sovereignty means that the DA should keep its judicial settlement provisions as toothless as they are now to ensure widespread ratification is up to the competent decision-makers to judge. The key question remains – what do the states wish to achieve through developing the law on crimes against humanity?

Ultimately, despite these potential shortcomings of the DA and broader systemic issues of atrocity prevention and law enforcement, the codification of the DA into a treaty would be an immense progress in developing international law further towards a human security focus. It would signal that the international community remains committed to prevention of future atrocities and

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[352] *Reuters,* "China, Russia block U.N. council concern about Myanmar violence" (2017), https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6.
[353] Cassese, "International Law", *op.cit.*: 301.

the furtherance of human rights guarantees across the globe (then again, talk is cheap). It would also theoretically offer a strong legal basis to seek pragmatic, even if not emotionally satisfactory, justice from mass atrocities for vulnerable groups and individuals – whether genocide or a crime against humanity, the acts concerned are objectively morally wrong and must be recognized as such.

Were the DA applicable to the Rohingya case in the reality, the responsibility incurred by Myanmar would be much more extensive than under the applicants in the ongoing ICJ case on the GC could hope to achieve. Were the DA applicable to the discrimination against Uyghurs in China, it might also render China responsible for its attempts at identity-erasure, as these are not covered by the physical-destruction focused GC. Were the DA applicable to widespread atrocities against everybody but the elite group within a State, the State might be held accountable more broadly as well. All that remains is for states to chisel out the remaining technicalities, polish the weak points, and rally for a widespread ratification of the Convention. Regrettably, assigning a legal category to a particular case of mass atrocities does not guarantee effective international action in response. Indeed, states may even avoid legal determination to avoid incurring such responsibility, or it may be counterproductive to political settlement and transitional justice efforts. However, if there even theoretically is an option to legally classify a case as an atrocity crime with state responsibility to prevent it attached, this certainly does not hurt the cause.

8.3. Further Research

Another aim of this thesis has been to open a discussion on the broader impact of a new convention on CAH to the field of atrocity prevention. Questions for further research to complement this study include the nature of state responsibility for atrocity crimes; the effect of characterizing a situation as "genocide", "crimes against humanity", or "ethnic cleansing" etc. on the political will of states to act on it; the extraterritorial prevention obligations, particularly in the context of genocide in failed states; the effectiveness of a criminal-justice approach vs. other transitional justice and political settlement approaches; the responsibility of international organizations to respond to mass atrocities, including the UNSC and a potential "responsibility not to veto"; effective enforcement of treaties concerning *jus cogens* obligations etc.

The author hopes that by studying these and many other related questions, leading scholars and decision-makers will eventually be able to give full effect to the understanding of the ever-

important state sovereignty as a responsibility to protect the fundamental rights of its population regardless of their group affiliation. The efforts of the ILC to complete the legal regime of atrocity prevention are but a single – yet a very important – step in the right direction.

BIBLIOGRAPHY

SOURCES OF LAW

Socialist Republic of the Union of Burma, *Burma Citizenship Law*, 15 October 1982, https://www.refworld.org/docid/3ae6b4f71b.html

International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, https://www.refworld.org/docid/3ae6b37f40.html

International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, 71st Session, 2019, A/74/10, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS 16, https://www.refworld.org/docid/3ae6b3930.html

UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html

UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, https://www.refworld.org/docid/3ae6b3ac0.html

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, https://www.refworld.org/docid/3ae6b3a10.html

International Criminal Court, *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, https://www.refworld.org/docid/4ff5dd7d2.html

OFFICIAL DOCUMENTS

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Verbatim Record of the Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, ICJ, CR 2019/19 (2019)

International Law Commission 71St Session, "Crimes Against Humanity: Comments and Observations Received from Governments, International Organizations and Others" A/CN.4/726 (2019)

International Law Commission, 71st Session, "Fourth Report on Crimes Against Humanity", A/CN.4/725 (Feb.18, 2019)

UN General Assembly, "Report of the International Law Commission on the Work of its 48th Session 6 May-26 July 1996", *Yearbook of the International Law Commission,* A/51/10 (1996)

UN General Assembly, "Situation of human rights in Myanmar" A/65/368 (Sep.15, 2010)

UN General Assembly "2005 World Summit Outcome Document", A-RES-60-1-E, (2005)

UN Human Rights Council, 39th Session, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar" A/HRC/39/CRP.2 (2018)

UN Human Rights Council, 39th Session, "Report of the independent international fact-finding mission on Myanmar", A/HRC/39/64 (2018)

UN Human Rights Council, 42nd Session, "Detailed findings of the Independent International Fact-Finding Mission on Myanmar" A/HRC/42/CRP.5 (2019)

JURISPRUDENCE

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Feb. 26, 2007), I.C.J. Reports 2007, p. 43

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order, (Jan. 23, 2020)

International Criminal Court

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

Prosecutor v. Al Bashir, Decision, Pre-Trial Chamber I, ICC-02/05-01/09 (Mar. 4, 2009)

Prosecutor v. Bemba, Decision on the Charges of the Prosecutor, Pre-Trial Chamber II, ICC-01/05–01/08–424 (Jun. 15, 2009)

Prosecutor v. Bemba, Judgment, Trial Chamber III, ICC-01/05-01/08 (Mar. 21, 2016)

Prosecutor v. Gbagbo, Decision, Pre-Trial Chamber I, ICC-02/11-01/11 (Jun.12, 2014)

Prosecutor v. Katanga, Judgment, Trial Chamber II, ICC-01/04–01/07, (Mar. 7, 2014)

Prosecutor v. Katanga and Ngudjolo, Decision, Pre-Trial Chamber I, ICC-01/04-01/07-717 (Sep. 30, 2008)

International Criminal Tribunal for Rwanda

Prosecutor v. Akayesu, Judgment, Trial Chamber I, ICTR-96-4-T (Sep. 2, 1998)

Prosecutor v. Kayishema and Ruzindana, Appeals Judgment, Appeals Chamber, ICTR-95-1-A (Jun. 1, 2001)

Prosecutor v. Kayishema and Ruzindana, Judgment, Trial Chamber II, ICTR-95-1-T (May 21, 1999)

Prosecutor v. Musema, Judgment, Trial Chamber, ICTR-96-13-T (Jan. 27, 2000)

International Criminal Tribunal for Yugoslavia

Prosecutor v. Blaškić, Judgment, Trial Chamber, IT-95-14-T (Mar.3, 2000):

Prosecutor v. Brđanin, Judgment, Trial Chamber II, IT-99-36-T, (Sep. 1, 2004)

Prosecutor v. Furundžija, Judgment, Trial Chamber, IT-95-17/1-T (Dec. 10, 1998)

Prosecutor v. Jelisić, Appeals Judgment, Appeals Chamber, IT-95-10-A (Jul. 5, 2001)

Prosecutor v. Jelisić, Judgment, Trial Chamber I, IT-95-10-T (Dec. 14, 1999)

Prosecutor v. Karadžić, Judgment, Trial Chamber, IT-95-5/18-T (Mar. 24, 2016)

Prosecutor v. Krstić, Appeals Judgment, Appeals Chamber, IT-98-33, (Apr. 19, 2004)

Prosecutor v. Krstić, Judgment, Trial Chamber, IT-98-33-T (Aug. 2, 2001)

Prosecutor v. Kunarac, Appeals Judgment, Appeals Chamber, IT-96-23 & IT-96-23/1-A (Jun. 12, 2002)

BOOKS

Arendt, Hannah, "The Origins of Totalitarianism" (*Harcourt, Brase Company*, 1951)

Bergsmo, Morten, and Song Tianying (eds.), "On the Proposed Crimes Against Humanity Convention" (*Torkel Opsahl Academic EPublisher,* 2014)

Boas, Gideon, James L. Bischoff, and Natalie L. Reid, "Elements of Crimes Under International Law", (*Cambridge University Press*, 2008)

Cassese, Antonio, "Cassese's International Criminal Law" Third Edition (*Oxford University Press*, 2013)

Cassese, Antonio, "International Law" 2nd Edition, (*Oxford University Press,* 2005)

Cassese, Antonio, "The Rome Statute of the International Criminal Court: A Commentary" (*Oxford University Press*, 2002)

Gaeta, Paola, "The UN Genocide Convention: A Commentary" (*Oxford,* 2009)

Klamberg, Mark (ed.), "Commentary on the Law of the International Criminal Court", (*Torkel Opsahl Academic EPublisher,* 2017)

Lindblom, Alina, Elizabeth Marsh, Tasnim Motala, and Katherine Munyan, "Persecution of the Rohingya Muslims: Is genocide occurring in Myanmar's Rakhine State?" (*Fortify Rights,* 2015)

Sadat, Leila Nadya, "Forging a Convention for Crimes against Humanity", (*Cambridge University Press,* 2011)

Schabas, William A. "Genocide in International Law" 2nd Edition, (*Cambridge University Press,* 2009)

Schabas, William A. (ed.), "The Cambridge Companion to International Criminal Law" (*Cambridge University Press,* 2015)

Schmid, Evelyne, "Taking Economic, Social and Cultural Rights Seriously in International Criminal Law" (*Cambridge University Press,* 2015)

ACADEMIC ARTICLES

Abdelkader, Engy, "Myanmar's Democracy Struggle: The Impact of Communal Violence Upon Rohingya Women and Youth", *Pacific Rim Law & Policy Journal* 23/3 (2014): 511-542

Alam, Jobair, "The Rohingya of Myanmar: Theoretical Significance of the Minority Status", *Asian Ethnicity* 19/2 (2018): 180-210

Ambos, Kai, "What Does 'Intent to Destroy' in Genocide Mean?" *International Review of the Red Cross* 91/876 (2009): 833-858

Amerasinghe, C. F., "The Bosnia Genocide Case", *Leiden Journal of International Law* 21/2 (2008): 411-428

Aquilina, Kevin, and Klejda Mulaj. "Limitations in Attributing State Responsibility under the Genocide Convention." *Journal of Human Rights* 17/1 (2018): 123–39

Chesterman, Simon, "Altogether Different Order: Defining the Elements of Crimes against Humanity," *Duke Journal of Comparative & International Law* 10/2 (2000): 307-344

Ferrer-Monfort, Adria, "Revisiting the Interpretation of the Protected Groups of the Genocide Convention in Light of the Rohingya Case," *Trinity College Law Review* 22 (2019): 77-99

Gaeta, Paola, "On What Conditions Can a State Be Held Responsible for Genocide?" *European Journal of International Law* 18/4 (2007): 631-648

Green, Penny, Thomas MacManus, Alicia de la Cour Venning, "Countdown to Annihilation: Genocide in Myanmar", *International State Crime Initiative* (2015), http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf.

Howe, Adam E., and Zachary A. Karazsia, "A Long Way to Peace: Identities, Genocide, and State Preservation in Burma, 1948–2018." *Politics, Groups, and Identities* 8/4 (2018): 677-697

Jørgensen, Nina H.B., "'The Next Darfur' and Accountability for the Failure to Prevent Genocide." *Nordic Journal of International Law* 81/4 (2012): 407–436

Kingston, Lindsey N., "Protecting the world's most persecuted: the responsibility to protect and Burma's Rohingya minority", *The International Journal of Human Rights*, 19/8 (2015): 1163-1175

Kipgen, Nehginpao, "Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum", *Journal of Muslim Minority Affairs*, 33/2 (2013): 298-310

Kipgen, Nehginpao, "The Rohingya Crisis: The Centrality of Identity and Citizenship", Journal of Muslim Minority Affairs, 39/1 (2019): 61-74

Lingaas, Carola, "Defining the protected groups of genocide through the case law of international courts", *International Crimes Database Brief* 18 (2015)

Lippmann, Matthew, "A road map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide", *Journal of Genocide Research*, 4/2 (2002): 177-195

Matori, Saadatu Salisu, and Abubakar Bukar Kagu. "The Need for a Clear Legal and Contextual Framework to Distinguish Between the Crime of Genocide and the Crimes Against Humanity in Modern International Criminal Law." *IOSR Journal of Humanities and Social Science* 22/2 (2017): 73-78

Mohamed, Saira, "A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice", *University of Colorado Law Review* 80 (2009): 327-399

Motala, Tasnim. "The Genocide Name Game: The Case for Crimes against Humanity to Prevent Genocide." Quinnipiac Law Review 37/4 (2018-2019): 611–78

Mundorff, Kurt, "Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)," *Harvard International Law Journal* 50 (2009), 61-128

Murray, Alexandar R. J.,"Does International Criminal Law Still Require a Crime of Crimes: A Comparative Review of Genocide and Crimes against Humanity", *Goettingen Journal of International Law* 3/2 (2011): 589-616

Nersessian, David L. "The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention." *Cornell International Law Journal* 36/2 (2003-2004): 293–328.

Nouwen, Sarah M H. "Is There Something Missing in the Proposed Convention on Crimes Against Humanity?" *Journal of International Criminal Justice* 16/4 (2018): 877–908

Novic, Elisa. "Physical-Biological or Socio-Cultural 'Destruction' in Genocide? Unravelling the Legal Underpinnings of Conflicting Interpretations", *Journal of Genocide Research* 17/1 (2015): 63–82.

Palombino, Fulvio Maria, “Should Genocide Subsume Crimes Against Humanity? Some Remarks in the Light of the Krstić Appeal Judgment” *Journal of International Criminal Justice* 3/3 (2005): 778–789

Pillai, Priya, “Expanding the Scope of Provisional Measures Under the Genocide Convention.” *The Cambridge Law Journal* 79/2 (2020): 201-204

Quayle, Peter, “Unimaginable Evil: The Legislative Limitations of the Genocide Convention”, *International Criminal Law Review* 5/3 (2005): 363-372

Roberts, Christopher, "On the Definition of Crimes against Humanity and Other Widespread or Systematic Human Rights Violations," *University of Pennsylvania Journal of Law and Social Change* 20/1 (2017): 1-28

Ruvebana, Etienne, and Marcel Brus. “Before It’s Too Late: Preventing Genocide by Holding the Territorial State Responsible for Not Taking Preventive Action.” *Netherlands International Law Review* 62/1 (2015): 25–47

Schabas, William A. “Crimes Against Humanity as a Paradigm for International Atrocity Crimes.” *Middle East Critique* 20/3 (2011): 253–69

Shah, Rajika L., “Assessing the Atrocities: Early Indications of Potential International Crimes Stemming from the 2017 Rohingya Humanitarian Crisis” Loyola Law School, Los Angeles Legal Studies Research Paper No. 2018-36 (2018) https://ssrn.com/abstract=3275649

Sterio, Milena, "The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide" *Emory International Law Review* 31/2 (2017): 271-298

Straus, Scott, “The Limits of a Genocide Lens: Violence Against Rwandans in the 1990s.” *Journal of Genocide Research* 21/4 (2019): 504–524

Strauss, Ekkehard, “Reconsidering Genocidal Intent in the Interest of Prevention”, *Global Responsibility to Protect* 5 (2013): 129–153

Tams, Christian J. and Martin Mennecke, “The Genocide Case Before the International Court of Justice” (2007), https://ssrn.com/abstract=1416756

Ware, Anthony, and Costas Laoutides, “Myanmar’s ‘Rohingya’ Conflict: Misconceptions and Complexity”, *Asian Affairs*, 50/1 (2019): 60-79

Zarni, Maung and Alice Cowley, “The Slow-Burning Genocide of Myanmar’s Rohingya”, *Pacific Rim Law & Policy Journal*, 23/3 (2014): 682-752

Zimmermann, Andreas, and Felix Boos, “Bringing States to Justice for Crimes against Humanity.” *Journal of International Criminal Justice* 16/4 (2018): 835–855

Zyberi, Gentian, "The Practice of Shared Responsibility in Relation to Responsibility of States and Individuals for Mass Atrocity" SHARES Research Paper 105 (2016)

OTHER SOURCES

Heidelberg Institute for International Conflict Research, "Conflict Barometer 2019" (2019), https://hiik.de/wp-content/uploads/2020/08/ConflictBarometer_2019_4.pdf

Human Rights Watch, "'All You Can Do is Pray': Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State" (2013), https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims

Human Rights Watch, "A New Wave of Atrocities is Being Committed Against Muslims in Burma's Rakhine State" (Mar. 15, 2017), accessed July 28, 2020, https://www.hrw.org/news/2017/03/15/new-waveatrocities-being-committed-against-muslims-burmas-rakhine-state

Human Rights Watch, "Burma: Security Forces Raped Rohingya Women, Girls" (Feb. 6, 2017), accessed July 16, 2020, https://www.hrw.org/news/2017/02/06/burma-security-forcesraped-rohingya-women-girls

Reuters, "China, Russia block U.N. council concern about Myanmar violence" (2017), https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6.