

LEGAL MECHANISMS TO AVERT MASS MASSACRES TARGETING THE ROHINGYA MUSLIMS

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Abstract: *Genocide, as defined by the covenants of international law, is defined as an international crime that includes acts committed with the purpose of eradicating, in whole or in part, a national or ethnic group over an extended period of time, including the destruction of that group's political, cultural, humanitarian, and social institutions. Religious and racial hate are the main driving forces behind the crime of genocide committed against Rohingya Muslims in Burma. We will look at how international law can protect this minority from the crime of human genocide and ethnic cleansing to which it is subject, activating the various international agreements that criminalize this act, among other things, the International Criminal Court's 1998 Statute, the Convention on the Prevention and Punishment of the Genocide of 1948, and so on. Human rights and international humanitarian law would ensure that the Rohingya people of Burma are protected, regardless of whether their case is brought before the International Criminal Court or falls under universal jurisdiction. Victims of these atrocities would face appropriate legal consequences.*

Keywords: *Genocide; Rohingya; International Law; Ethnic Cleansing; International Criminal Court.*

INTRODUCTION:

Recent extensive violence the Rohingya minority has suffered at the hands of the Myanmar government, motivated by religious hatred and ethnic animosity, has made this issue a major concern for the international community. Harsh living conditions, severe forms of torture, and physical and sexual assaults have been suffered by this minority. Several measures have been imposed with the aim of preventing reproduction within this minority, in addition to random killings, all with the intention of causing partial or total destruction of this group. Defined by the United Nations Convention on the Prevention and Punishment of the Crime of Mass atrocity, this is a Mass atrocity crime. Thus, in order to seek justice for this Muslim minority, the international community must intervene with several legal tools to stop and prevent these massacres and hold those accountable to international or national justice. This brings up the following question:

How effective are national and international legal rules in preventing the Mass atrocity of the Rohingya Muslims and punishing those responsible?

This article is split into two parts to address this issue. While the second part will cover the legal tools at hand to hold those responsible for the mass atrocity massacres in Burma accountable, the first will deal with the legal qualification of the Mass atrocity crime in the setting of the Rohingya events in Myanmar (Burma).

SECTION I: LEGAL QUALIFICATION OF THE CRIME OF MASS ATROCITY IN MYANMAR

Because of its seriousness and the toll it takes on the lives of millions of innocent people, Mass atrocity is regarded as the most horrible of massacres. In this crime, a group of people is destroyed and subjugated by the perpetrators without them having done anything wrong other than being of a different race, religion, or ethnicity. We will try to define this crime in international legal documents in this chapter and apply it to the massacres against the Rohingya minority.

A) The Concept of the Crime of Mass atrocity:

Because it violates and harms individuals, groups of people, or their rights and freedoms, Mass atrocity is one of the most serious massacres and one of the most heinous massacres against humanity. But after much waiting and suffering, international agreements were passed to forbid, stop, and punish Mass atrocity. We will define and explain the concept of Mass atrocity in this section.

1- DEFINITION OF THE CRIME OF MASS ATROCITY

Classified as a crime under international public law, the crime of Mass atrocity sets itself apart from other international massacres, which we will cover in this subsection.

1.1 Legal Definition:

According to both national and international law (IL), Mass atrocity is a concept that exists independently in theory. The international community acknowledges that it is a criminal act and that it entails extreme danger. In order to undermine a community's political, cultural, and economic foundation, this crime takes the form of a deliberate plot to murder and destroy its social fabric. As a result, an international convention was established in 1948 to prevent it.¹

"Mass atrocity, as defined by Article 2 of the Convention on the Prevention and Punishment of the Crime of Mass atrocity, is any of the following acts committed with the intent to completely or partially eradicate a national, ethnic, racial, or religious group.

- Members of the gang may be killed, or they may suffer severe bodily or psychological injuries.
- purposefully subjecting the group to living circumstances that are intended to completely or partially destroy it.
- Implementing policies aimed at preventing the birth of children inside the group; forcibly moving children from one group to another.²

It is clear from the article's language that a crime of Mass atrocity cannot be contemplated unless one of the designated actions is committed.

Moreover, "Mass atrocity" is defined as any of the following acts carried out with the purpose of eradicating a national, ethnic, racial, or religious group in whole or in part under Article 06 of the Statute of the International Criminal Court (ICC).":

- Killing members of the group.
- causing members of the group to suffer severe physical or psychological harm.
- Intentionally subjecting the group to living conditions that are intended to cause its physical demise.
- Imposing measures to prevent births within the group.
- Forcibly transferring children of the group to another group."³

1.2 Jurisprudential Definition:

Mass atrocity is considered an international crime that threatens global peace and security because it aims to violate interests protected by international law (IL).

¹- Abdelaziz Al-Achawi: Research in International Criminal Law, Part II, Houma Publishing, Algeria, 2006, p. 227.

²- International Committee of the Red Cross, full file address: <https://www.icrc.org/ara/misc> (consulted on 12/02/2020 at 10:49).

³- Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, full file address: <https://www.icrc.org/ara/misc> (consulted on 12/02/2020 at 11:10).

Academics have disagreed in characterizing this offense. Glasier described it as "An act that violates the rules of public international law (IL), harmful to the interests protected by this law, acknowledging it as a crime deserving of punishment."⁴ Seropoulos described it as: "An international crime is an act committed by a state or allowed by it, in violation of international law (IL), resulting in international responsibility, and harming individuals or the international community."⁵

Seropoulos described it as: "An international crime is an act committed by a state or allowed by it, in violation of IL, resulting in international responsibility, and harming individuals or the international community." A violation of IL by a state or one it permits causes international responsibility and harms people or the world society, therefore constituting an international crime.

Professor Hussein Obeid described it as "An aggression against an interest protected by international criminal law (ICL), which is one of the branches of IL that grants criminal protection to an interest deemed significant and essential to the international community."

"Any act or omission committed against an individual who is criminally responsible, causing harm to a significant interest of the international community, where the international community deems the perpetrator deserving of punishment based on the principles of international criminal law (ICL),"⁶ others have said. Most academics have accepted this definition as thorough and all-encompassing.

2- THE ELEMENTS OF THE CRIME OF MASS ATROCITY:

Mass atrocity, with its assault on human life, health, and dignity, is considered the most serious international crime. Like other international massacres, Mass atrocity is founded on the following components:

2.1 The Material Element:

The material element of the crime of Mass atrocity is present if any of the acts listed in Article 2 of the Convention on the Prevention and Punishment of the Crime of Mass atrocity are committed. These acts include:

- Killing group members: This means that a certain number of people from the group, not just one, are killed. It makes no difference if the act is performed in a positive or negative way, or if the Mass atrocity is partial or complete.⁷
- Inflicting severe physical or psychological harm on group members: The act must be so severe that it interferes with the group members' ability to survive. Any material or immaterial means that affect the group's members, such as torture or physical assault that results in permanent disabilities, can cause this harm.
- Imposing severe living conditions meant to destroy the group in whole or in part: For instance, this might involve under severe climatic conditions that spread diseases without offering means of survival or in areas totally lacking life-sustaining resources like food and water.
- Imposing policies to stop or hinder reproduction inside the group: This covers actions like coercing members of the group into abortion once pregnant, sterilizing women with drugs that prevent pregnancy or birth, and castrating men.

⁴- Mohamed Abdel-Fattah Bayoumi Hegazy: The International Criminal Court, Dar Al-Fikr Al-Jamei, Alexandria, 2005, p. 98.

⁵- Naif Hamed Al-Aleimat: The Crime of Aggression under the Statute of the International Criminal Court, Dar Al-Thaqafa for Publishing and Distribution, 1st ed., Jordan, 2008, p. 109.

⁶- Salma Jihad: The Crime of Genocide Between Text and Application, Dar Al-Houda, Ain M'lila, 2009, p. 34.

⁷- Abdelkader Al-Baqirat: International Criminal Justice, University Publications Office, Algeria, 2005, p. 156.

– The Forcible or Coercive Transfer of Children or Young Members of a Group to Another Group. These children are the cultural future of the group and its social continuity, therefore this act constitutes a kind of cultural Mass atrocity.⁸

2.2 The Mental Element:

The mental component of this offense calls for a particular criminal intent. The offender has to know that their deeds cause the group's destruction and annihilation. Knowing this, they press on with their activities meant to reach this objective. This crime cannot be merely about the components of criminal intent—knowledge and will; the offender must be motivated by a particular goal and driven by religious, racial, or sexual reasons among other considerations.⁹

2.3 The Legal Element:

A basic tenet of criminal law is the principle "no crime and no punishment without a law." This implies that unless there is a written legal provision specifying a penalty for the act done, an act done by a person cannot be deemed a crime. Domestic law, on the other hand, is not affected by the concept of legality since legal texts are always written. ICL suffers since it is based on customary law, which means international custom is the origin of criminalization in international massacres. Put another way, the lack of an international legislator in charge of drafting international criminal provisions means there are no written texts at the international level criminalizing and punishing acts constituting international massacres. Thus, IL does not follow the concept of "no crime and no punishment without a law." Rather, most academics argue that, depending on the ideals of justice, ethics, and the public good, it is enough for an action to fall under the framework of ICL or to refer to what is specified in certain treaties and international agreements clarifying this customary law.¹⁰

Mass atrocity is forbidden under the Convention on the Prevention and Punishment of the Crime of 1948, which provides the legal basis for this crime. The United Nations has designated it as an international crime opposing its spirit and values. Moreover, the Statute of the ICC shows the legal foundation for this crime in its definition of Mass atrocity under Article 5; under this legal foundation, offenders are prosecuted following:

2.4 The International Element:

Often, rulers or dominant social groups with power or close ties to the power against oppressed social, ethnic, or religious groups orchestrate this crime. The international nature of this crime comes from either the subject matter of the crime, which relates to international interests, or the fact that its perpetrator either wields actual power or is linked to the current power. These include the need to safeguard people regardless of their nationality, religion, or ethnicity.¹¹

B) Criminal Acts Committed in Myanmar that Constitute the Crime of Mass atrocity:

The Rohingya Muslim minority has experienced many forms of persecution, marginalization, racial discrimination, extermination, and abuse. But first, let us quickly discuss the origins of the Rohingya problem in Myanmar before exploring these genocidal criminal activities.

⁸- Abdallah Suleiman Suleiman: Fundamental Introductions to International Criminal Law, University Publications Office, Algeria, 2003, p. 98.

⁹- Youssef Al-Shukri: International Criminal Law in a Changing World, Itrak for Printing and Publishing, Heliopolis, p. 121.

¹⁰- Sabrina Al-Ifawi: Specific Intent as a Basis for International Criminal Responsibility in the Crime of Genocide, Master's Thesis in Law, Faculty of Law and Political Science, Kasdi Merbah University - Ouargla, 2010-2011, p. 41.

¹¹- Ashraf Ali Al-Lamsawi: The International Criminal Court, 1st ed., National Center for Legal Publications, p. 160.

1- Roots of the Rohingya Crisis:

Myanmar (formerly Burma), a Buddhist-majority nation in Southeast Asia, has been home to the Muslim minority known as the Rohingya for centuries. About 89% of the population is Buddhist, 4% is Muslim, and the remainder is split between other minorities, according to official statistics from 2015. The Rohingya are viewed by the Burmese government as illegal migrants from Bengal who live in the Rakhine region (formerly Arakan), not as indigenous ethnic groups in the country).¹² Some contend that this Muslim minority resulted from the mingling of various ethnicities including Arabs, Persians, Turks, and Indians.¹³

Burmese Muslims have shown their devotion to the nation since the start of the fight for independence against British colonialism. The Anti-Fascist People's Freedom League in 1946 acknowledged the contribution of Burmese Muslims and commended their patriotism. Consequently, they were given their rights under Articles 10 and 11 of the 1947 Constitution of the Union of Burma.¹⁴ The military coup on March 2, 1961 caused widespread discrimination and exclusion of the Rohingya minority in many spheres of life, therefore ending this situation quickly. The 1982 Citizenship Law passed by the military council, which stripped the Rohingya of their right to citizenship and so denied them the right to education and job, was one of the most notable expressions of this discrimination. The Rohingya were even more forbidden from entering particular areas, therefore restricting their mobility. Other regions were designated Muslim-free zones, therefore they were not permitted to reside in these places.

The 2008 Constitution of Myanmar makes clear that the present laws and rights about citizenship follow the same attitude as the prior one about nationality, therefore institutionalizing the same practices from the 1982 Constitution. This keeps institutional discrimination against the Burmese Muslims going since they still experience the same human rights abuses and cruel treatment.¹⁵

2- Mass atrocity and the Burmese Case:

Mass atrocity, as already noted, is an international crime comprising religious, racial, and ethnic extermination. Mass atrocity's goals of eradicating a national, religious, or ethnic group may take protracted time and include their removal and the destruction of political, cultural, and social institutions of a particular population group.¹⁶ As stated in the first part, this is the reality for the Rohingya Muslim minority since 1961, the year of the military coup that stripped their rights. But after 2012, especially with the growth of extreme Buddhist nationalism spearheaded by the "Race and Religion Protection Committee," under a Buddhist monk, the violence and ethnic cleansing against this minority intensified. This committee pressured the Burmese government on behalf of the Rohingya minority.

The death of about 200,000 people and the displacement of many members of this minority to Bangladesh, Malaysia, and Thailand under apartheid-like policies following violent confrontations between the Buddhist majority and the Muslim minority during that year resulted from the toll. A 2013 report from the Human Rights Watch group said the Rohingya Muslim minority had been denied medical treatment and forced sterilization as forms of abuse committed against them.¹⁷ The Myanmar government worked with community leaders and Buddhist monks to cover up the terrible atrocities done against the Rohingya by erasing evidence of those massacres

¹²- Ayat Ahmed Ramadan: The Rohingya Muslim Crisis in the Discourse of Arab Media Websites - An Analytical Study, *Journal of Media Research*, No. 48, October 2017, Al-Azhar University, Cairo, Egypt, p. 22.

¹³- Saifallah Hafez Ghariballah: *Islamic Culture in Burma - Reality and Challenges*, Dar Al-Dirasat Al-Ilmiyyah for Publishing and Distribution, Mecca, Kingdom of Saudi Arabia, 2012, p. 28.

¹⁴- Dr. Fawzi Oussedik: *Delayed Justice - Contemporary Applications of Grave Violations in International Humanitarian Law*, Houma Publishing, Algeria, 2018, p. 76.

¹⁵- Ibid., p. 77.

¹⁶- Ibid., p. 78.

¹⁷- Soha Abu Shakra, *Rohingya Women Subjected to Forced Abortions*, available at: <https://www.oic-iphrc.org/ar/data/docs/field/visits/821339pdf> (consulted on 14/02/2020 at 22:10).

Furthermore, Human Rights Watch said that the Myanmar government worked with Buddhist monks and community leaders to hide the terrible massacres perpetrated against the Rohingya by trying to erase evidence of these massacres. This included hiding four Rakhine State locations that constituted mass graves going back to the 2012 wave of violence targeting the Mass atrocity of the Rohingya.¹⁸

The Rohingya minority's situation notably deteriorated following the military council's collapse and Prime Minister Aung San Suu Kyi's ascension to power, which is also significant. Though she was a Nobel Peace Prize winner and a human rights campaigner, she defended the treatment of this Muslim minority as part of the battle against terrorism.¹⁹

The Myanmar government's decision to shut down mosques and forbid congregational prayers, citing their propagation of corruption and division, is one of the massacres committed against Rohingya Muslims. Worshippers were frequently killed while they were in mosques. The most graphic proof of the Rohingya people's suffering is the police-perpetrated Shikaly mosque massacre, which claimed the lives of fifty-one worshippers. Furthermore, 400 Rohingya Muslims were killed when Burmese army forces opened fire on them without discrimination, killing men, women, or even children. Many Rohingya members were forced to relocate to Bangladesh as a result of rape cases involving Rohingya women.²⁰

Under the guise of fighting Rohingya terrorists, the Myanmar army began a military campaign against the Rohingya Muslims on August 25, 2017, which resulted in the worst wave of rapes, torture, village destruction, displacement, and killings. Around 6,700 Rohingya people were killed in the first month of the attacks, including at least 730 children under five,²¹ according to the non-governmental organization Médecins Sans Frontières. Along the border crossings that refugees used to escape to Bangladesh, numerous landmines and bombs were also planted.²²

It should be emphasized that the main motivations and incitements for the above-mentioned acts, which are criminalized and punishable under the provisions of the Convention on the Prevention and Punishment of the Crime of Mass atrocity, as described in Article 6, are religious hatred and ethnic animosity. These acts can also be subject to local and international jurisdiction.

Given the legal documents and institutional practices of the Burmese state, Article 2 of the Convention makes it obvious that the authorities of this state purposefully and methodically tried, partially or totally, to destroy the national, religious, or ethnic group, and the will and intent to commit Mass atrocity is extremely evident.

Aiming for a particular outcome, the act can be characterized as intentional with the goal of committing Mass atrocity. The desire to do it can be either direct or indirect; the goal is to either force the Muslim population in Burma to leave their land via forced deportation or, at the same time, settle foreign migrants from other areas in places historically occupied by Muslims.

Though it might be challenging to demonstrate in particular circumstances, the need for intent to commit Mass atrocity is obvious and current. Legal documents, laws, and comments have all made clear and obvious incitement to Mass atrocity against Muslims.

¹⁸- The Rohingya Muslim Tragedy, Referred Research Series, No. 26, December 2017, Consultative Center for Studies and Documentation, Beirut, Lebanon, p. 12.

¹⁹- Shaimaa Bahaeddine: The Rohingya Muslims: Roots of the Crisis - International Interactions - Proposed Solutions, Civilization Center for Studies and Research, available at: <http://www.hadaracenter.com/pdfs%D9%85%D8%B3%85>.

²⁰- Ayat Ahmed Ramadan, op. cit., pp. 28-29.

²¹- Médecins Sans Frontières (Doctors Without Borders), "No One Was Left" - Killings and Violence Against the Rohingya in Rakhine State, Myanmar, NGO Report, 2018, available at: <https://www.msf.org/files/pdf-weeklyisg-sitrep-final.pdf> (consulted on 09/02/2020).

²²- Wafi Haja: International Protection of Minorities Between Text and Practice - The Rohingya Muslim Minority Crisis as a Model, Journal of Legal Studies, Vol. 6, No. 2, December 2019, p. 369.

Given the religious racism and ethnic hatred, which are seen as the main motivations and incitements behind the murder of many Muslims in Burma, it will not be hard to supply the required materials and physical proof to show the Mass atrocity massacres perpetrated against the Rohingya in the Burmese situation. Furthermore, the Mass atrocity Convention through its clauses put populations and peoples under severe living conditions meant to cause partial or total destruction, which clearly qualifies as massacres endangering the peace and security of mankind.

The United Nations, adding to its definition of Mass atrocity, includes the destruction of cultural legacy, acts of extreme cruelty, and actions meant to wipe out human existence, as well as the degradation of human dignity. Each of these elements is seen as an entry point for Mass atrocity; they are all various sides of intellectual aggression that can cause racial intolerance, violence, and hatred.²³

According to Article 2 of the Convention, which defines and lists the acts that constitute Mass atrocity, Myanmar has at least committed three specific acts in spite of the aforementioned events: "killing members of the group," "causing conditions that would lead to the destruction of the group," and "imposing measures to prevent births within the group." The UN, however, has limited itself to characterizing the situation as ethnic cleansing, a term not defined under international conventions like Mass atrocity, and has refused to formally recognize it as Mass atrocity for political reasons.²⁴ This is because the 147 states that are signatories to the United Nations Mass atrocity Convention, including Myanmar (Burma), would be required to prevent and punish the crime of Mass atrocity under Article 1 of the Convention if it were acknowledged in the case of the Rohingya minority. This would therefore make it mandatory to stop killings and displacement, even if doing so involved using force.²⁵

SECTION II: LEGAL MECHANISMS AVAILABLE FOR PROSECUTING THOSE RESPONSIBLE FOR MASS ATROCITY IN MYANMAR

This part will cover the legal tools at hand to pursue justice for the Rohingya Muslim minority in front of the systematic Mass atrocity the state of Myanmar (Burma) subjects them under. The study will be split into two sub-sections: the first will look at the International Criminal Court's (ICC) jurisdiction over Mass atrocity offenses committed in Myanmar; the second will consider whether universal jurisdiction (UJ) could be applied to massacres committed in Myanmar.

A) The Jurisdiction of the International Criminal Court (ICC) over Mass atrocity Massacres Committed in Myanmar:

Long considered one of the most grave massacres, Mass atrocity endangers world peace and security because of its savagery. Therefore, it was added under Article 6 of the Statute of the ICC as one of the offenses addressed by this worldwide tool. We will therefore split the study into two parts. The first will cover the ICC's jurisdiction over Mass atrocity massacres in general; the second will cover its jurisdiction in the Burmese case.

1- THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC) IN THE CRIME OF MASS ATROCITY:

This jurisdiction is divided into the following:

1.1 Subject-Matter Jurisdiction:

The crime of Mass atrocity is defined in Article 6 of the Rome Statute of the ICC in the same language as Article 2 of the United Nations Convention on the Prevention and Punishment of the Crime of Mass atrocity of 1948, which we covered previously in this intervention. The Rome Statute therefore views Mass atrocity as an international crime threatening the world community even if it takes place inside a state by its own officials.

²³- Fawzi Oussedik, op. cit., pp. 78-79.

²⁴- Ahmed Boukhris: The Rohingya Crisis: Genocide and Ethnic Cleansing, Arab Democratic Center, Morocco, available at: <http://democratic.de/?p=50571> (consulted on 14/02/2020 at 11:05).

²⁵- Ibid.

The crime does not have to be committed by offenders from another state against the people of the state in question.

Furthermore, to be classified as Mass atrocity, this crime does not have to take place during an armed conflict. Carried out by a person on behalf of the state or with its consent, it is an illegal human act resulting from criminal intent involving the breach of an international interest that IL aims to protect by means of criminal penalties. Thus, Mass atrocity is a crime set apart by its international component, besides the other components.²⁶

1.2 Personal Jurisdiction:

The ICC's personal jurisdiction is restricted to natural people; it does not cover legal entities including states, bodies, or organizations. The Court was founded mainly to lower the impunity of those most seriously harming the international community and help to deter such offenses. Paragraph 3 of Article 25 of the Rome Statute states that a person is criminally liable before the Court and may be punished for any crime under the Court's jurisdiction should they commit one of the following acts:

- Whether or not the person is criminally responsible, he or she is either personally or in concert with others via a third party committing a crime.
- Ordering, tempting, or encouraging the execution of a crime already attempted or completed.
- Offering help, motivation, or any kind of support to enable the crime to be committed.
- Contributing in any way to the activities of a group of people striving toward a shared goal to commit or try to commit the crime, with the contribution being deliberate.
- Publicly encouraging the direct commission of Mass atrocity or committing the crime of Mass atrocity.
- Trying to commit a crime by means of specific actions.

Article 26 of the Rome Statute of the ICC specifies that a person must be 18 years or older at the time of committing the alleged crime to be prosecuted before the court.

The official status of the individual is not considered; it has no impact on their extenuation or responsibility. Military leaders and heads of state are accountable for massacres committed by those under their command if they knew or should have known that their forces or subordinates were committing or were about to commit these massacres, or if they did not take all appropriate and reasonable steps to stop these massacres, suppress them, or refer the matter to the appropriate authorities for investigation or prosecution.²⁷

1.3 Temporal Jurisdiction:

According to Article 11 of the Rome law, which is based on the idea of "non-retroactivity," the ICC may only hear cases involving massacres that were committed after the law went into effect.²⁸ Only offenses committed after this date are subject to the court's jurisdiction, according to paragraph 1 of Article 11. For states that become parties to the statute after depositing their instrument of ratification, acceptance, approval, or accession, the court can only exercise its jurisdiction over massacres committed after the system goes into effect for that state, beginning on the first day of the month after the 60th day after the state's instrument was deposited. However, if a state has stated under Article 12, paragraph 3, that it accepts the court's

²⁶- Nabil Malkia: Mechanisms for Prosecuting Perpetrators of Genocide under International Law, Doctorate Thesis in Legal Sciences, Faculty of Law and Political Science, University of Batna, 2016, p. 152.

²⁷- Ali Jamil Harb: The Theory of Contemporary International Sanctions - The System of International Sanctions Against States and Individuals, 1st ed., Part I, Al-Halabi Legal Publications, Lebanon, 2013, p. 451.

²⁸- Boutabja Rim: Procedural Steps of Litigation Before the International Criminal Court, Master's Thesis, Faculty of Law and Political Science, University of Frères Mentouri - Constantine, 2006-2007, p. 39.

jurisdiction over a specific crime as of the day the law went into effect, then the court's jurisdiction is an exception, extending to massacres committed prior to the statute's implementation.²⁹

1.4 Jurisdictional Scope:

The court's ability to handle massacres committed inside the borders of any state that ratifies its legislation is known as international jurisdiction. Unless the treaty or the accused's state of nationality consents, the court often lacks jurisdiction if the state where the crime occurred is not a party to the treaty or the accused's state of nationality. When the United Nations Security Council submits a case under Chapter VII of the UN Charter, there is no obstacle to the court's jurisdiction being extended to citizens of governments that are not parties to the legislation.³⁰

1.5 Complementary Jurisdiction:

The court outlined the parameters of its relationship with national criminal justice systems in its preamble. The ICC serves as a supplement to national criminal jurisdictions, as stated in the preamble's paragraph 10.

Article 17 of the court's statute states that the court may exercise its jurisdiction when a crime is brought before the state's national courts but the state is either unable or unwilling to carry out investigations and prosecutions, or when the case is before the competent national courts but no investigation has been started because the state chose not to prosecute or postponed the investigation without cause. The court may also have jurisdiction if the criminal has been found guilty of the crime but the trial was not impartial and fair, or if the person was found not guilty of the crime and the ICC has not yet brought charges against them.³¹

2- THE POSSIBILITY OF THE INTERNATIONAL CRIMINAL COURT (ICC) CONSIDERING THE MASS ATROCITY COMMITTED IN MYANMAR:

Humanitarian groups and agencies worried about the Rohingya problem have stepped up their efforts lately, pushing the United Nations to set up a commission of investigation into the Mass atrocity perpetrated against the Rohingya Muslims. Myanmar's military leaders are said to have committed these massacres, and the groups want their prosecution before the ICC.³²

However, it is not easy to refer the case to the ICC. We must first acknowledge, as we have previously said, that the Statute of the ICC designates three individuals who have the power to refer a case to the Court in order to comprehend the possibility of this. These include the nations parties to the Statute, the UN Security Council, which functions under Chapter VII of the UN Charter, and the prosecutor of the Court, who acts on an as-needed basis. Since Myanmar (Burma) is not a party to the Statute and the Rohingya Muslims are not citizens of another state that is a party to the Statute, the Security Council's only remaining option is to submit the issue to the Court. When a reference is made based on Chapter VII of the UN Charter, the Security Council may submit the matter to the Court, according to Article 13 of the Statute. However, given political circumstances influencing its choices, the likelihood of the Security Council sending the Myanmar crisis to the Court remains quite low.

Therefore, the Prosecutor of the ICC has last recourse to start an investigation on his own, using information connected to massacres within the Court's jurisdiction acquired from trustworthy sources or from any other source, including governments, government agencies, non-governmental organizations, and even the victims themselves. Under Article 15 of the Statute of the ICC, this is the authority given to the Prosecutor. In this situation, this could be the most feasible option. Thus, it is absolutely vital for nations, pertinent government agencies like the Organization of Islamic Cooperation, civil society groups worried about human rights, the International Committee of the Red Cross, the Rohingya people themselves, and others to record the atrocities

²⁹- Bara'a Mundhir Kamal Abdel Latif: *The Judicial System of the International Criminal Court*, 1st ed., Dar Al-Hamed for Publishing and Distribution, Jordan, 2008, pp. 211-212.

³⁰- Ibid., p. 214.

³¹- Boutabja Rim, *op. cit.*, p. 44.

³²- Ahmed Boukhris, *op. cit.*

perpetrated against them and send this data to the Prosecutor using all accessible channels. This might encourage the Prosecutor to look into these offenses.³³

B) The Possibility of Applying the Principle of Universal Jurisdiction (UJ) to the Massacres Committed in Burma:

In national criminal law, the territoriality principle is an exception to the UJ principle. Any national judge may prosecute, arrest, try, or extradite offenders of serious international massacres listed in applicable international treaties or customary IL, regardless of the nationality of the perpetrators or victims or the location of the crime. It is founded on the principle of defending values and interests of global significance.

1- Definition of Universal Jurisdiction (UJ):

"The power given to national courts to prosecute, try, and punish people charged with certain international massacres, as defined by national law, regardless of where the massacres were committed and without the need for a particular link between the state exercising jurisdiction and the perpetrators or victims, or the site of the massacres."³⁴

Defined by the Institute of IL during its 2005 session as "An extra principle of general jurisdiction, which reflects the authority of a national court of a state to pursue any individual accused of committing an international crime and punish them if convicted, regardless of the location where the crime occurred, and without considering a positive or negative national connection between the court and the defendant, or other recognized bases for jurisdiction under IL."³⁵

2- The Legal Basis for Universal Jurisdiction (UJ) and Its Applicability to the Massacres of Mass atrocity Committed in Burma:

Universal jurisdiction finds its foundation both in IL and in national legislations.

2.1 Universal Jurisdiction in International Law:

Several international treaties on particular international massacres, including the four Geneva Conventions of 1949, guarantee this jurisdiction. These treaties' Articles 49, 50, 129, and 146 grant UJ over people who either cause or order serious breaches of these treaties. According to Article 02 common to these conventions, even if those violations are not committed on the territory where the conflict is ongoing, these violations must take place within the context of an international armed conflict. But, they have to be closely related to the war and the infractions have to be against people or property protected by the treaties in order to be considered serious breaches.

This authority is also mentioned in Article 5 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Article 86 of Additional Protocol I to the Geneva Conventions.³⁶ of the International Convention for the Prevention of the Massacres of Apartheid, founded in 1973. Article 5 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that each State Party is obligated to implement measures to assert jurisdiction over the massacres delineated in this article when the alleged perpetrator is present within its territory, and to refrain from extraditing the individual to any country as referenced in the first paragraph of Article 5. This underscores the need of implementing the principle of universal criminal jurisdiction.

³³- Ibid.

³⁴- Tarek Sorour: International Criminal Jurisdiction, 1st ed., Dar Al-Nahda Al-Arabiya, Cairo, 2006, p. 25.

³⁵- Khelafi Sofiane: Universal Jurisdiction of National Courts over War Crimes, Genocide, and Crimes Against Humanity, Doctorate Thesis, Faculty of Law and Political Science, Mouloud Mammeri University - Tizi Ouzou, 2014, p. 17.

³⁶- Dr. Fouad Khawaldia, Prof. Abdelrazak Laamara: Universal Criminal Jurisdiction to Sanction International Crime, Al-Ustadh Al-Bahith Journal for Legal and Political Studies, No. 10, June 2018, Vol. II, p. 439.

The Convention Against Torture is relevant to war massacres, massacres against humanity, and Mass atrocity whether they take place during peacetime or armed conflict since they usually entail acts of torture.³⁷

Regarding the Mass atrocity against the Rohingya minority, the Convention Against Torture previously mentioned concept of UJ may be applied in light of the suffering and mistreatment experienced by this Muslim minority. Given that this minority has been under apartheid and the main cause of Mass atrocity against them is racial and religious reasons, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 may also apply.

2.2 Universal Jurisdiction in National Legislation and Its Applicability to the Mass atrocity Committed in Myanmar:

A significant number of countries have adopted the principle of UJ in their national legislation, with some of the most notable examples being the United States, where the U.S. Congress passed a law in 1987 recognizing the principle of UJ over the crime of Mass atrocity. Belgium also adopted a UJ law in 1993, incorporating Mass atrocity massacres within the scope of Belgian judicial authority^{38, 39}.

Spanish law expressly gives Spanish courts jurisdiction over a number of international massacres, including Mass atrocity, under Article 23/4 of the Organic Law on Judicial Power.⁴⁰

Many other nations have embraced this idea, which could lead to the prosecution of Myanmar's military and civilian leaders who participated in the Mass atrocity against the Rohingya minority. Human rights organizations from Latin America and the Rohingya community have already filed lawsuits. They sued a number of senior Burmese officials, including the prime minister, in Argentina, a country that has incorporated the idea of UJ into its national legislation. The goal of this case, according to their attorneys, is to bring charges against those who committed Mass atrocity as well as those who assisted in or concealed the crime.⁴¹

CONCLUSION:

The Mass atrocity endured by the Rohingya minority is a grave breach of IL. Whether in times of peace or conflict, the international community has to take a strong and serious stand to stop these violations by using the international criminal legal systems meant to safeguard human rights. From this, we suggest the following:

- International bodies, mostly the United Nations, must guarantee the Mass atrocity against the Rohingya in Myanmar stops right away.
- International condemnation of the Mass atrocity massacres against the Rohingya in Myanmar should be swift.
- Including the Rohingya minority in Myanmar under a special category under the United Nations Human Rights Council, which demands quick focus on the problem.
- The urgent execution of human rights treaties to protect the rights of the Rohingya in Myanmar.

³⁷- Dr. Badr Eddine Chebel: Universal Criminal Jurisdiction and Its Role in Advancing International Criminal Justice, *Journal of Legal Sciences*, No. 01, June 2010, p. 129.

³⁸- The Belgian law of 1993 was initially limited in its universal jurisdiction to war crimes only; however, it was amended several times, including the amendment of 10/02/1999, which expanded the jurisdiction of the Belgian judiciary to include crimes of genocide and crimes against humanity.

³⁹- Dr. Fouad Khawaldia, *op. cit.*, p. 440.

Damien Vandermeersh: What Future for the Universal Jurisdiction of Belgian Courts over Crimes under International Humanitarian Law, *RPN2*, June 2003, p. 235.

⁴⁰- Dr. Fouad Khawaldia, *op. cit.*, p. 440.

⁴¹- Lawsuit Filed in Argentina Against Aung San Suu Kyi for Crimes Against the Rohingya, article published on the electronic newspaper *swissinfo.ch*, available at: <https://www.swissinfo.ch/ara/afp/45367098> (consulted on 13/02/2020).

– The urgency for countries and governmental organizations, especially the Organization of Islamic Cooperation, and civil society organizations, to act quickly, alongside the Rohingya people themselves, in documenting the massacres committed against them and submitting this information to the Prosecutor at the ICC in order to encourage the opening of an investigation into the Mass atrocity massacres they are facing.

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